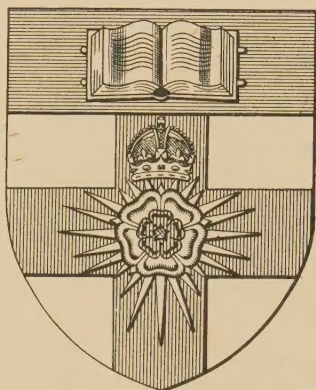


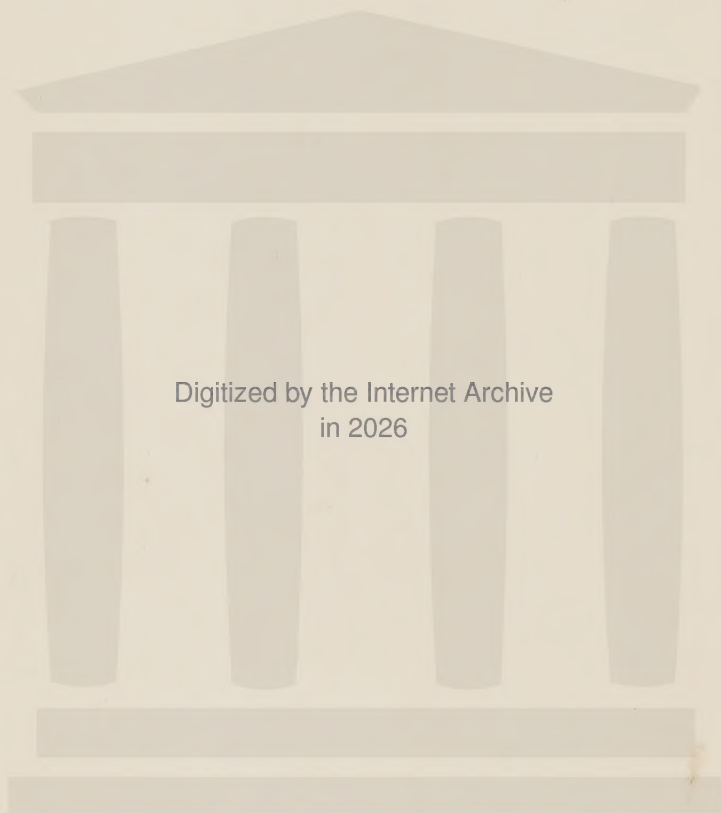
Max North

3



UNIVERSITY OF LONDON
LIBRARY

17 JAN 1991



Digitized by the Internet Archive
in 2026

THE ALL ENGLAND LAW REPORTS

(INCORPORATING THE

LAW TIMES REPORTS

AND THE

LAW JOURNAL REPORTS)

OF CASES DECIDED IN

THE HOUSE OF LORDS

THE PRIVY COUNCIL

THE COURT OF APPEAL

ALL DIVISIONS OF THE HIGH COURT

AND

COURTS OF SPECIAL JURISDICTION

1953

VOLUME 1

Consulting Editor for Chancery Cases :
HAROLD CHRISTIE, ESQ., Q.C.

Bencher of Lincoln's Inn.

Consulting Editor for Taxation Cases :
CYRIL KING, ESQ., Q.C.

Bencher of the Middle Temple.

General Editor :
G. F. L. BRIDGMAN, ESQ.
of the Middle Temple, Barrister-at-Law.

[*For list of Reporters see overleaf*]

LONDON
BUTTERWORTH & CO. (Publishers) LTD.

REPORTERS.

House of Lords	G. A. KIDNER, ESQ.	<i>Barrister-at-Law</i>
Privy Council	G. A. KIDNER, ESQ.	<i>Barrister-at-Law</i>
Court of Appeal, No. 1 ..	F. GUTTMAN, ESQ.	<i>Barrister-at-Law</i>
Court of Appeal, No. 2 ..	MISS PHILIPPA PRICE	<i>Barrister-at-Law</i>
Court of Appeal, No. 3 ..	F. A. AMIES, ESQ.	<i>Barrister-at-Law</i>
Court of Appeal, No. 4 ..	F. GUTTMAN, ESQ.	<i>Barrister-at-Law</i>
Court of Criminal Appeal	{ G. A. KIDNER, ESQ. MICHAEL MALONEY, ESQ.	<i>Barristers-at-Law</i>
Chancery Division ..	{ R. D. H. OSBORNE, ESQ. MISS PHILIPPA PRICE	<i>Barristers-at-Law</i>
Queen's Bench Division	{ MISS M. D. CHORLTON F. GUTTMAN, ESQ. G. A. KIDNER, ESQ. MISS GWYNEDD LEWIS MICHAEL MALONEY, ESQ. CONRAD OLDHAM, ESQ. G. M. SMAILES, ESQ.	<i>Barristers-at-Law</i>
Revenue Cases	F. A. AMIES, ESQ.	<i>Barrister-at-Law</i>
Probate, Divorce and Admiralty	A. T. HOOLAHAN, ESQ.	<i>Barrister-at-Law</i>
Ecclesiastical Cases ..	A. T. HOOLAHAN, ESQ.	<i>Barrister-at-Law</i>



HOUSE OF LORDS

LORD HIGH CHANCELLOR: The Rt. Hon. Lord Simonds

LORDS OF APPEAL IN ORDINARY

The Rt. Hon. Lord Porter	The Rt. Hon. Lord Radcliffe
The Rt. Hon. Lord Normand	The Rt. Hon. Lord Tucker
The Rt. Hon. Lord Oaksey	The Rt. Hon. Lord Asquith of Bishopstone
The Rt. Hon. Lord Morton of Henryton	The Rt. Hon. Lord Cohen
The Rt. Hon. Lord Reid of Drem	

COURT OF APPEAL

MASTER OF THE ROLLS: The Rt. Hon. Sir Raymond Evershed

The Rt. Hon. Lord Justice Somervell	The Rt. Hon. Lord Justice Birkett
The Rt. Hon. Lord Justice Singleton	The Rt. Hon. Lord Justice Hodson
The Rt. Hon. Lord Justice Denning	The Rt. Hon. Lord Justice Morris
The Rt. Hon. Lord Justice Jenkins	The Rt. Hon. Lord Justice Romer

CHANCERY DIVISION

The Hon. Mr. Justice Vaisey	The Hon. Mr. Justice Harman
The Hon. Mr. Justice Roxburgh	The Hon. Mr. Justice Danckwerts
The Hon. Mr. Justice Wynn-Parry	The Hon. Mr. Justice Lloyd-Jacob
The Hon. Mr. Justice Upjohn	

QUEEN'S BENCH DIVISION

LORD CHIEF JUSTICE OF ENGLAND: The Rt. Hon. Lord Goddard

The Hon. Mr. Justice Hilbery	The Hon. Mr. Justice Streatfeild
The Hon. Mr. Justice Oliver	The Hon. Mr. Justice Ormerod
The Hon. Mr. Justice Croom-Johnson	The Hon. Mr. Justice Slade
The Hon. Mr. Justice Stable	The Hon. Mr. Justice Devlin
The Hon. Mr. Justice Cassels	The Hon. Mr. Justice Parker
The Hon. Mr. Justice Hallett	The Hon. Mr. Justice Gorman
The Hon. Mr. Justice Pilcher	The Hon. Mr. Justice Barry
The Hon. Mr. Justice Lynskey	The Hon. Mr. Justice Donovan
The Hon. Mr. Justice Jones	The Hon. Mr. Justice McNair
The Hon. Mr. Justice Byrne	The Hon. Mr. Justice Pearson
The Hon. Mr. Justice Sellers	The Hon. Mr. Justice Havers
The Hon. Mr. Justice Finemore	The Hon. Mr. Justice Glyn-Jones
The Hon. Mr. Justice Pritchard	(appointed Jan. 12, 1953)
(retired Jan. 12, 1953)	The Hon. Mr. Justice Gerrard
	(appointed Jan. 29, 1953)

PROBATE, DIVORCE AND ADMIRALTY DIVISION

PRESIDENT: The Rt. Hon. Lord Merriman

The Hon. Mr. Justice Wallington	The Hon. Mr. Justice Pearce
The Hon. Mr. Justice Barnard	The Hon. Mr. Justice Collingwood
The Hon. Mr. Justice Willmer	The Hon. Mr. Justice Karminski
The Hon. Mr. Justice Davies	

These reports are cited thus:

[1953] 1 All E. R.

CASES REPORTED IN VOLUME I

	PAGE		PAGE
ADSETT v. K. & L. STEELFOUNDERS & ENGINEERS, LTD. [Q.B.D.]	97	BRIGHT'S ASPHALT CONTRACTORS, LTD., HARRIS v. ALLARD & SAUNDERS, LTD. (THIRD PARTIES) [Q.B.D.]	395
AGRICULTURAL LAND TRIBUNAL FOR THE WALES AND MONMOUTH AREA, R. v. <i>Ex parte</i> DAVIES [Q.B.D. DIVL. CT.]	1182	BRISTOL AEROPLANE CO., LTD., WHITE v. [C.A.]	40
ALBION, THE [C.A.]	978	BRITISH CELANESE, LTD., PRIDE OF DERBY AND DERBYSHIRE ANGLING ASSOCIATION, LTD. v. [C.A.]	179
ALLARD & SAUNDERS, LTD. (THIRD PARTIES), HARRIS v. BRIGHT'S ASPHALT CONTRACTORS, LTD. [Q.B.D.]	395	BRITISH ELECTRICAL & ASSOCIATED INDUSTRIES (CARDIFF), LTD. v. PATLEY PRESSINGS, LTD. RED BROS. (GLASGOW), LTD., THIRD PARTY, DOUGLAS SCOTT, LTD., FOURTH PARTY [Q.B.D.]	94
ALLEN (<i>dec'd.</i>), <i>Re</i> [CH.D.]	308	BRITISH ELECTRICITY AUTHORITY v. EXETER CORPN. [CH.D.]	502
ALLWEATHER MECHANICAL GROUTING CO., LTD., BROWN v. [Q.B.D. DIVL. CT.]	474	BRITISH OVERSEAS AIRWAYS CORPN. (SECOND DEFENDANTS AND THIRD PARTIES). LITTLEWOOD v. WIMPEY (GEORGE) AND CO., LTD. [Q.B.D.]	583
AMES, <i>Ex parte</i> . R. v. GOVERNOR OF BEDFORD PRISON [Q.B.D. DIVL. CT.]	1002	BRITISH OVERSEAS AIRWAYS CORPN., ROTTERDAMSCH BANK N.V. v. [Q.B.D.]	675
ANSON v. ANSON [Q.B.D.]	867	BRITISH THOMSON-HOUSTON CO., LTD., THOMAS v. [Q.B.D.]	29
ART JEWELS, LTD., RELIANCE (NAMEPLATES), LTD. v. [CH.D.]	759	BRITISH TRANSPORT COMMISSION v. LONDON COUNTY COUNCIL [C.A.]	801
ASHMORE, BENSON, PEASE & CO., LTD., MORGAN v. [LEEDS ASSIZES]	328	BROOKE'S WILL TRUSTS, <i>Re</i> [CH.D.]	668
ATLANTIC MARITIME CO., INC. v. GIBBON [Q.B.D.]	893	BROOM v. MORGAN [C.A.]	849
ATTORNEY-GENERAL, LONDON & COUNTRY COMMERCIAL PROPERTY INVESTMENTS, LTD. v. [CH.D.]	436	BROSAN, BICKNELL v. [Q.B.D. DIVL. CT.]	1126
BADDELEY v. INLAND REVENUE COMRS. [CH.D.]	63	BROWN v. ALLWEATHER MECHANICAL GROUTING CO., LTD. [Q.B.D. DIVL. CT.]	474
BALFOUR WILLIAMSON MERCHANT SHIPPERS, LTD., LESTER v. [Q.B.D. DIVL. CT.]	1146	BROWN, DUMMER v. [C.A.]	1158
BANQUE DES MARCHANDS DE MOSCOU (KOUPETSCHESKY), <i>Re</i> [CH.D.]	278	BRUNSON, <i>Ex parte</i> . R. v. NORFOLK QUARTER SESSIONS [Q.B.D. DIVL. CT.]	346
BARNARD v. NATIONAL DOCK LABOUR BOARD [C.A.]	1113	BULLARD v. CROYDON HOSPITAL GROUP MANAGEMENT COMMITTEE [Q.B.D.]	596
BARNES v. JARVIS [Q.B.D. DIVL. CT.]	1061	BUNTEN & LANCASTER, LTD., HARRISON & JONES, LTD. v. [Q.B.D.]	903
BARNES AND FITZPATRICK (A FIRM), MARSHALL (W. F.), LTD. v. [Q.B.D.]	970	BUSH, FLOYD v. [Q.B.D. DIVL. CT.]	265
BARNETT, TAYLOR (DAVID) & SON, LTD. v. [C.A.]	843	CALLAN, SEALEY (OTHERWISE CALLAN) v. [DIV.]	942
BASIOLI (<i>dec'd.</i>), <i>Re</i> [CH.D.]	301	CAMPBELL, CARPENTER v. [Q.B.D. DIVL. CT.]	280
BASS, R. v. [C.C.A.]	1064	CAMPBELL, R. v. <i>Ex parte</i> HOY [Q.B.D. DIVL. CT.]	684
BATES (<i>dec'd.</i>), <i>Re</i> [CH.D.]	318	CAMPBELL v. THOMPSON [Q.B.D.]	831
BATES v. PARKER [C.A.]	768	CANADIAN PACIFIC RAILWAY CO., BORYS v. [P.C.]	451
BECK v. SCHOLZ [C.A.]	814	CARD v. SALMON [Q.B.D. DIVL. CT.]	324
BECKETT v. NEWALLS INSULATION CO., LTD. [C.A.]	250	CARMARTHENSHIRE COUNTY COUNCIL, LEWIS v. [CARMARTHENSHIRE WINTER ASSIZES]	1025
BEDFORD PRISON (GOVERNOR), R. v. <i>Ex parte</i> AMES [Q.B.D. DIVL. CT.]	1002	CARNILL v. EDWARDS [Q.B.D. DIVL. CT.]	282
BELL v. TRAVCO HOTELS, LTD. [C.A.]	638	CARNILL v. ROWLAND [Q.B.D. DIVL. CT.]	486
BENCARD (C. L.) (1934), LTD., NORDISK INSULIN-LABORATORY v. [C.A.]	986	CARPENTER v. CAMPBELL [Q.B.D. DIVL. CT.]	280
BIBBY (J.) AND SONS, LTD., BIRCHALL v. [LIVERPOOL ASSIZES]	163	CARR LANE (No. 39), ACOMB, <i>Re</i> [CH.D.]	699
BICKNELL v. BROSAN [Q.B.D. DIVL. CT.]	1126	CARTWRIGHT, SHEPHERD v. [CH.D.]	569
BIGGS, NEWTON v. [C.A.]	99	CEMENTATION CO., LTD., FINNIGAN v. [C.A.]	1130
BILANKIN, RIVLIN v. [Q.B.D.]	534	CHAPMAN'S SETTLEMENT TRUSTS, <i>Re</i> [C.A.]	103
BIRCHALL v. BIBBY (J.) AND SONS, LTD. [LIVERPOOL ASSIZES]	163	CHEERY, CLARKE v. [Q.B.D. DIVL. CT.]	267
BLACKMAN v. RAILWAY EXECUTIVE [Q.B.D.]	4	CHESTERFIELD & DISTRICT CO-OPERATIVE SOCIETY, LTD., SMITH v. [C.A.]	447
BLACKWELL'S SETTLEMENT TRUSTS, <i>Re</i> [C.A.]	103	CHURCH, ADAMS, TATHAM & CO. (A FIRM), OTTER v. [CH.D.]	168
BLOUNT v. WAR OFFICE [BIRMINGHAM ASSIZES]	1071	CITY OF GLASGOW POLICE ATHLETIC ASSOCIATION, INLAND REVENUE COMRS. v. [H.L.]	747
BOOTS CASH CHEMISTS (SOUTHERN), LTD., PHARMACEUTICAL SOCIETY OF GREAT BRITAIN v. [C.A.]	482	CITY OF LONDON CORPN. (AS THE CONSERVATORS OF EPPING FOREST), INLAND REVENUE COMRS. v. [H.L.]	1075
BORYS v. CANADIAN PACIFIC RAILWAY CO. [P.C.]	451	CLARK v. CLARK [DIV.]	704
BOWERS v. SMITH [Q.B.D. DIVL. CT.]	320	CLARKE v. CHERRY [Q.B.D. DIVL. CT.]	267
BOYER v. WARBEY [C.A.]	269	CLARKE, MILES v. [CH.D.]	779
BOYES, PEARSON v. [Q.B.D. DIVL. CT.]	492	COHEN (<i>dec'd.</i>), <i>Re</i> [CH.D.]	378
BRAY (INSPECTOR OF TAXES) v. COLENBRANDER [H.L.]	1090	COLENBRANDER, BRAY (INSPECTOR OF TAXES) v. [H.L.]	1090
BRAY (ALFRED) & SONS, LTD., KANGOL INDUSTRIES, LTD. v. [CH.D.]	444	COMPTROLLER-GENERAL OF PATENTS, R. v. <i>Ex parte</i> PARKE, DAVIS & CO. [Q.B.D. DIVL. CT.]	862
BREYFOGLE, HARVEY (INSPECTOR OF TAXES) v. [H.L.]	1090	CONNIFF, KENT v. [C.A.]	155
BRIDGMAN v. STOCKDALE [Q.B.D.]	1166	CONSOLIDATED GOLD FIELDS OF NEW ZEALAND, LTD., <i>Re</i> [CH.D.]	791
BRIESS v. ROSHER [C.A.]	717		

PAGE		PAGE
	CONTIMAR S. A. COMPANIA INDUSTRIAL COMERCIAL Y-MARITIMA, GETREIDE-IMPORT-GESELLSCHAFT m.b.H. v. [Q.B.D.]	257
	COOPER v. RAILWAY EXECUTIVE (SOUTHERN REGION) [HAMPSHIRE AUTUMN ASSIZES]	477
	COOTE v. EASTERN GAS BOARD [Q.B.D.]	762
	COUTTS & Co. v. INLAND REVENUE COMRS. [H.L.]	418
	CROSSLEY v. CROSSLEY [Div.]	891
	CROSVILLE MOTOR SERVICES, LTD., ORMROD v. (MURPHIE, THIRD PARTY) [CHESTER ASSIZES]	711
	CROYDON HOSPITAL GROUP MANAGEMENT COMMITTEE, BULLARD v. [Q.B.D.]	596
	CRUIKSHANK, SHIELDS v. [H.L.]	874
	CUNARD STEAMSHIP CO., LTD., HOOK v. [WINCHESTER ASSIZES]	1021
	CUSTOMS AND EXCISE COMRS., STEPHENSON BROTHERS, LTD. v. SAME, KING AND JARRETT, LTD. v. [CH.D.]	469
	CUTTRESS v. SCAFFOLDING (GREAT BRITAIN), LTD. [LIVERPOOL ASSIZES]	165
	CUZEN, HOLE v. [C.A.]	87
	DAVIDSON v. DAVIDSON [Div.]	611
	DAVIES, <i>Ex parte</i> . R. v. AGRICULTURAL LAND TRIBUNAL FOR THE WALES AND MONMOUTH AREA [Q.B.D. DIVL. CT.]	1182
	DAVIES, R. v. [C.C.A.]	341
	D'AVIGDOR-GOLDSMID v. INLAND REVENUE COMRS. [H.L.]	403
	DAWSON v. EUXINE SHIPPING CO., LTD. [Q.B.D.]	299
	DEANE-FREEMAN, REEVES v. [C.A.]	461
	DEBTOR, A. (No. 36 of 1952), <i>Re</i> [CH.D.]	776
	DEBTOR, A. (No. 48 of 1952), <i>Re. Ex parte</i> AMPHILL RURAL DISTRICT COUNCIL v. THE DEBTOR [C.A.]	545
	DEPAOLI (<i>decd.</i>), <i>Re</i> [CH.D.]	301
	DERWENT, <i>Ex parte</i> . R. v. WIMBLEDON JUSTICES [Q.B.D. DIVL. CT.]	390
	DICK (<i>decd.</i>), <i>Re</i> [C.A.]	559
	DICKSON v. FLACK [Q.B.D.]	236
	DISPUTES COMMITTEE OF THE NATIONAL JOINT COUNCIL FOR THE CRAFT OF DENTAL TECHNICIANS, R. v. <i>Ex parte</i> NEATE [Q.B.D. DIVL. CT.]	327
	DIXON v. DIXON [Div.]	910
	DOCKS AND INLAND WATERWAYS EXECUTIVE, PIGOTT (J. H.) & SON v. [Q.B.D.]	22
	DONCASTER CORPN., EAST MIDLANDS GAS BOARD v. [Q.B.D.]	54
	DORRINGTON v. GRIFF FENDER (SWANSEA), LTD. [C.A.]	1177
	DOWNSHIRE'S SETTLED ESTATES, <i>Re</i> [C.A.]	103
	DRIVE YOURSELF HIRE CO. (LONDON), LTD. v. STRUTT [Q.B.D.]	1036
	DUMMER v. BROWN [C.A.]	1158
	DUNBAR, GRIMSHAW v. [C.A.]	350
	DUNN, GREEN v. [Q.B.D. DIVL. CT.]	550
	DURLEY CHINE (INVESTMENTS), LTD., MAURAY v. [Q.B.D.]	712
	EAST MIDLANDS GAS BOARD v. DONCASTER CORP. [Q.B.D.]	54
	EASTERN GAS BOARD, COOTE v. [Q.B.D.]	762
	EDWARDS, CARNILL v. [Q.B.D. DIVL. CT.]	282
	ELBRICK (TRADING AS ELBRICK AND HUTCHESON), ROAD HAULAGE EXECUTIVE v. [H.L.]	736
	ENGLAND v. NATIONAL COAL BOARD [C.A.]	1194
	ETABLISSEMENT BAUDELLOT v. R. S. GRAHAM AND CO., LTD. [C.A.]	149
	EUXINE SHIPPING CO., LTD., DAWSON v. [Q.B.D.]	299
	EVANS v. EVANS [C.A.]	70
	EVANS v. SMITH [Q.B.D. DIVL. CT.]	320
	EXETER CORPN., BRITISH ELECTRICITY AUTHORITY v. [CH.D.]	502
	F. G. (FILMS), LTD., <i>Re</i> [CH.D.]	615
	FIFIELD (INSPECTOR OF TAXES), NORTH CENTRAL WAGON & FINANCE CO., LTD. v. [C.A.]	1009
	FINNEGAN v. CEMENTATION CO., LTD. [C.A.]	1130
	FLACK, DICKSON v. [Q.B.D.]	236
	FLACK v. SMITH [Q.B.D. DIVL. CT.]	320
	FLOYD v. BUSH [Q.B.D. DIVL. CT.]	265
	FRAWLEY (M. & F.), LTD. v. VE-RI-BEST MANUFACTURING CO., LTD. [C.A.]	50
	GARNER, PERRY v. [Q.B.D. DIVL. CT.]	285
	GENERAL ACCIDENT FIRE AND LIFE ASSURANCE CORPN., LTD., WEBSTER v. [Q.B.D.]	663
	GESTETNER (<i>decd.</i>), <i>Re</i> [CH.D.]	1150
	GETREIDE-IMPORT-GESELLSCHAFT m.b.H. v. CONTIMAR S. A. COMPANIA INDUSTRIAL COMMERCIAL Y-MARITIMA [Q.B.D.]	257
	GIBBON, ATLANTIC MARITIME CO., INC. v. [Q.B.D.]	893
	GORTZE (<i>decd.</i>), <i>Re</i> [C.A.]	76
	GRAHAM (R. S.) AND CO., LTD., ETABLISSEMENT BAUDELLOT v. [C.A.]	149
	GRAY, MORGAN v. [CH.D.]	213
	GREEN v. DUNN [Q.B.D. DIVL. CT.]	550
	GREEN v. PORTSMOUTH STADIUM, LTD. [Q.B.D.]	642
	GRIFF FENDER (SWANSEA), LTD., DORRINGTON v. [C.A.]	1177
	GRIMSHAW v. DUNBAR [C.A.]	350
	GRINSTEAD v. HADRILL [C.A.]	1188
	HADRILL, GRINSTEAD v. [C.A.]	1188
	HAINES v. ROBERTS [Q.B.D. DIVL. CT.]	344
	HAMLIN, JACKSON v. [CH.D.]	887
	HANS HOTH, THE [ADM.]	218
	HARRIS v. BRIGHT'S ASPHALT CONTRACTORS, LTD. ALLARD & SAUNDERS, LTD. (THIRD PARTIES) [Q.B.D.]	395
	HARRISON & JONES, LTD. v. BUNTON & LANCASTER, LTD. [Q.B.D.]	903
	HARROW LITERARY INSTITUTION, <i>Re</i> [CH.D.]	838
	HAR-SHEFI v. HAR-SHEFI [C.A.]	783
	HARVEY (INSPECTOR OF TAXES) v. BREYFOGLE [H.L.]	1090
	HASTIE (BERNARD) & CO., LTD., REES v. [C.A.]	375
	HEARN v. HEARN AND JARVIS [Div.]	797
	HEATLEY v. STEEL CO. OF WALES, LTD. [C.A.]	489
	HENLYS, LTD., <i>Ex parte</i> . <i>Re</i> A JUDGMENT SUMMONS (No. 25 of 1952) [C.A.]	424
	HENNY, HINCKLEY AND COUNTRY BUILDING SOCIETY v. [CH.D.]	515
	HENRY WILL TRUST, <i>Re</i> [CH.D.]	531
	HENSHALL, LINCOLN COUNTY COUNCIL (PARTS OF LINDSEY) v. [Q.B.D. DIVL. CT.]	1143
	HERTFORD CORPN. v. METROPOLITAN WATER BOARD [C.A.]	1047
	HICKSON v. HICKSON [C.A.]	382
	HINCKLEY AND COUNTRY BUILDING SOCIETY v. HENNY [CH.D.]	515
	HINDE v. HINDE [C.A.]	171
	HOLE v. CUZEN [C.A.]	87
	HOLST & CO., LTD., STEBBINGS v. [LEEDS ASSIZES]	925
	HOOK v. CUNARD STEAMSHIP CO., LTD. [WINCHESTER ASSIZES]	1021
	HOY, <i>Ex parte</i> . R. v. CAMPBELL [Q.B.D. DIVL. CT.]	684
	HUTCHINSON'S WILL TRUSTS, <i>Re</i> [CH.D.]	996
	INDUSTRIAL DISPUTES TRIBUNAL, R. v. <i>Ex parte</i> KIGASS, LTD. [Q.B.D. DIVL. CT.]	593
	INLAND REVENUE COMRS., BADDELEY v. [CH.D.]	63
	INLAND REVENUE COMRS. v. CITY OF GLASGOW POLICE ATHLETIC ASSOCIATION [H.L.]	747
	INLAND REVENUE COMRS. v. CITY OF LONDON CORPN. (AS THE CONSERVATORS OF EPPING FOREST) [H.L.]	1075
	INLAND REVENUE COMRS., COUTTS & Co. v. [H.L.]	418
	INLAND REVENUE COMRS., D'AVIGDOR-GOLDSMID v. [H.L.]	403
	INLAND REVENUE COMRS., JOHANNESBURG CONSOLIDATED INVESTMENT CO., LTD. v. [H.L.]	729
	INLAND REVENUE COMRS., NESTLE CO., LTD. v. [C.A.]	877
	INLAND REVENUE COMRS. v. PEARLBERG [C.A.]	388
	INLAND REVENUE COMRS., TRINIDAD LEASEHOLDS, LTD. v. [H.L.]	729
	INLAND REVENUE COMRS., UNION CORPN., LTD. v. [H.L.]	729
	INLAND REVENUE COMRS., WORTH v. [C.A.]	930
	INVESTMENT TRUST CORPN., LTD., PHILLIPS (GODFREY), LTD. v. [CH.D.]	7
	IRVING (T. G.) & CO., LTD., RITCHIE v. [C.A.]	37
	ISLE OF WIGHT COUNTY COUNCIL v. WARWICKSHIRE COUNTY COUNCIL [Q.B.D. DIVL. CT.]	525
	IZUORA v. REGINAM [P.C.]	827
	JACKSON v. HAMLIN [CH.D.]	887
	JACKSON, R. v. [C.C.A.]	872
	JAMES, MUIR v. [C.A.]	494
	JARVIS, BARNES v. [Q.B.D. DIVL. CT.]	1061
	JOHANNESBURG CONSOLIDATED INVESTMENT CO., LTD. v. INLAND REVENUE COMRS. [H.L.]	729
	JON BRAUFORTE (LONDON), LTD., <i>Re</i> [CH.D.]	634
	JONES (<i>decd.</i>), <i>Re</i> [CH.D.]	357
	JUDGMENT SUMMONS, A. (No. 25 of 1952), <i>Re. Ex parte</i> HENLYS, LTD. [C.A.]	424
	K. & L. STEELPOUNDERS & ENGINEERS, LTD., ADSETT v. [Q.B.D.]	97
	KANGOL INDUSTRIES, LTD. v. BRAY (ALFRED) & SONS, LTD. [CH.D.]	444
	KENALDO, LTD., PAULEY v. [Q.B.D.]	226
	KENDREW (<i>decd.</i>), <i>Re</i> [C.A.]	551
	KENT v. CONNIF [C.A.]	155
	KENWAY, MORNINGTON PERMANENT BUILDING SOCIETY v. [CH.D.]	951

PAGE	PAGE
KIGASS, LTD., <i>Ex parte</i> . R. v. INDUSTRIAL DISPUTES TRIBUNAL [Q.B.D. DIVL. CT.]	593
KING v. PHILLIPS [C.A.]	617
KING v. T. AND W. FARMLOE, LTD. [Q.B.D.]	614
LANGSTON AND JARRETT, LTD. v. CUSTOMS AND EXCISE COMRS. [CH.D.]	469
KLUCINSKI v. KLUCINSKI [Div.]	683
KRUSE v. QUESTIER & Co., LTD. [Q.B.D.]	954
LANCASHIRE UNITED TRANSPORT CO., LTD., PRESCOTT v. [C.A.]	288
LANGTON (<i>dec'd.</i>), <i>Re</i> [PROB.]	928
LAWSON v. TIGER [CH.D.]	698
LESTER v. BALFOUR WILLIAMSON MERCHANT SHIPPERS, LTD. [Q.B.D. DIVL. CT.]	1146
LEWIS v. CARMARTHENSHIRE COUNTY COUNCIL [CARMARTHENSHIRE WINTER ASSIZES]	1025
LEWIS'S DECLARATION OF TRUST, <i>Re</i> [CH.D.]	1005
LINCOLN COUNTY COUNCIL (PARTS OF LINDSEY) v. HENSHALL [Q.B.D. DIVL. CT.]	1143
LITTLEWOOD v. WIMPEY (GEORGE) AND CO., LTD. BRITISH OVERSEAS AIRWAYS CORPN. (SECOND DEFENDANTS AND THIRD PARTIES) [Q.B.D.]	583
LLOYD v. SINGLETON [Q.B.D. DIVL. CT.]	291
LONDON & COUNTRY COMMERCIAL PROPERTY INVESTMENTS, LTD. v. ATTORNEY-GENERAL [CH.D.]	436
LONDON COUNTY COUNCIL, BRITISH TRANSPORT COMMISSION v. [C.A.]	801
LONDON COUNTY COUNCIL v. MARKS & SPENCER, LTD. [H.L.]	1095
LOUDON v. RYDER [C.A.]	741
MACHOROWSKI, MARELA, LTD. v. [C.A.]	960
MACKINNON, THIRD PARTY, MARLES v. TRANT (PHILIP) & SONS, LTD. (No. 1) [HAMPSHIRE SUMMER ASSIZES]	645
MACKINNON, THIRD PARTY, MARLES v. TRANT (PHILIP) & SONS, LTD. (No. 2) [C.A.]	651
MARCEL (J.) (FURRIERS), LTD. v. TAPPER [Q.B.D.]	15
MARELA, LTD. v. MACHOROWSKI [C.A.]	960
MARKS & SPENCER, LTD., LONDON COUNTY COUNCIL v. [H.L.]	1095
MARLES v. TRANT (PHILIP) & SONS, LTD. (MACKINNON, THIRD PARTY) (No. 1) [HAMPSHIRE SUMMER ASSIZES]	645
MARLES v. TRANT (PHILIP) & SONS, LTD. (MACKINNON THIRD PARTY) (No. 2) [C.A.]	651
MARSHALL (INSPECTOR OF TAXES), THOMAS v. [H.L.]	1102
MARSHALL (W. F.), LTD. v. BARNES AND FITZPATRICK (A FIRM) [Q.B.D.]	970
MARTIN (GEORGE) (FULHAM), LTD., PRIOR (INSPECTOR OF TAXES) v. [CH.D.]	16
MASTERS (<i>dec'd.</i>), <i>Re</i> [CH.D.]	19
MAURAY v. DURLEY CHINE (INVESTMENTS), LTD. [Q.B.D.]	712
MAURICE (LESLIE) & Co., LTD. v. WILLEDSEN CORPN. [C.A.]	1014
MELVIN, R. v. [C.A.]	294
METAMORPHOSIS, THE [ADM.]	723
METCALF v. WELLS [C.A.]	626
METROPOLITAN WATER BOARD v. HERTFORD CORPN. [C.A.]	1047
MIDDLESEX COUNTY COUNCIL, SWALLOW AND PEARSON (A FIRM) v. [Q.B.D.]	580
MIDDLETON BOROUGH COUNCIL, YORKSHIRE DYEING AND PROOFING CO., LTD. v. [Q.B.D. DIVL. CT.]	540
MILES v. CLARKE [CH.D.]	779
MILLINGTON, SYKES v. [Q.B.D. DIVL. CT.]	1098
MILLS (<i>dec'd.</i>), <i>Re</i> [CH.D.]	835
MINKLEY v. MINKLEY [Div.]	1176
MINISTRY OF EDUCATION, SURREY COUNTY COUNCIL v. [Q.B.D.]	705
MISKIN LOWER JUSTICES, R. v. <i>Ex parte</i> YOUNG [Q.B.D. DIVL. CT.]	495
MOORE, R. v. [C.C.A.]	641
MORGAN v. ASHMORE, BENSON, PEASE & Co., LTD. [LEEDS ASSIZES]	328
MORGAN, BROOM v. [C.A.]	849
MORGAN v. BRAY [CH.D.]	213
MORNINGTON PERMANENT BUILDING SOCIETY v. KENWAY [CH.D.]	951
MUIR v. JAMES [C.A.]	494
MURPHIE, THIRD PARTY. ORMROD v. CROSVILLE MOTOR SERVICES, LTD. [CHESTER ASSIZES]	711
NATIONAL COAL BOARD, ENGLAND v. [C.A.]	1194
NATIONAL COAL BOARD, RUSHTON v. [C.A.]	314
NATIONAL DOCK LABOUR BOARD, BARNARD v. [C.A.]	1113
NEATE, <i>Ex parte</i> . R. v. DISPUTES COMMITTEE OF THE NATIONAL JOINT COUNCIL FOR THE CRAFT OF DENTAL TECHNICIANS [Q.B.D. DIVL. CT.]	327
NESBITT'S WILL TRUSTS, <i>Re</i> [CH.D.]	936
NESLIE CO., LTD. v. INLAND REVENUE COMRS. [C.A.]	877
NEWALLS INSULATION CO., LTD., BECKETT v. [C.A.]	250
NEWBORNE v. SENSOLID (GREAT BRITAIN), LTD. [C.A.]	708
NEWMAN, ROSENFELD v. [Q.B.D.]	840
NEWTON v. BIGGS [C.A.]	99
NICOLENE, LTD. v. SIMMONDS [C.A.]	822
NORDICK INSULINLABORATORIUM v. BENCARD (C. L.) (1934), LTD. [C.A.]	986
NORFOLK QUARTER SESSIONS, R. v. <i>Ex parte</i> BRUNSON [Q.B.D. DIVL. CT.]	346
NORTH CENTRAL WAGON & FINANCE CO., LTD. v. FIFIELD (INSPECTOR OF TAXES) [C.A.]	1009
OATES, WALSH v. [C.A.]	963
ORMROD v. CROSVILLE MOTOR SERVICES, LTD. (MURPHIE, THIRD PARTY) [CHESTER ASSIZES]	711
OSBORNE v. SNOOK [C.A.]	332
OTTER v. CHURCH, ADAMS, TATHAM & Co. (A FIRM) [CH.D.]	168
PAGE v. PAGE [C.A.]	626
PANTER, STRUTT v. [C.A.]	445
PARKE, DAVIS & Co., <i>Ex parte</i> . R. v. COMPTROLLER-GENERAL OF PATENTS [Q.B.D. DIVL. CT.]	862
PARKER, BATES v. [C.A.]	768
PASMORE v. WHITBREAD & Co., LTD. [C.A.]	361
PATLEY PRESSINGS, LTD., BRITISH ELECTRICAL & ASSOCIATED INDUSTRIES (CARDIFF), LTD. v. REID BROS. (GLASGOW), LTD., THIRD PARTY, DOUGLAS SCOTT, LTD., FOURTH PARTY [Q.B.D.]	94
PAULEY v. KENALDO, LTD. [Q.B.D.]	226
PEARLBERG, INLAND REVENUE COMRS. v. [C.A.]	388
PEARSON v. BOYES [Q.B.D. DIVL. CT.]	492
PERERA v. VANDIYAR [CH.D.]	1109
PERRYMAN (<i>dec'd.</i>), <i>Re</i> [CH.D.]	225
PERRY v. GARNER [Q.B.D. DIVL. CT.]	223
PHARMACEUTICAL SOCIETY OF GREAT BRITAIN v. BOOTS CASH CHEMISTS (SOUTHERN), LTD. [C.A.]	482
PHILLIPS, KING v. [C.A.]	617
PHILLIPS, R. v. [C.C.A.]	968
PHILLIPS (GODFREY), LTD. v. INVESTMENT TRUST CORPN., LTD. [CH.D.]	7
PIGOTT (J. H.) & SON v. DOCKS AND INLAND WATERWAYS EXECUTIVE [Q.B.D.]	22
PIKE v. PIKE [C.A.]	232
PORTSMOUTH STADIUM, LTD., GREEN v. [Q.B.D.]	642
POSNER (<i>dec'd.</i>), <i>Re</i> [PROB.]	1123
POTTER, R. v. [LEEDS ASSIZES]	296
PRESCOTT v. LANCASHIRE UNITED TRANSPORT CO., LTD. [C.A.]	288
PRESTIGE & Co., LTD., WINGROVE v. [Q.B.D.]	694
PRIDE OF DERBY AND DERBYSHIRE ANGLING ASSOCIATION, LTD. v. BRITISH CELANESE, LTD. [C.A.]	179
PRIOR (INSPECTOR OF TAXES) v. MARTIN (GEORGE) (FULHAM), LTD. [CH.D.]	16
PROCURATOR-GENERAL, SCHIFFAHT-TREUHAND G.m.b.H. v. [P.C.]	364
QUESTIER & Co., LTD., KRUSE v. [Q.B.D.]	954
R. v. AGRICULTURAL LAND TRIBUNAL FOR THE WALES AND MONMOUTH AREA. <i>Ex parte</i> DAVIES [Q.B.D. DIVL. CT.]	1182
R. v. BASS [C.C.A.]	1064
R. v. BEDFORD PRISON (GOVERNOR), <i>Ex parte</i> AMES [Q.B.D. DIVL. CT.]	1002
R. v. CAMPBELL. <i>Ex parte</i> HOY [Q.B.D. DIVL. CT.]	684
R. v. COMPTROLLER-GENERAL OF PATENTS. <i>Ex parte</i> PARKE, DAVIS & Co. [Q.B.D. DIVL. CT.]	862
R. v. DAVIES [C.C.A.]	341
R. v. DISPUTES COMMITTEE OF THE NATIONAL JOINT COUNCIL FOR THE CRAFT OF DENTAL TECHNICIANS. <i>Ex parte</i> NEATE [Q.B.D. DIVL. CT.]	327
R. v. INDUSTRIAL DISPUTES TRIBUNAL. <i>Ex parte</i> KIGASS, LTD. [Q.B.D. DIVL. CT.]	593
REGINAM, IZUORA v. [P.C.]	827
R. v. JACKSON [C.C.A.]	872
R. v. MELVIN [C.A.]	294
R. v. MISKIN LOWER JUSTICES. <i>Ex parte</i> YOUNG [Q.B.D. DIVL. CT.]	495
R. v. MOORE [C.C.A.]	641

	PAGE		PAGE
R. v. NORFOLK QUARTER SESSIONS. <i>Ex parte</i>		STEEL CO. OF WALES, LTD., <i>HEATLEY v. [C.A.]</i>	489
BRUNSON [Q.B.D. DIVL. CT.]	346	STEPHENSON BROTHERS, LTD. v. CUSTOMS AND	
R. v. PHILLIPS [C.C.A.]	968	EXCISE COMRS. [CH.D.]	469
R. v. POTTER [LEEDS ASSIZES]	296	STOCKDALE, BRIDGMAN v. [Q.B.D.]	1166
R. v. ROGERS [C.C.A.]	206	STRUTT, DRIVE YOURSELF HIRE CO. (LONDON),	
R. v. SANDERSON [C.C.A.]	485	LTD. v. [Q.B.D.]	1036
R. v. TALBOT [C.C.A.]	340	STRUTT v. PANTER [C.A.]	445
R. v. WEBB [C.C.A.]	1156	SURREY COUNTY COUNCIL v. MINISTRY OF	
R. v. WESTMINSTER COMPENSATION APPEAL		EDUCATION [Q.B.D.]	705
TRIBUNAL. <i>Ex parte</i> ROAD HAULAGE EXECU-		SWALLOW AND PEARSON (A FIRM) v. MIDDLESEX	
TIVE [C.A.]	687	COUNTY COUNCIL [Q.B.D.]	580
R. v. WILLIAMS [C.C.A.]	1068	SYKES v. MILLINGTON [Q.B.D. DIVL. CT.]	1098
R. v. WIMBLEDON JUSTICES. <i>Ex parte</i> DERWENT		T. AND W. FARMILOB, LTD., KING v. [Q.B.D.]	614
[Q.B.D. DIVL. CT.]	390	TALBOT, R. v. [C.C.A.]	340
R. v. YOUNG [C.C.A.]	21	TAPPER, MARCEL (J.) (FURRIERS), LTD. v.	
R. P. C. HOLDINGS, LTD. v. ROGERS [CH.D.]	1029	[Q.B.D.]	15
RAILWAY EXECUTIVE, BLACKMAN v. [Q.B.D.]	4	TAYLOR (DAVID) & SON, LTD. v. BARNETT [C.A.]	843
RAILWAY EXECUTIVE (SOUTHERN REGION),		THOMAS v. BRITISH THOMSON-HOUSTON CO.,	
COOPER v. [HAMPSHIRE AUTUMN ASSIZES]	477	LTD. [Q.B.D.]	29
RAILWAY EXECUTIVE, TOMLINSON v. [C.A.]	1	THOMAS v. MARSHALL (INSPECTOR OF TAXES)	
REES v. HASTIE (BERNARD) & CO., LTD. [C.A.]	375	[H.L.]	1102
REEVES v. DEANE-FREEMAN [C.A.]	461	THOMPSON, CAMPBELL v. [Q.B.D.]	831
REID BROS. (GLASGOW), LTD., THIRD PARTY,		THOMPSON v. WARD [C.A.]	1169
DOUGLAS SCOTT, LTD., FOURTH PARTY.		THOMSON SETTLEMENT TRUSTS, <i>Re</i> [CH.D.]	1139
BRITISH ELECTRICAL & ASSOCIATED INDUS-		TIGER, LAWSON v. [CH.D.]	698
TRIES (CARDIFF), LTD. v. PATLEY PRESSINGS,		TINDALL v. TINDALL [C.A.]	139
LTD. [Q.B.D.]	94	TOMLINSON v. RAILWAY EXECUTIVE [C.A.]	1
RELIANCE (NAMEPLATES), LTD. v. ART JEWELS,		TRANT (PHILIP) & SONS, LTD. MARLES v. (MAC-	
LTD. [CH.D.]	759	KINNON, THIRD PARTY) (No. 1) [HAMPSHIRE	
RIDLEY v. RIDLEY [Div.]	798	SUMMER ASSIZES]	645
RILEY v. TROLL [MANCHESTER ASSIZES]	966	TRANT (PHILIP) & SONS, LTD., MARLES v. (MAC-	
RITCHIE v. IRVING (T. G.) & CO., LTD. [C.A.]	37	KINNON THIRD PARTY) (No. 2) [C.A.]	651
RIVLIN v. BILANKIN [Q.B.D.]	534	TRAVCO HOTELS, LTD., BELL v. [C.A.]	638
ROAD HAULAGE EXECUTIVE, <i>Ex parte</i> R. v.		TRINIDAD LEASEHOLDS, LTD. v. INLAND	
WESTMINSTER COMPENSATION APPEAL TRI-		REVENUE COMRS. [H.L.]	729
BUNAL [C.A.]	687	TROLL, RILEY v. [MANCHESTER ASSIZES]	966
ROAD HAULAGE EXECUTIVE v. ELRIK (TRADING		UNION CORPN., LTD. v. INLAND REVENUE COMRS.	
AS ELRIK AND HUTCHESON) [H.L.]	736	[H.L.]	729
ROBB'S WILL TRUSTS, <i>Re</i> [CH.D.]	920	VANDIYAR, PERERA v. [C.A.]	1109
ROBERTS, HAINES v. [Q.B.D. DIVL. CT.]	344	VAUGHAN v. VAUGHAN [C.A.]	209
ROGERS, R. v. [C.C.A.]	206	VE-RI-BEST MANUFACTURING CO., LTD., FRAW-	
ROGERS, R.P.C. HOLDINGS, LTD. v. [CH.D.]	1029	LEY (M. & F.), LTD. v. [C.A.]	50
ROSENFELD v. NEWMAN [Q.B.D.]	840	WALSH (<i>decd.</i>), <i>Re</i> [CH.D.]	982
ROSEHER, BRIESS v. [C.A.]	717	WALSH v. OATES [C.A.]	963
ROTTERDAMSCHIE BANK N.V. v. BRITISH OVER-		WAR OFFICE, BLOUNT v. [BIRMINGHAM ASSIZES]	1071
SEAS AIRWAYS CORPN. [Q.B.D.]	675	WARBEY, BOYER v. [C.A.]	269
ROWLAND, CARNILL v. [Q.B.D. DIVL. CT.]	486	WARBEY, SPICER v. [Q.B.D. DIVL. CT.]	284
RUSHTON v. NATIONAL COAL BOARD [C.A.]	314	WARD, THOMPSON v. [C.A.]	1169
RYDER, LOUDON v. [C.A.]	741	WARWICKSHIRE COUNTY COUNCIL, ISLE OF	
ST. JOHN THE DIVINE, RICHMOND, <i>Re</i> [SOUTH-		WIGHT COUNTY COUNCIL v. [Q.B.D. DIVL.	
WARK CONSISTORY COURT]	818	CT.]	525
SALMON, CARD v. [Q.B.D. DIVL. CT.]	324	WEBB, R. v. [C.C.A.]	1156
SANDERSON, R. v. [C.C.A.]	485	WEBSTER v. GENERAL ACCIDENT FIRE AND LIFE	
SCAFFOLDING (GREAT BRITAIN), LTD., CUTTRESS		ASSURANCE CORPN., LTD. [Q.B.D.]	663
v. [LIVERPOOL ASSIZES]	165	WELLS, METCALF v. [C.A.]	626
SCHIFFFAHRT-TREUHAND, G.m.b.H. v. PROCURA-		WESTMINSTER COMPENSATION APPEAL TRI-	
TOR-GENERAL [P.C.]	364	BUNAL, R. v. <i>Ex parte</i> ROAD HAULAGE	
SCHOLZ, BECK v. [C.A.]	814	EXECUTIVE [C.A.]	687
SCOTT (DOUGLAS), LTD., FOURTH PARTY, REID		WHITBREAD & CO., LTD., PASMORE v. [C.A.]	361
BROS. (GLASGOW), LTD., THIRD PARTY.		WHITE v. BRISTOL AEROPLANE CO., LTD. [C.A.]	40
BRITISH ELECTRICAL & ASSOCIATED INDUS-		WILLEDEN CORPN., MAURICE (LESLIE) & CO.,	
TRIES (CARDIFF), LTD. v. PATLEY PRESSINGS,		LTD. v. [C.A.]	1014
LTD. [Q.B.D.]	94	WILLIAMS, R. v. [C.C.A.]	1068
SEALY (OTHERWISE CALLAN) v. CALLAN [Div.]	942	WILLIAMS' WILL TRUSTS, <i>Re</i> [CH.D.]	536
SENSOLD (GREAT BRITAIN), LTD., NEWBORNE		WIMBLEDON JUSTICES, R. v. <i>Ex parte</i> DERWENT	
v. [C.A.]	708	[Q.B.D. DIVL. CT.]	390
SHEPARD v. CARTWRIGHT [CH.D.]	569	WIMPEY (GEORGE) AND CO., LTD., LITTLEWOOD	
SHIELS v. CRUKSHANK [H.L.]	874	v. BRITISH OVERSEAS AIRWAYS CORPN. (SE-	
SILVERSTONE v. SILVERSTONE [P.D.A.]	556	COND DEFENDANTS AND THIRD PARTIES)	
SIMMONDS, NICOLENE, LTD. v. [C.A.]	822	[Q.B.D.]	583
SINGLETON, LLOYD v. [Q.B.D. DIVL. CT.]	291	WINGROVE v. PRESTIGE & CO., LTD. [Q.B.D.]	694
SLATER v. SLATER [C.A.]	246	WIPPERMAN, <i>In the Estate of</i> [PROB.]	764
SMITH, BOWERS v. [Q.B.D. DIVL. CT.]	320	WISEMAN v. WISEMAN [C.A.]	601
SMITH v. CHESTERFIELD & DISTRICT CO-OPERA-		WORBOYS v. WORBOYS [Div.]	857
TIVE SOCIETY, LTD. [C.A.]	447	WORTH v. INLAND REVENUE COMRS. [C.A.]	930
SMITH, EVANS v. [Q.B.D. DIVL. CT.]	320	WOZNIAK v. WOZNIAK [C.A.]	1192
SMITH, FLACK v. [Q.B.D. DIVL. CT.]	320	WYATT v. WYATT (BY HER GUARDIAN) [Div.]	1185
SMITH'S (JOHN) TADCASTER BREWERY CO., LTD.,		YORKSHIRE DYEING AND PROOFING CO., LTD. v.	
<i>Re</i> [C.A.]	518	MIDDLETON BOROUGH COUNCIL [Q.B.D.	
SNOOK, OSBORNE v. [C.A.]	332	DIVL. CT.]	540
SPICER v. WARBEY [Q.B.D. DIVL. CT.]	284	YOUNG, <i>Ex parte</i> R. v. MISKIN LOWER JUSTICES	
STEBBINGS v. HOLST & CO., LTD. [LEEDS		[Q.B.D. DIVL. CT.]	495
ASSIZES]	925	YOUNG, R. v. [C.C.A.]	21

INDEX

	PAGE
ACCIDENT Road. <i>See</i> STREET TRAFFIC.	
ACCUMULATION Restriction— <i>Power, as distinct from direction, to accumulate—Annuities continuing charge on income—Title to income unlawfully accumulated—Law of Property Act, 1925 (c. 20), s. 164 (1) (b) [Re ROBB'S WILL TRUSTS]</i>	920
ADMINISTRATOR <i>See</i> EXECUTOR AND ADMINISTRATOR.	
ADMISSION <i>See</i> CRIMINAL LAW (Evidence).	
ADOPTION Child subject of custody order by Divorce Court— <i>Effect of adoption on custody order—Duty of county court and justices—Adoption Act, 1950 (c. 26), s. 10 (1), (2) [CROSSLEY v. CROSSLEY]</i> ..	891
ADVANCEMENT <i>See</i> GIFT; HUSBAND AND WIFE; WILL.	
AGENT Profit acquired through knowledge obtained in course of agency— <i>Agency terminated by war—Right to transfer property vested in Custodian of Enemy Property—Purchase by agent and re-sale—Duty to account for profit [NORDISK INSULINLABORATORIUM v. C. L. BENCARD (1934), LTD.]</i>	986
Signature “for account of our [disclosed] principal”— <i>Liability of principal for defect in goods sold [LESTER v. BALFOUR WILLIAMSON MERCHANT SHIPPERS, LTD.]</i>	1146
AGRICULTURE Agricultural holding— <i>Claim by landlord for damages for breach of covenant—Claim made during currency of tenancy—Claim not displaced by statutory provisions for compensation on termination of tenancy—Agricultural Holdings Act, 1948 (c. 63), s. 57 (3) (a) [KENT v. CONNIEFF]</i> ..	155
Notice to quit— <i>Consent of Minister—Exercise of discretion—Matters for consideration—Agreement by landlord to pay tenant compensation—Relevance—“In the interests of efficient farming”—Agricultural Holdings Act, 1948 (c. 63), s. 25 (1) (a) [R. v. AGRICULTURAL LAND TRIBUNAL FOR THE WALES AND MONMOUTH AREA, Ex parte DAVIES]</i>	1182
AGRICULTURAL HOLDING <i>See</i> AGRICULTURE.	
AIR Carriage. <i>See</i> CARRIAGE BY AIR.	
ALTAR <i>See</i> ECCLESIASTICAL LAW.	
APPEAL Bankruptcy. <i>See</i> BANKRUPTCY. County court, from. <i>See</i> COUNTY COURT. Criminal appeal. <i>See</i> CRIMINAL LAW (Appeal). Transport Tribunal, from. <i>See</i> TRANSPORT TRIBUNAL.	
APPOINTMENT Power of. <i>See</i> POWER OF APPOINTMENT.	
APPROBATION Unconsummated marriage, of. <i>See</i> NULLITY.	
APPROVED SCHOOL Order in respect of young person. <i>See</i> CHILDREN AND YOUNG PERSONS.	
ARBITRATION Certiorari— <i>Prohibition—Power of court to issue orders addressed to arbitrator [R. v. DISPUTES COMMITTEE OF THE NATIONAL JOINT COUNCIL FOR THE CRAFT OF DENTAL TECHNICIANS, Ex parte NEATE, R. v. SAME]</i>	327
Dispute within scope of clause— <i>Frustration of contract—Executory contract [KRUSE v. QUESTIER & Co., LTD.]</i>	954
Ouster of jurisdiction of court— <i>Term of contract that award condition precedent to proceedings—Dispute as to right of appeal against award—Action for declaration as to right—Competency—Service of notice of appeal—London Corn Trade Association contract—Foreign party “considered as ordinarily resident” in London—Validity of service at office abroad—Power of court to order provision making award condition precedent to bringing action to be of no effect—Exercise of discretion—Arbitration Act, 1950 (c. 27), s. 25 (4) [GETREIDE-IMPORT-GESELLSCHAFT m.b.H. v. CONTIMAR S. A. COMPANIA INDUSTRIAL COMMERCIAL Y-MARITIMA]</i> ..	257
Settling aside award— <i>Misconduct by arbitrator—Award enforcing illegal contract—Arbitration Act, 1950 (c. 27), s. 22 (1), s. 23 (2) [DAVID TAYLOR & SON, LTD. v. BARNETT]</i> ..	843
ARBITRATOR <i>See</i> ARBITRATION.	
ASSAULT Damages— <i>Exemplary damages—Way forced into flat—Shock, but no injuries, inflicted—Award of separate sum for assault and as exemplary damages—Judge's direction comparing damages with magistrates' fine [LOUDON v. RYDER]</i>	741
ASSISTED PERSON <i>See</i> LEGAL AID.	
ASSURANCE Life assurance. <i>See</i> ESTATE DUTY.	

	PAGE
ATTORMENT CLAUSE	
Mortgage, in. <i>See</i> MORTGAGE.	
AWARD	
<i>See</i> ARBITRATION.	
BAILMENT	
Gratuitous bailment—House requisitioned by War Office—Owner's property stored in strong room with consent of War Office—Requisition transferred to another authority—Theft of property from strong room—Liability of War Office—Defence (General) Regulations, 1939 (S.R. & O., 1939, No. 927, as amended), reg. 51 (1), (2) [BLOUNT v. THE WAR OFFICE]	1071
BANK	
Administrator—Remuneration—Power of court to authorise—Trustee Act, 1925 (c. 19), s. 42 [Re MASTERS (decd.)]	19
Trustee—Remuneration—Power of court to authorise [Re MASTERS (decd.)]	19
BANKRUPTCY	
Appeal—Appeal from county court—Notice of appeal—Delivery of copy to registrar—Extension of time for delivery—"Good cause shown"—Mistake by appellant's solicitor—Bankruptcy Rules, 1952 (S.I., 1952, No. 2113), r. 130, r. 389 [Re A DEBTOR (No. 36 of 1952), Ex parte THE DEBTOR v. J. T. RICHARDSON, RYMER BROS., LTD.]	776
Bankruptcy notice—"Final order" against debtor—Order by court of summary jurisdiction for payment of arrears of water rate and costs—Summary Jurisdiction Act, 1879 (c. 49), s. 35—Direction to levy distress in default of payment—Bankruptcy Act, 1914 (c. 59), s. 1 (1) (g)—Water Act, 1945 (c. 42), s. 38 (3) [Re A DEBTOR (No. 48 of 1952), Ex parte AMPHILL RURAL DISTRICT COUNCIL v. THE DEBTOR]	545
Shareholder—Right to vote [MORGAN v. GRAY]	213
Tenancy—Premises subject to Rent Acts—Rent paid in excess of recoverable rent—Bankruptcy of landlord—Right of tenant to deduct amount of rent overpaid from rent payable to trustee—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (c. 17), s. 14 (1) [HOLE v. CUZEN]	87
BED	
Hospital—Endowment. <i>See</i> NATIONAL HEALTH SERVICE.	
BICYCLE	
<i>See</i> CYCLE.	
BILL OF DIVORCEMENT	
Jewish. <i>See</i> NULLITY.	
BILL OF LADING	
<i>See</i> SHIPPING.	
BOOKMAKER	
Admission charge to racing track—Excessive charge—Recovery of excess by bookmaker—Betting and Lotteries Act, 1934 (c. 58), s. 13 (1), (2) [GREEN v. PORTSMOUTH STADIUM, LTD.]	642
BORROWING	
Money. <i>See</i> MONEY.	
BREACH OF CONTRACT	
<i>See</i> CONTRACT.	
BRITISH TRANSPORT COMMISSION	
Charges scheme—New scheme as distinct from alteration of existing scheme—Body of new scheme similar to that of existing scheme, but alteration of schedules by increasing charges—Application for confirmation of new scheme within twelve months of coming into force of existing scheme—Transport Act, 1947 (c. 49), s. 79 (1), proviso (i) [BRITISH TRANSPORT COMMISSION v. LONDON COUNTY COUNCIL]	801
Transferred undertaking—Compensation to discharged employee—"Right to payment of compensation"—Right to damages for wrongful dismissal—"Existing officer or servant"—Transferred Undertakings (Compensation to Employees) Regulations, 1950 (S.I., 1950, No. 1083), sched. II, para. 4 (1) (i) [R. v. WESTMINSTER COMPENSATION APPEAL TRIBUNAL, Ex parte ROAD HAULAGE EXECUTIVE]	687
Compensation to owner of undertaking—One-man business conducted by owner personally—Calculation of average net annual profit—Transport Act, 1947 (c. 49), s. 47 (3), sched. IX, paras. 1, 2 (1) [ROAD HAULAGE EXECUTIVE v. ELRICK (TRADING AS ELRICK AND HUTCHEON)]	736
BUILDING	
Building regulations—Safe means of access to work—Injury to person not working on scaffold—Building (Safety, Health and Welfare) Regulations, 1948 (S.I., 1948, No. 1145), reg. 4 (i), reg. 5 [WINGROVE v. PRESTIGE & CO., LTD.]	694
BUILDING CONTROL	
Licence for specified work—Authorised expenditure exceeded—Work ordered and executed separately—Execution at same time as licensed work—Defence (General) Regulations, 1939 (S.R. & O., 1939, No. 927), reg. 56A (as amended), sched. VI, Part II [MUIR v. JAMES]	494
BUSINESS PURPOSES	
Bequest for advancement of "business". <i>See</i> WILL (Advancement clause).	
CARRIAGE BY AIR	
Carriage of goods—Carriage by successive carriers—Negligence of carriers not mentioned in consignment note—Competence of court to entertain action for damages—Carriage by Air Act, 1932 (c. 36), sched. I, art. 28 (1), art. 30 (1) [ROTTERDAMSCH BANK N.V. v. BRITISH OVERSEAS AIRWAYS CORP.]	675
CARRIAGE OF PASSENGERS	
Injury to passenger—Snow on station platform—Delay in sanding and salting—Porter responsible otherwise urgently engaged—Liability of Railway Executive [TOMLINSON v. RAILWAY EXECUTIVE]	1
CASE STATED (BY JUSTICES)	
Amendment—Delay in application—Need of affidavit in support of application—Need to submit draft of Case to respondent [SPICER v. WARBEY]	284
Power of examining justices to state—Summary Jurisdiction Act, 1879 (c. 49), s. 33 (1) [CARD v. SALMON]	324

CATERING

Wages regulation. *See* MASTER AND SERVANT.

CATTLE

Straying—*On railway.* *See* RAILWAY.

CERTIORARI

Industrial Disputes Tribunal—*Dispute in Scotland—Employer's registered office and award in England—Jurisdiction to hear application for certiorari* [R. v. INDUSTRIAL DISPUTES TRIBUNAL, *Ex parte* KIGASS, LTD.] 593

Prohibition—*Power of court to issue orders addressed to private arbitrator* [R. v. DISPUTES COMMITTEE OF THE NATIONAL JOINT COUNCIL FOR THE CRAFT OF DENTAL TECHNICIANS, *Ex parte* NEATE, R. v. SAME] 327

CHARITY

Benefit to community—*Encouragement of athletic sports of police force—Provision of recreation for police officers—Finance Act, 1921 (c. 32), s. 30 (1) (c), (3) (as substituted by Finance Act, 1927 (c. 10), s. 24) [INLAND REVENUE COMRS. v. CITY OF GLASGOW POLICE ATHLETIC ASSN.]* 747

Moral, social, and physical training and recreation [BADDELEY v. INLAND REVENUE COMRS.] 63

Relief of poverty—*Moral, social, and physical training and recreation—Persons lacking means to indulge in activities* [BADDELEY v. INLAND REVENUE COMRS.] 63

Religion—*Unitarian church* [Re NESBITT'S WILL TRUSTS] 936

CHEMIST

Poison—*Sale by retail.* *See* POISON.

CHILD

Allurement of. *See* NEGLIGENCE (Child).

Legitimacy. *See* LEGITIMACY.

† Negligence. *See* NEGLIGENCE.

CHILDREN AND YOUNG PERSONS

Approved school order—*Residence of young person unknown—No power, on appeal, of court of summary jurisdiction or quarter sessions to name local authority within whose district offence committed—Children and Young Persons Act, 1933 (c. 12), s. 70 (2), s. 90 (2), (3) [ISLE OF WIGHT COUNTY COUNCIL v. WARWICKSHIRE COUNTY COUNCIL]* 525

Protection—*Probation order—Order to parent to exercise proper care and guardianship—Indecent acts by young persons—Absence of knowledge by parents—Inference from young persons' conduct—Children and Young Persons Act, 1933 (c. 12), s. 62 (1) (c) (d) [BOWERS v. SMITH, EVANS v. SAME, FLACK v. SAME]* 320

CHURCH

Charity. *See* CHARITY (Religion).

CINEMATOGRAPH

Film—*British film—Making by British company—Company incorporated in England—Nominee of foreign company—Cinematograph Films Act, 1938 (c. 17), s. 25 (1), s. 44 (1) [Re F. G. (FILMS), LTD.]* 615

CLASS GIFT

See WILL.

CLOSING ORDER

Rent Restrictions Acts, effect of. *See* RENT RESTRICTION (Closing order).

CLUB

Members' club—*Parties to action—Representation order—Action by club servant for injury on club premises—Assistant honorary secretary and chairman of house committee made defendants—Order authorising them to defend action in representative capacity—R.S.C., Ord. 16, r. 9 [CAMPBELL v. THOMPSON]* 831

COAL MINING

Shot firing—*Breach of statutory duty and negligence of shot-firer—Plaintiff himself in breach of safety regulations—Liability of mine owner—General Regulations, 1913 (S.R. & O., 1913, No. 748), reg. 1, made under the Coal Mines Act, 1911 (c. 50), s. 86—Explosives in Coal Mines Order, 1934 (S.R. & O., 1934, No. 6), cl. 2 (e), cl. 2 (h) [ENGLAND v. NATIONAL COAL BOARD]* 1194

COLLISION

At sea. *See* SHIPPING.

COMMITTAL

Arrears of maintenance, for. *See* JUSTICES (Husband and wife).

Debt, for. *See* DEBT (Committal).

Non-payment under maintenance order, for. *See* JUSTICES (Husband and wife).

Trial, for. *See* CRIMINAL LAW.

COMPANY

Alteration of members' rights—*Proposal to increase capital—Increase of ordinary share capital affecting rights of preference stockholders* [Re JOHN SMITH'S TADCASTER BREWERY CO., LTD.] 518

Issue of preference and ordinary shares to ordinary shareholders—Whether rights of preference stockholders "affected" [WHITE v. BRISTOL AEROPLANE CO., LTD.] 40

Conspiracy—*Payment by third party to debenture holder for support of scheme of arrangement* [R. v. POTTER] 296

Contract—*Company not registered—Contract signed in company's name with prospective director's signature—Contract a nullity—Action by prospective director—Competency* [NEWBORNE v. SENSOLID (GREAT BRITAIN), LTD.] 708

Dividend—*Underpayment—Cumulative preference shares—Distribution of aggregate sum in respect of underpayment—Period of deficiency—Shareholders entitled to share in distribution—Rate of income tax deductible* [GODFREY PHILLIPS, LTD. v. INVESTMENT TRUST CORPN., LTD.] 7

Income tax—*Residence—Dual residence—Residence in countries where sufficient part of "superior and directing authority" is found* [UNION CORPN., LTD. v. INLAND REVENUE COMRS., JOHANNESBURG CONSOLIDATED INVESTMENT CO., LTD. v. SAME, TRINIDAD LEASEHOLDS, LTD. v. SAME] 729

COMPANY—continued.	PAGE
Meeting—Adjournment—Poll—Poll to be taken immediately at meeting—Impossibility of continuing meeting to ascertain result of poll [JACKSON v. HAMLYN]	887
Sale of shares—Negotiations by managing director—Shareholders informed of offer—Instruction to managing director to complete transaction—Liability of shareholders for fraudulent misrepresentation by managing director [BRIESS v. ROSHER]	717
Shareholder—Bankruptcy—Right to vote [MORGAN v. GRAY]	213
Stamp duty—Exemption—Capital duty—Increase of capital to acquire shares in Northern Ireland companies—"Existing company"—Finance Act, 1927 (c. 10), s. 55 (1) [NESTLÉ Co., LTD. v. INLAND REVENUE COMRS.]	877
Winding-up—Claim under ultra vires contract—Issue of ultra vires not before court when judgment on contract obtained by creditor [Re JON BEAUFORTE (LONDON), LTD.]	634
Supply of fuel for unauthorised purpose—Constructive notice of memorandum [Re JON BEAUFORTE (LONDON), LTD.]	634
"Debt"—Dividend due to past member—Companies Act, 1948 (c. 38), s. 212 (1) (g) [Re CONSOLIDATED GOLD FIELDS OF NEW ZEALAND, LTD.]	791
Payment ex gratia by liquidator—Authorisation by court [Re BANQUE DES MARCHANDS DE MOSCOU (KOUPETSCHESKY)]	278
COMPENSATION	
Loss of goodwill. See LANDLORD AND TENANT.	
Nationalised industries. See BRITISH TRANSPORT COMMISSION.	
Transferred undertaking—Discharged employee. See BRITISH TRANSPORT COMMISSION.	
CONDITIONAL DISCHARGE	
See CRIMINAL LAW (Sentence).	
CONFESSION	
Admissibility. See CRIMINAL LAW (Evidence).	
CONFLICT OF LAWS	
Nullity. See NULLITY.	
CONSPIRACY	
Criminal. See CRIMINAL LAW.	
CONSTRUCTIVE DESERTION	
See DIVORCE (Desertion).	
CONTEMPT OF COURT	
Counsel—Act of discourtesy [IZUORA v. REGINAM]	827
Parliament—Publication of libel to member within precincts of Parliament—Breach of injunction against repetition of libel [RIVLIN v. BLAINKIN]	534
CONTRACT	
Breach—Damages—Measure—Damages payable by plaintiff for breach of other contract—Illegal performance by plaintiff of other contract—No moral turpitude [MARLES v. PHILIP TRANT & SONS, LTD. (MACKINNON, THIRD PARTY) (No. 2)]	651
Enforceable contract—Meaningless clause—Rejection [NICOLENE, LTD. v. SIMMONDS]	822
Illegality—Illegal performance by one party—Right of other party to sue on contract—Statutory statement of particulars not supplied by seller on sale of seeds—Buyer's right to sue for breach of warranty—Seeds Act, 1920 (c. 54), s. 1 (1), s. 8 (1) [MARLES v. PHILIP TRANT & SONS, LTD. (MACKINNON, THIRD PARTY) (No. 1)]	645
Parties—Company not registered—Contract signed in company's name with prospective director's signature—Contract a nullity [NEWBORNE v. SENSOLID (GREAT BRITAIN), LTD.]	708
Sale of goods. See SALE OF GOODS.	
Unenforceable contract—Uncertainty of term—Agreement "subject to force majeure conditions"—Variety of force majeure conditions in trade—No concluded agreement [BRITISH ELECTRICAL & ASSOCIATED INDUSTRIES (CARDIFF), LTD. v. PATLEY PRESSINGS, LTD., REID BROS. (GLASGOW), LTD. (THIRD PARTY), DOUGLAS SCOTT, LTD. (FOURTH PARTY)]	94
CONTRIBUTION	
Joint tortfeasors. See TORT.	
COPYRIGHT	
Medal—Coronation commemoration medallion—Exclusion from registration as design—Copyright Act, 1911 (c. 46), s. 1 (1)—Designs Rules, 1949 (S.I., 1949, No. 2368), r. 26 [RELIANCE (NAMEPLATES), LTD. v. ART JEWELS, LTD.]	759
CORRECTIVE TRAINING	
See CRIMINAL LAW (Sentence).	
CORROBORATION	
Sexual charge against spouse. See JUSTICES (Husband and wife).	
See also CRIMINAL LAW (Evidence).	
COSTS	
Assisted person. See LEGAL AID.	
Counsel's fees. See COUNSEL.	
Divorce. See DIVORCE.	
Legal aid. See LEGAL AID.	
Security for costs—Wife's costs in divorce proceedings—Husband an "assisted person" [EVANS v. EVANS]	70
COUNSEL	
Contempt of court—Act of discourtesy [IZUORA v. REGINAM]	827
Fees—Refresher fees—"Total time occupied by trial"—Time spent by counsel with judge in private room and discussing settlement—R.S.C. Ord. 65, r. 27 (48) [LAWSON v. TIGER]	698
COUNTY COURT	
Adjournment—Action by wife for arrears of maintenance under separation deed—Application for determination of title to property under Married Women's Property Act, 1882, s. 17—Petition by husband for divorce on ground of wife's adultery—Proof of adultery relevant on issue of payment of maintenance—Applications by husband for adjournment of proceedings pending hearing of divorce petition—Husband's refusal to accept terms of adjournment [HICKSON v. HICKSON]	382

COUNTY COURT— <i>continued</i> .	PAGE
Adoption. <i>See</i> ADOPTION.	
Appeal— <i>New trial</i> —Discretion of county court judge to allow—No reason given for refusal—Power of Court of Appeal to review facts and reverse decision—County Court Rules, 1936, Ord. 37, r. 2—County Courts Act, 1934 (c. 53), s. 105 [GRIMSHAW <i>v.</i> DUNBAR]	350
Essential matter not considered by county court judge [DORRINGTON <i>v.</i> GRIFF FENDER (SWANSEA), LTD.]	1177
Bankruptcy. <i>See</i> BANKRUPTCY.	
COURT OF APPEAL	
Transport tribunal—Appeal from order—Jurisdiction to entertain [BRITISH TRANSPORT COMMISSION <i>v.</i> LONDON COUNTY COUNCIL]	801
COURT OF CRIMINAL APPEAL	
<i>See</i> CRIMINAL LAW (Appeal).	
CRIMINAL LAW	
Appeal—Substitution of verdict—Substitution of verdict of guilty of offence of which appellant acquitted—Criminal Appeal Act, 1907 (c. 23), s. 5 (2) [R. <i>v.</i> MELVIN]	294
Committal—Validity—Inadmissible evidence given before examining justices [R. <i>v.</i> NORFOLK QUARTER SESSIONS, <i>Ex parte</i> BRUNSON]	346
Conspiracy—Agreement to do an unlawful act—Payment by third party to debenture holder for support of scheme of arrangement [R. <i>v.</i> POTTER]	296
Count. <i>See</i> Indictment, post.	
Evidence—Confession—Admission to police officers while in custody, obtained without caution—Direction to jury—Judges' Rules, r. (3) [R. <i>v.</i> BASS]	1064
Corroboration—Failure of accused to give evidence [R. <i>v.</i> JACKSON]	872
Police witness—Denial of collaboration in preparing notes—Refusal by court to allow jury to inspect notebooks [R. <i>v.</i> BASS]	1064
Witness called after summing-up on application of defence [R. <i>v.</i> SANDERSON]	485
Indictment—Count bad for duplicity—Larceny of aggregate of sums charged in other counts [R. <i>v.</i> WILLIAMS]	1068
Larceny—Addition of charge to indictment for receiving—Evidence of previous conviction of fraud or dishonesty inadmissible—Larceny Act, 1916 (c. 50), s. 43 (1) (b) [R. <i>v.</i> DAVIES]	341
Defence—Intention to replace money—Larceny Act, 1916 (c. 50), s. 1 (1) [R. <i>v.</i> WILLIAMS]	1068
Receiving stolen property—Proof of theft [R. <i>v.</i> YOUNG]	21
Sentence—Conditional discharge—Breach of condition—Not to be taken into consideration on subsequent conviction—Sentence to be passed for original offence [R. <i>v.</i> WEBB]	1156
Corrective training—Preventive detention—Supervision—Previous convictions—"Previous occasions"—Criminal Justice Act, 1948 (c. 58), s. 21 (1) (b), s. 21 (2) (b), s. 22 (1) (a) [R. <i>v.</i> ROGERS]	206
Sentence of imprisonment to run concurrently with corrective training—Criminal Justice Act, 1948 (c. 58), s. 21 (1) [R. <i>v.</i> TALBOT]	340
Other offences taken into account—Breach of probation order—Sentence for original offence—Criminal Justice Act, 1948 (c. 58), s. 12 (1) [R. <i>v.</i> WEBB]	1156
Supervision—Order not made by court of trial <i>per incuriam</i> —Inclusion in sentence by Court of Criminal Appeal [R. <i>v.</i> ROGERS]	206
Trial—Place of trial—Case sent for trial to other court—Amendment of indictment—Power to new court of trial—Assizes and Quarter Sessions (Convenient Court) Order, 1926 (S.R. & O., 1926, No. 774), art. 1 (d)—Criminal Justice Act, 1925 (c. 86), s. 14 (2), s. 14 (3) [R. <i>v.</i> MOORE]	641
Vagrancy—Prostitution—Wandering in a public highway—Indecent behaviour in stationary motor car—Vagrancy Act, 1824 (c. 83), s. 3 [CARNILL <i>v.</i> EDWARDS]	282
CRUELTY	
Persistent cruelty. <i>See</i> JUSTICES (Husband and wife).	
CUSTODY	
Child. <i>See</i> DIVORCE.	
CYCLE	
Auxiliary engine—Use as pedal cycle—No removal of essential parts of engine—Need of third-party insurance and driving licence [FLOYD <i>v.</i> BUSH]	265
DAMAGES	
Exemplary damages—Trespass and assault—Way forced into flat—Shock, but no injuries, inflicted—Award of separate sums for assault and as exemplary damages—Judge's direction comparing damages with magistrates' fine [LOUDON <i>v.</i> RYDER]	741
Fatal accident. <i>See</i> NEGLIGENCE.	
Mental shock—Accident to child—Mother hearing scream and seeing something of accident while seventy to eighty yards away [KING <i>v.</i> PHILLIPS]	617
Negligence. <i>See</i> NEGLIGENCE.	
<i>See also</i> CONTRACT (Breach).	
DANGEROUS GOODS	
<i>See</i> NEGLIGENCE.	
DANGEROUS MACHINERY	
<i>See</i> FACTORY.	
DEBT	
Committal—Bar to committal order—Extortion—Creditor requiring payment of costs of bankruptcy notice—Debtors Act, 1869 (c. 62), s. 5 (Re A JUDGMENT SUMMONS (No. 25 of 1952), <i>Ex parte</i> HENLYS, LTD.)	424
Company's winding-up. <i>See</i> COMPANY (Winding-up).	
Summary recovery. <i>See</i> JUSTICES.	
DECLARATION	
Illegality of act of statutory body—Suspension of dock workers [BARNARD <i>v.</i> NATIONAL DOCK LABOUR BOARD]	1113
DECLARATORY JUDGMENT	
Jewish bill of divorce—Declaration sought that marriage dissolved—R.S.C., Ord. 25, r. 5 [HAR-SHEFI <i>v.</i> HAR-SHEFI]	783

DECREE ABSOLUTE

See DIVORCE.

DEFAMATION

See LIBEL; SLANDER.

DESCRIPTION

Trade. See TRADE DESCRIPTION.

DESERTION

See DIVORCE.

DESIGN

Practice motion—Undertaking to deliver up machines and drawings—Enforcement [KANGOL INDUSTRIES, LTD. v. ALFRED BRAY & SONS, LTD.] .. 444

DIVIDEND

See COMPANY.

DIVORCE

Costs—Security for wife's costs—Husband an "assisted person"—Matrimonial Causes Rules, 1950 (S.I., 1950, No. 1940), r. 65 (3) [EVANS v. EVANS] .. 70

Custody—Adoption of child—Effect on custody order—Adoption Act, 1950 (c. 26), s. 10 (1), (2) [CROSSLEY v. CROSSLEY] .. 891

Decree absolute—Setting aside—Order for substituted service—No "sufficient or candid" disclosure by petitioner—No knowledge by respondent of hearing of petition—Appeal against decree absolute—Re-marriage of petitioner—Birth of child—Effect on child's legitimacy of decree absolute being set aside—Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 31 (1) (e) [WISEMAN v. WISEMAN] .. 601

Re-marriage of petitioner—Birth of child—Effect on child's legitimacy of decree absolute being set aside [WISEMAN v. WISEMAN] .. 601

Desertion—Constructive desertion—Conduct equivalent to expulsion of other spouse—Conduct falling short of cruelty [PIKE v. PIKE] .. 232

Defence of "just cause" and countercharge of constructive desertion—Pleading based on substantially the same items as relied on to support charges of cruelty in former unsuccessful suit—Summons to strike out pleading [DIXON v. DIXON] .. 910

Insanity—Period of care and treatment—Temporary patient—Absence on trial—Purported discharge by superintendent of hospital—Subsequent treatment as voluntary patient—Matrimonial Causes Act, 1950 (c. 25), s. 1 (1) (d), s. 1 (2) (a) (d) [WYATT v. WYATT (BY HER GUARDIAN)] .. 1185

Maintenance of wife—Recovery from husband's executors—Order by consent for monthly payments "until re-marriage"—Matrimonial Causes Act, 1950 (c. 25), s. 19 (3) [HINDE v. HINDE] .. 171

Practice—Notice to produce and admit documents—Undefended suit [CLARE v. CLARE] .. 704

Petition—Form of petition—"Previous proceedings"—Orders made by justices—Need for counsel to see certified copies—Matrimonial Causes Rules, 1950 (S.I., 1950, No. 1940), r. 4 (1) (h) [HEARN v. HEARN AND JARVIS] .. 797

Service—Substituted service—Order for security of wife's costs—Matrimonial Causes Rules, 1950 (S.I., 1950, No. 1940), r. 62 (2)—R.S.C., Ord. 67, r. 6 [WORBOYS v. WORBOYS] .. 857

Stay of proceedings—Petition presented in England—Proceedings against petitioner begun by respondent abroad—Advantage to petitioner from proceeding in England—Delay by respondent [SEALEY (OTHERWISE CALLAN) v. CALLAN] .. 942

Striking out pleading—Desertion—Defence of "just cause" and countercharge of constructive desertion—Pleading based on substantially the same items as relied on to support charges of cruelty in former unsuccessful suit—Summons to strike out pleading [DIXON v. DIXON] .. 910

Stay of proceedings. See Practice, ante.

DOCK

Safe means of access to ship—Gangway—Docks Regulations, 1934 (S.R. & O., 1934, No. 279), reg. 9 [DAWSON v. EUXINE SHIPPING CO., LTD.] .. 299

DOCK LABOUR

Regulation. See EMPLOYMENT.

DOCTOR

See MEDICAL PRACTITIONER.

DRIVING LICENCE

See STREET TRAFFIC.

DRIVING UNINSURED MOTOR VEHICLE

See STREET TRAFFIC.

DRUNK

Having charge of motor vehicle while drunk. See STREET TRAFFIC.

DUST

Removal in factory. See FACTORY.

EASEMENT

Right of way—Extent—User for all purposes while dominant tenement agricultural—Change of character of dominant tenement [R. F. C. HOLDINGS, LTD. v. ROGERS] .. 1029

Way over soil later becoming highway—Order by quarter sessions stopping up highway—Effect on private right of way—Highway Act, 1835 (c. 50), s. 91 [WALSH v. OATES] .. 963

ECCLESIASTICAL LAW

Altar—Need to be immovable—Materials of construction—Canon 92 and rubric at beginning of Book of Common Prayer [Re ST. JOHN THE DIVINE, RICHMOND] .. 818

EDUCATION

Negligence of education authority. See NEGLIGENCE (Schoolmaster).

Transport to and from school—Payment of public transport to point within three miles of destination—"Suitable arrangements"—"Reasonable travelling expenses"—Education Act, 1944 (c. 31), s. 39 (2) (c), s. 55 (2) (as amended by Education (Miscellaneous Provisions) Act, 1948 (c. 40), s. 11, sched. I, Part I) [SURREY COUNTY COUNCIL v. MINISTRY OF EDUCATION] .. 705

EFFLUENT

Trade effluent—Discharge into sewer. See SEWER.

ELECTION

To go for trial. *See* JUSTICES.

ELECTRICITY

Nationalisation—*Undertaking formerly maintained by local authority—Expenses and receipts of undertaking to be paid out of and into general rate fund—Authority directed "to show under a separate heading or division" accounts of their undertakings—Excess revenue of undertaking to be credited to revenue account of undertaking for the next following year—Liability of local authority to account to electricity authority for sum transferred in aid of rates in account for year ending Mar. 31, 1947—Exeter Corporation Act, 1935 (c. cii), s. 108 (1), s. 109 (1), s. 112 (1) (b) [BRITISH ELECTRICITY AUTHORITY v. EXETER CORPN.]* 502

ELECTRICITY SUPPLY

Right to abstract water from river—*Water returned in heated condition—Injury to fish—Rights of Earl Harrington "as riparian owner . . . upon the river"—Derbyshire and Nottinghamshire Electric Power Act, 1929 (c. lxxxvi), s. 37 (1), s. 37 (2) [PRIDE OF DERBY AND DERBYSHIRE ANGLING ASSN., LTD. v. BRITISH CELANESE, LTD.]* 179

EMPLOYMENT

Regulation—*Registration of workers—Suspension of workers by statutory tribunal—Action for declaration of invalidity of suspension—Dock labour—Delegation of power to suspend—Dock Workers (Regulation of Employment) Order, 1947 (S.R. & O., 1947, No. 1189), cl. 16 (2) (b) [BARNARD v. NATIONAL DOCK LABOUR BOARD]* 1113

ENFORCEMENT NOTICE

See TOWN AND COUNTRY PLANNING.

ESTATE DUTY

Allowance—*Double taxation—Canadian succession duty—Legacies given "free of legacy duty and all other death duties"—Allowance of amount of Canadian succession duty against estate duty—Benefit of allowance—Double Taxation Relief (Estate Duty) (Canada) Order, 1946 (S.R. & O., 1946, No. 1884), art. V [Re GOETZ (dec.)]* 76

Incidence—*Legacy payable in part out of Australian assets—Liability to bear proportion of estate duty paid in respect of Australian assets [Re NESBITT'S WILL TRUSTS]* 936

Passing—*Property deemed to pass—Money received under a policy of assurance—"Interest purchased or provided"—Beneficial interest arising—Finance Act, 1894 (c. 30), s. 2 (1) (d)—Finance Act, 1939 (c. 41), s. 30 (1) [D'AVIGDOR-GOLDSMID v. INLAND REVENUE COMRS.]* 403

Policy of assurance—Premiums paid by trustees of settlement—Death of assured—Cesser of payment of premiums—Claim on capital needed to produce premiums—Cessation of "interest" in property—Interest of remaindermen—Finance Act, 1894 (c. 30), s. 2 (1) (b) [COUTTS & CO. v. INLAND REVENUE COMRS.] 418

ESTOPPEL

Res judicata—Possession claim—Claim in county court on ground of trespass by defendants, and, alternatively, assignment to them without landlord's consent—Claim in trespass beyond jurisdiction of county court—Election to proceed on alternative ground—Subsequent claim in trespass in High Court [ROSENFELD v. NEWMAN] 840

EVIDENCE

Examination of witness before special examiner—*Special report by examiner—Comment on credibility of witness—R.S.C., Ord. 37, r. 17 [In the Estate of WIPPERMANN]* 764

Will. *See* PROBATE.

EXECUTOR AND ADMINISTRATOR

Administrator—*Remuneration—Appointment of trust corporation—Power of court to authorise remuneration—Trustee Act, 1925 (c. 19), s. 42 [Re MASTERS (dec.)]* 19

Maintenance of widow of deceased—*Recovery from executor—Order by consent following divorce for monthly payments "until re-marriage" [HINDE v. HINDE]* 171

EXTORTION

See DEBT (Committal).

EYES

Protection of—*In factory—Cutting sheet metal by cold process—Need for employers to provide goggles [REES v. BERNARD HASTIE & CO., LTD.]* 375

FACTORY

Dangerous machinery—*Cutter of vertical spindle moulding machine—"Most efficient guard"—Protection from contact with cutters or from flying broken parts of machine—Woodworking Machinery Regulations, 1922 (S.R. & O., 1922, No. 1196), reg. 17 [DICKSON v. FIACK]* 236

Rolling machine in bakery—Guard leaving space for operator's hand to go underneath it—Operator putting hand through in breach of instructions—Factories Act, 1937 (c. 67), s. 14 (1) [SMITH v. CHESTERFIELD & DISTRICT CO-OPERATIVE SOCIETY, LTD.] 447

"Place" used for purpose other than processes carried on in factory—*Restaurant within cartilage—Use by administrative staff—Exclusion of workmen—Dining room in restaurant occasionally used for conferences—Games room for apprentices—Factories Act, 1937 (c. 67), s. 151 (1), (6) [THOMAS v. BRITISH THOMSON-HOUSTON CO., LTD.]* 29

Protection of eyes—*Cutting sheet metal by cold process—Need for employers to provide goggles or screens—Factories Act, 1937 (c. 67), s. 49—Protection of Eyes Regulations, 1938 (S.R. & O., 1938, No. 654), schedule [REES v. BERNARD HASTIE & CO., LTD.]* 375

Removal of dust—*"All practicable measures" to be taken—Provision of exhaust appliances—Standard of duty—Factories Act, 1937 (c. 67), s. 47 (1) [ADSETT v. K. & L. STEELFOUNDERS & ENGINEERS, LTD.]* 97

Sand blasting—Enclosed cabinet—Absolute duty to maintain to prevent escape of dust—Grinding of Metals (Miscellaneous Industries) Regulations, 1925 (S.R. & O., 1925, No. 904), reg. 13 [ADSETT v. K. & L. STEELFOUNDERS & ENGINEERS, LTD.] 97

FALSE IMPRISONMENT

Merchant ship—*Member of crew—Right of master, at common law, to arrest and confine [HOOK v. CUNARD STEAMSHIP CO., LTD.]* 1021

FAMILY PROVISION

Provision for widow—*Estate not exceeding £2,000—Payment of capital—Maximum amount payable—Capitalised value of income—Inheritance (Family Provision) Act, 1938 (c. 45), s. 1 (3) (b), s. 1 (4) [Re BATES (dec.)]* 318

FATAL ACCIDENT

Damages. *See* NEGLIGENCE.Negligence. *See* NEGLIGENCE.

Writ—Indorsement of claim “as administratrix”—*Letters of administration obtained in Ireland—Plaintiff stated to be “widow and administratrix” in statement of claim—Competency of action—Fatal Accidents Act, 1846 (c. 93), s. 2 [FINNEGAN v. CEMENTATION CO., LTD.]* . . . 1130

Issue by “widow and administratrix” before grant of letters of administration—*Statement of representative capacity—Fatal Accidents Act, 1846 (c. 93), s. 2—Fatal Accidents Act, 1864 (c. 95), s. 1—R.S.C., Ord. 2, r. 3, Ord. 3, r. 4 [STEBBINGS v. HOLST & CO., LTD.]* . . . 925

FEES

Counsel, of. *See* COUNSEL.

FENCE

Railway. *See* RAILWAY.

FILM

See CINEMATOGRAPH.

FOOD AND DRUGS

Misleading label—*Sale of tins of food—Labels bearing untrue statement of minimum weight—Sale by agents “for account of” foreign principals—Liability of agents for “act or default” —Pre-packed Foods (Weights and Measures: Marking) Order, 1950 (S.I., 1950, No. 1125), art. 6 (3) [LESTER v. BALFOUR WILLIAMSON MERCHANT SHIPPERS, LTD.]* . . . 1146

FOREIGN JUDGMENT

Jewish bill of divorce. *See* NULLITY.

FORFEITURE

Clause in will. *See* WILL (Forfeiture clause).

FREIGHT.

Insurance. *See* INSURANCE (Marine insurance).

GANGWAY

Ship's. *See* DOCK.

GAS

Dangerous goods—*Leakage—Explosion—Liability—Cylinder of gas introduced into ship by contractor [BECKETT v. NEWALLS INSULATION CO., LTD.]* . . . 250

Nationalisation—*Action against gas board—Period of limitation—Alleged tort by undertaking before transfer to board—Gas Act, 1948 (c. 67), s. 14 (2), s. 17 (5) [COOTE v. EASTERN GAS BOARD]* . . . 762

Undertaking formerly maintained by local authority—Recovery of sums transferred from gas undertaking accounts to other accounts—Amounts “debited . . . in the accounts of the gas undertaking . . . and credited . . . in . . . other account”—Expenses and receipts of undertaking to be paid out of and into general rate fund—Authority directed to “show under a separate heading or division” accounts of gas undertaking—Transfers from gas undertaking section to general rate fund—Liability of authority to account to gas board for sums transferred—Finality of determination by Minister of Health—Doncaster Corporation Act, 1926 (c. xxvii), s. 71, s. 72—Gas Act, 1948 (c. 67), s. 37 (1), (2) [EAST MIDLANDS GAS BOARD v. DONCASTER CORPN.] . . . 54

GIFT

Inter vivos—*Advancement—Father and children—Evidence to rebut presumption of advancement—Subsequent acts or events—Allotments of shares in names of children—Shares subsequently sold and proceeds treated by father as his own moneys—Other provision made for children [SHEPHARD v. CARTWRIGHT]* . . . 569

Will, in. *See* WILL.

GOODS

Carriage of. *See* CARRIAGE BY AIR.Sale of. *See* SALE OF GOODS.

GOODWILL

Compensation for loss. *See* LANDLORD AND TENANT (Compensation for goodwill).

GUARANTEE

Husband and wife—*Presumption of advancement—Husband surety for wife's banking account—Payment by husband of overdraft—Recovery from wife [ANSON v. ANSON]* . . . 867

HARBOUR

Pilot—*Compulsory pilot—Responsibility of shipowner—Local traffic signals ignored [THE HANS HOTH]* . . . 218

Tug—*Right of owners to perform tug services—“Shipping and unshipping goods”—Tugs employed in towing vessels into and out of dock—Harbours, Docks, and Piers Clauses Act, 1847 (c. 27), s. 33 [J. H. PIGOTT & SON v. DOCKS AND INLANDS WATERWAYS EXECUTIVE]* . . . 22

HOLY TABLE

See ECCLESIASTICAL LAW.

HOSPITAL

Bequest to. *See* NATIONAL HEALTH SERVICE.

Negligence—*Liability of hospital group management committee—National Health Service Act, 1946 (c. 81), s. 72 [BULLARD v. CROYDON HOSPITAL GROUP MANAGEMENT COMMITTEE]* . . . 596

HOTCHPOT

See SETTLEMENT.

HOTEL.

See INN.

HOUSE

Purchase price. *See* HOUSING.

HOUSING

House unfit for human habitation—*Notice to execute works—Reasonable expense—Material date for consideration of reasonableness—Housing Act, 1936 (c. 51), s. 9 (1), (3), s. 15 (1)—Middlesex County Council Act, 1944 (c. xxi), s. 260 (1), (2) [LESLIE MAURICE & CO., LTD. v. WILLESDEN CORPN.]* . . . 1014

HOUSING—continued.	PAGE
Purchase price— <i>Limitation—House constructed under building licence—Condition limiting rent included in licence—Letting at excessive rent—Information laid more than six months after date of letting—Competency of proceedings—Building Materials and Housing Act, 1945 (c. 20), s. 7 (1) [R. v. WIMBLEDON JUSTICES, Ex parte DERWENT]</i>	390
HUSBAND AND WIFE	
Deserted wife in occupation of husband's dwelling-house— <i>Dissolution of marriage—Revocation of licence to occupy premises—Length of notice to deliver up possession [VAUGHAN v. VAUGHAN]</i>	209
Guarantee— <i>Presumption of advancement—Husband surety for wife's banking account—Payment by husband of overdraft—Recovery from wife [ANSON v. ANSON]</i>	867
Injunction. See INJUNCTION.	
Legal proceedings— <i>Injury to wife due to husband's negligence—Liability of husband's employer [BROOM v. MORGAN]</i>	849
Title to property— <i>Application by wife to county court—Petition by husband for divorce on ground of wife's adultery—Adjournment of application [HICKSON v. HICKSON]</i>	382
Maintenance— <i>Application to High Court—"Reasonable maintenance"—Deductions from husband's gross income—Infant children provided for under deed of covenant—Jurisdiction to order maintenance for children while living with wife—Matrimonial Causes Act, 1950 (c. 25), s. 23 (1) [RIDLEY v. RIDLEY]</i>	798
Arrears— <i>Action in county court—Petition by husband for divorce on ground of wife's adultery—Proof of adultery relevant on issue of payment of maintenance—Adjournment of action pending hearing of divorce petition [HICKSON v. HICKSON]</i>	382
See also DIVORCE; JUSTICES.	
Ownership of property— <i>Money found in matrimonial home after death of spouses—Wife owner of matrimonial home—Intention to form joint fund accruing to survivor [Re COHEN (dec'd.)]</i>	378
INCOME TAX	
Charity— <i>Law to be applied in Scotland [INLAND REVENUE COMRS. v. CITY OF GLASGOW POLICE ATHLETIC ASSN.]</i>	747
Deduction against profits— <i>Wear and tear—Plant or machinery—Sale by person having control over buyer—Sale at market price—Restriction of wear and tear allowances by reference to "limit of re-charge"—Application of restriction to sale taking place before Income Tax Act, 1945, received Royal Assent—Income Tax Act, 1945 (c. 32), s. 59 (3) (b) [PRIOR (INSPECTOR OF TAXES) v. GEORGE MARTIN (FULHAM), LTD.]</i>	16
Deduction of tax— <i>Cumulative dividend—Underpayment—Distribution of aggregate sum in respect of underpayment—Rate of tax deductible [GODFREY PHILLIPS, LTD. v. INVESTMENT TRUST CORPN., LTD.]</i>	7
Foreign employment— <i>Remuneration paid outside United Kingdom—Work and residence in United Kingdom—Income Tax Act, 1918 (c. 40), sched. D, Case V, r. 2 [BRAY (INSPECTOR OF TAXES) v. COLENBRANDER, HARVEY (INSPECTOR OF TAXES) v. BREYFOGLE]</i>	1090
Income—"Annual payment"— <i>Statutory liability to contribute to upkeep of forest—Amount of contribution ascertained by reference to excess of conservators' expenditure over other income—Right of contributor to deduct tax and of conservators to recover it—Income Tax Act, 1918 (c. 40), sched. D, Case III, r. 1 (a) [INLAND REVENUE COMRS. v. CITY OF LONDON CORPN. (AS THE CONSERVATORS OF EPPING FOREST)]</i>	1075
Profits— <i>Profits from letting machinery and plant—Railway wagons—Charge under Case I, not Case VI, of sched. D—Finance Act, 1936 (c. 34), s. 22 (2) [NORTH CENTRAL WAGON & FINANCE CO., LTD. v. FIFIELD (INSPECTOR OF TAXES)]</i>	1009
Recovery of unpaid tax— <i>Assessments under sched. A—No appeal against assessment—Denial of liability by taxpayer—No defence to summons by Crown—Income Tax Act, 1918 (c. 40), s. 169—Finance Act, 1941 (c. 30), sched. I, para. 5 [INLAND REVENUE COMRS. v. PEARLBERG]</i>	388
Residence— <i>Dual residence—Company—Residence in countries where sufficient part of "superior and directing authority" is found [UNION CORPN., LTD. v. INLAND REVENUE COMRS., JOHANNESBURG CONSOLIDATED INVESTMENT CO., LTD. v. SAME, TRINIDAD LEASEHOLDS, LTD. v. SAME]</i>	729
Settlement— <i>Transfer of assets—Absolute gift—Deposits to child's account in Post Office Savings Bank and purchases of Defence Bonds for child—Finance Act, 1936 (c. 34), s. 21 (9) (b) [THOMAS v. MARSHALL (INSPECTOR OF TAXES)]</i>	1102
INJUNCTION	
Husband and wife— <i>Husband restrained from occupying matrimonial home pending petition by wife for judicial separation [SILVERSTONE v. SILVERSTONE]</i>	556
Nuisance— <i>Local authority—Licence needed for work necessary for compliance with injunction—Form of order [PRIDE OF DERBY AND DERBYSHIRE ANGLING ASSN., LTD. v. BRITISH CELANESE, LTD.]</i>	179
INN	
Safety of premises— <i>Hotel drive—Duty to take reasonable care to see reasonably safe—Slipperiness [BELL v. TRAVCO HOTELS, LTD.]</i>	638
INSANITY	
Divorce on ground of. See DIVORCE (Insanity).	
INSURANCE	
Life assurance— <i>Estate duty on money received under policy. See ESTATE DUTY.</i>	
Marine insurance— <i>Freight—Cover for loss caused through restraint, warlike operations, and civil war, etc.—Frustration clause if voyage or adventure lost through restraint of princes—Delay—Institute Time Clauses (Freight), cl. 8 [ATLANTIC MARITIME CO., INC. v. GIBBON]</i>	893
Motor insurance—"Loss" of car— <i>Car sold contrary to owner's authority and proceeds of sale retained [WEBSTER v. GENERAL ACCIDENT FIRE AND LIFE ASSURANCE CORPN., LTD.]</i>	663
Third party insurance. See STREET TRAFFIC (Driving uninsured motor vehicle).	
INTERIM DEVELOPMENT	
See TOWN AND COUNTRY PLANNING.	
INTESTACY	
Right asserted on behalf of intestate's estate— <i>No letters of administration yet granted—Action disputing right—Competency [Re LEWIS'S DECLARATION OF TRUST]</i>	1005
INVITEE	
See NEGLIGENCE; RAILWAY.	

	PAGE
IRELAND	
Citizen of Republic resident in England— <i>Liability to national service</i> [BICKNELL v. BROSNAN]	1126
JEWISH BILL OF DIVORCEMENT	
<i>See</i> NULLITY.	
JOINT TORTFEASORS	
<i>See</i> TORT.	
"JUDGES' RULES"	
Questions by police to person in custody— <i>Need to administer caution. See CRIMINAL LAW</i> (Evidence).	
JUSTICES	
Adoption. <i>See</i> ADOPTION.	
Case stated. <i>See</i> CASE STATED (By Justices).	
Committal for trial. <i>See</i> CRIMINAL LAW.	
Copies of orders for High Court— <i>Need to be properly certified</i> [HEARN v. HEARN AND JARVIS] ..	797
Debt— <i>Summary recovery—Order by court of summary jurisdiction for payment—Direction to levy distress in default of payment—“Final order” against debtor—Bankruptcy notice</i> [Re A DEBTOR (No. 48 of 1952), <i>Ex parte</i> AMPHILL RURAL DISTRICT COUNCIL v. THE DEBTOR] ..	545
Election by offender to go for trial at quarter sessions— <i>Substitution of new charge—Summary Jurisdiction Act, 1879 (c. 49), s. 17 (1)</i> [R. v. PHILLIPS] ..	968
Husband and wife— <i>Maintenance—Amount of—Earning capacity of husband—Overtime pay</i> [KLUCINSKI v. KLUCINSKI] ..	683
<i>Maintenance and separation orders—Copies—Duty to supply properly certified copies</i> [HEARN v. HEARN AND JARVIS] ..	797
<i>Maintenance order—Arrears—Committal order suspended on condition that current payments made, with further payments on account of arrears—Payment of arrears, but failure to make current payments—Appropriation of payments—Right to discharge of committal order—Summary Jurisdiction Act, 1879 (c. 49), s. 21 (1)—Summary Jurisdiction (Married Women) Act, 1895 (c. 39), s. 9</i> [R. v. MISKIN LOWER JUSTICES, <i>Ex parte</i> YOUNG] ..	495
<i>Arrears—Examination of husband as to means—Committal order suspended on condition that current payments made, with further payments on account of arrears—Failure to comply with terms of suspension—Issue of warrant of commitment—No further inquiry as to husband's failure to pay—Money Payments (Justices Procedure) Act, 1935 (c. 46), s. 8 (1) (a)</i> [R. v. GOVERNOR OF BEDFORD PRISON, <i>Ex parte</i> AMES] ..	1002
<i>Persistent cruelty—Sodomy with wife—Form of justices' finding—Need of corroboration of charge—Acquiescence by wife</i> [DAVIDSON v. DAVIDSON] ..	611
Prohibition— <i>Order prohibiting justices proceeding in excess of jurisdiction</i> [R. v. WIMBLEDON JUSTICES, <i>Ex parte</i> DERWENT] ..	390
Withdrawal of plea of Guilty— <i>Defendant sentenced—Subsequent application that plea be amended to “Not Guilty”</i> [R. v. CAMPBELL, <i>Ex parte</i> HOY] ..	684
LAND	
Sale of. <i>See</i> SALE OF LAND.	
LAND REGISTRATION	
Overriding interest— <i>Occupation of dwelling-house—Letting by mortgagor before mortgage—Exclusion in mortgage of mortgagor's power to lease—Land Registration Act, 1925 (c. 21), s. 70 (1) (g)</i> [MORNINGTON PERMANENT BUILDING SOCIETY v. KENWAY] ..	951
LANDLORD AND TENANT	
Compensation for goodwill— <i>Carrying on business for five years—“Predecessors in title”—Title to premises, not to business—Landlord and Tenant Act, 1927 (c. 36), s. 4 (1), s. 25 (1)</i> [PASMORE v. WHITEREAD & Co., LTD.] ..	361
Covenant— <i>Breach—Damages—Measure—“Eviction”—Gas and electricity supply cut off by landlord with intention of forcing statutory tenant to quit premises</i> [PERERA v. VANDIYAR] ..	1109
Shop— <i>Renewal of tenancy—Builders and decorators—“Retail trade or business”—Leasehold Property (Temporary Provisions) Act, 1951 (c. 38), s. 10 (1), s. 20 (1)</i> [M. & F. FRAWLEY, LTD. v. VE-RI-BEST MANUFACTURING Co., LTD.] ..	50
<i>Omission of particulars in application—Leasehold Property (Temporary Provisions) Act, 1951 (c. 38), s. 10 (1)—County Court Rules, 1936, Ord. 40A, r. 7, Form 342A, para. 2 (h), para. 2 (k) (added by County Court (Amendment) Rules, 1951)</i> [OSBORNE v. SNOOK] ..	332
LAPSE	
Will. in. <i>See</i> WILL.	
LARCENY	
<i>See</i> CRIMINAL LAW.	
LEGACY	
<i>See</i> WILL.	
LEGAL AID	
Assisted person unsuccessful litigant— <i>Application by opponent for costs—No notice of issue of civil aid certificate served—Legal Aid (General) Regulations, 1950 (S.I., 1950, No. 1359), reg. 15 (2)</i> [KING v. T. AND W. FARMILOE, LTD.] ..	614
Certificate— <i>Amendment—Appeal by husband against maintenance order—Adultery by wife after making of order—Need to inform legal aid committee—Legal Aid (General) Regulations, 1950 (S.I., 1950, No. 1359), reg. 8 (1), reg. 18 (3)</i> [MINKLEY v. MINKLEY] ..	1176
Costs— <i>Disallowance—Attendance of country solicitor at trial in London—Costs incurred on behalf of unsuccessful defendants in arranging payment of judgment debt—Legal Aid and Advice Act, 1949 (c. 51), s. 1 (5), sched. III, para. 4 (1)—R.S.C., Ord. 65, r. 27 (29)</i> [W. F. MARSHALL, LTD. v. BARNES AND FITZPATRICK (A FIRM)] ..	970
Interlocutory proceedings— <i>Order for applicant to pay respondent's costs—Assessment only on determination of main suit—Legal Aid (General) Regulations, 1950 (S.I., 1950, No. 1359), reg. 17 (1) (a)</i> [WOZNIAK v. WOZNIAK] ..	1192
Security for costs— <i>Application by wife in divorce proceedings—Husband an “assisted person”—Legal Aid and Advice Act, 1949 (c. 51), s. 12 (2) (b) (ii)</i> [EVANS v. EVANS] ..	70
Taxation— <i>No order made as to costs—Duty of court to make order for taxation—Legal Aid and Advice Act, 1949 (c. 51), s. 6 (5), s. 6 (6), sched. III—Legal Aid (General) Regulations, 1950 (S.I., 1950, No. 1359), reg. 18 (3)</i> [PAGE v. PAGE, METCALF v. WELLS] ..	625

	PAGE
LEGITIMACY	
Decree absolute— <i>Re-marriage of petitioner—Birth of child—Effect on child's legitimacy of decree absolute being set aside</i> [WISEMAN v. WISEMAN]	601
LIBEL	
Privilege— <i>Communication to member of Parliament within precincts of Parliament—Publication not connected with proceedings of Parliament—Contempt of court—Breach of injunction against repetition of libel</i> [RIVLIN v. BILAINKIN]	534
LICENCE	
Building. <i>See</i> BUILDING CONTROL.	
Carrier's. <i>See</i> STREET TRAFFIC.	
Licence to occupy premises— <i>Revocation—Deserted wife in occupation of matrimonial home—Dissolution of marriage—Length of notice to deliver up possession</i> [VAUGHAN v. VAUGHAN] .. .	209
Patent, user of. <i>See</i> PATENT.	
LIFE ASSURANCE	
<i>See</i> ESTATE DUTY.	
LIMITATION OF ACTION	
Gas board— <i>Action against board—Alleged tort by undertaking before transfer to board—Gas Act, 1948 (c. 67), s. 14 (2), s. 17 (5)</i> [COOTE v. EASTERN GAS BOARD]	762
Public authority. <i>See</i> PUBLIC AUTHORITY.	
LITERARY AND SCIENTIFIC INSTITUTION	
Application of funds on lapsing of activities [Re HARROW LITERARY INSTITUTION]	838
LOCAL AUTHORITY	
Injunction against. <i>See</i> INJUNCTION.	
MACHINERY	
Dangerous. <i>See</i> FACTORY.	
Profits from letting— <i>Charge to income tax. See</i> INCOME TAX (Profits).	
Wear and tear— <i>Income tax allowance. See</i> INCOME TAX.	
MAINTENANCE	
Wife. <i>See</i> DIVORCE; HUSBAND AND WIFE; JUSTICES.	
MARINE INSURANCE	
<i>See</i> INSURANCE.	
MASTER AND SERVANT	
Liability of master— <i>Liability to third person for acts of servant—Act within course of employment—Injury to servant's wife due to servant's negligence</i> [BROOM v. MORGAN]	849
Trade dispute— <i>Award directed to take effect from before date of dispute—Certiorari—Jurisdiction—Dispute in Scotland—Employer's registered office and award in England—Industrial Disputes Order, 1951 (S.I., 1951, No. 1376), art. 10</i> [R. v. INDUSTRIAL DISPUTES TRIBUNAL, Ex parte KIGASS, LTD.]	593
Wages— <i>Regulation—Catering worker—Cloak-room attendant—Absence of control over manner of doing work—No contract of service—Remuneration by tips—No "employment in undertaking"—"Deemed to be employed"—Catering Wages Act, 1943 (c. 24), s. 1 (2), (4)</i> [PAULEY v. KENALDO, LTD.]	226
MEASURE OF DAMAGES	
<i>See</i> CONTRACT (Breach); NEGLIGENCE.	
MEDAL	
Copyright in design. <i>See</i> COPYRIGHT.	
MEDICAL PRACTITIONER	
Bequest for advancement of "business"— <i>Medical practice—Purchase of dwelling-house</i> [Re WILLIAMS' WILL TRUSTS]	536
MEDICINE	
Patent concerning process of production. <i>See</i> PATENT.	
MEMBER OF PARLIAMENT	
<i>See</i> PARLIAMENT.	
MERCANTILE MARINE	
False imprisonment— <i>Member of crew—Right of master, at common law, to arrest and confine</i> [HOOK v. CUNARD STEAMSHIP CO., LTD.]	1021
MICE	
<i>See</i> PESTS.	
MINE	
Minerals— <i>Reservation—Right to work implied in reservation—Meaning of "petroleum"—Vernacular, not scientific, meaning to be sought—Right of occupier of land to natural gas within the land</i> [BORYS v. CANADIAN PACIFIC RY. CO.]	451
MINIMUM WAGE	
<i>See</i> MASTER AND SERVANT.	
MONEY	
Borrowing— <i>Treasury control—Issue of shares and debenture stock in consideration of sale of land—Borrowing (Control and Guarantees) Act, 1946 (c. 58), s. 4 (2) (a)—Control of Borrowing Order, 1947 (S.R., & O., 1947, No. 945), art. 2 (1)</i> [LONDON & COUNTRY COMMERCIAL PROPERTY INVESTMENTS, LTD. v. ATTORNEY-GENERAL]	436
MORTGAGE	
Attornment clause— <i>Notice to quit—Need of notice—Breach of covenant to repay principal by instalments—Claim by mortgagee to possession</i> [HINCKLEY AND COUNTRY BUILDING SOCIETY v. HENNY]	515
MOTOR INSURANCE	
<i>See</i> INSURANCE; STREET TRAFFIC.	
NATIONAL HEALTH SERVICE	
Hospital— <i>Endowment of bed—Absence of recognised amount and scheme—Acceptance by governors of sum subject to conditions of will</i> [Re MILLS (dec'd.)]	835
<i>Gift of share of residue—"To any three hospitals in . . . Devon which . . . are most in need of it"—"Need" of hospitals vested in Minister of Health—National Health Service Act, 1946 (c. 81), s. 54 (1), (2)</i> [Re PERREYMAN (dec'd.)]	223

NATIONAL SERVICE

Person liable to be called up for service—"Ordinarily resident in Great Britain"—Residence in Great Britain for more than two years—Citizen of Republic of Ireland—Domicil in Ireland and intention to return thereto—National Service Act, 1948 (c. 64), s. 34 (4) (b) (c)—British Nationality Act, 1948 (c. 56), s. 3 (2)—Ireland Act, 1949 (c. 41), s. 3 (1) (a) (i), s. 3 (2) (a) [BICKNELL v. BROSNAN] 1126

NATIONALISATION

Electricity. *See* ELECTRICITY.

Gas industry. *See* GAS.

Road haulage. *See* BRITISH TRANSPORT COMMISSION.

Transport. *See* BRITISH TRANSPORT COMMISSION.

NEGLECTANCE

Child—Allurement—Scaffold—Erection for repair of house—Children injured by scaffold being pulled over by boys—Foreseeable danger of young persons interfering with scaffolding [CUTTRESS v. SCAFFOLDING (GREAT BRITAIN), LTD.] 165

Damages—Fatal accident—Deduction for benefits accruing from death—Deduction from deceased's wages of sum retained for his own use—Deduction in respect of house constituting matrimonial home [HEATLEY v. STEEL CO. OF WALES, LTD.] 489

Relevancy of widow's private means [SHIELDS v. CRUIKSHANK] 874

Mental shock. *See* DAMAGES.

Personal injury—Measure of damages—Diminished expectation of life—Loss of future wages through death supervening—Work "above" fragile roof—Provision of scaffolds—Building (Safety, Health and Welfare) Regulations, 1948 (S.I., 1948, No. 1145), reg. 5, reg. 31 (3) (a), (b) [HARRIS v. BRIGHT'S ASPHALT CONTRACTORS, LTD., ALLARD & SAUNDERS, LTD. (THIRD PARTIES)] 395

Measure of damages—Regard to be had to awards in comparable cases [RUSHTON v. NATIONAL COAL BOARD] 314

Dangerous goods—Gas—Cylinder introduced into ship by contractor—Leakage—Explosion—Liability of contractor [BECKETT v. NEWALLS INSULATION CO., LTD.] 250

Driving of motor vehicle—Liability of owner—Car driven by friend of owner, at owner's request and for his benefit [ORMROD v. CROSVILLE MOTOR SERVICES, LTD. (MURPHIE, THIRD PARTY)] 711

Fatal accident—Summary judgment—Defence mere denial of negligence and damage—Tribunal to assess damages—R.S.C., Ord. 14, r. 1 [DUMMER v. BROWN] 1158

Hospital. *See* HOSPITAL.

Invitee—Duty of occupier—Protection against unusual danger—Window cleaner—Plywood panel in window—Occupier's removal of bolts—Failure to inform cleaner [BATES v. PARKER] 768

Railway station—Passenger slipping on patch of oil—Duty owed by Railway Executive [BLACKMAN v. RAILWAY EXECUTIVE] 4

Omnibus—Passenger injured while alighting—Omnibus stopping short of request stop—No warning by conductor [PRESCOTT v. LANCASHIRE UNITED TRANSPORT CO., LTD.] 288

Remoteness of damage. *See* DAMAGE.

Res ipsa loquitur—Onus on defendant to disprove negligence—Evidence required to discharge onus—Plaintiff injured through breaking of hoist rope—Proof that rope had been cut maliciously [BIRCHALL v. J. BIBBY & SONS, LTD.] 163

Schoolmaster—Child at nursery school—Permitted to run on to highway—Injury to vehicle driver in avoiding child—Liability of education authority [LEWIS v. CARMARTHENSHIRE COUNTY COUNCIL] 1025

Solicitor. *See* SOLICITOR.

NIGERIA

See PRIVY COUNCIL.

NOTICE

Performance of "specified" work—Requirement to perform certain work "or other work of a not less effectual character"—Insufficiency of particularity [PERRY v. GARNER] 285

NOTICE TO EXECUTE WORKS

See HOUSING.

NOTICE TO QUIT

See AGRICULTURE (Agricultural holding); MORTGAGE (Attornment clause).

NUISANCE

Local authority—Injunction against. *See* INJUNCTION.

Pollution of river. *See* WATER AND WATERCOURSES.

NULLITY

Approbation of unconsummated marriage—Knowledge of facts and law—Reliance on validity of marriage for purpose of other proceedings—Decree inequitable and against public policy [TINDALL v. TINDALL] 139

Treatment by way of artificial insemination—Adoption of child by spouses [SLATER v. SLATER] 246

Jewish bill of divorce—Declaratory judgment sought that marriage be dissolved—Jurisdiction of court to make declaratory order—Husband domiciled in Israel—Wife resident in England—R.S.C., Ord. 25, r. 5 [HAR-SHEFI v. HAR-SHEFI] 783

OCCUPIER

Duty to invitee—Protection against unusual danger. *See* NEGLIGENCE (Invitee).

OMNIBUS

Passenger injured while alighting—Omnibus stopping short of request stop—No warning by conductor [PRESCOTT v. LANCASHIRE UNITED TRANSPORT CO., LTD.] 288

OPTION

To renew lease at rent stated therein—Rent reduced by rent tribunal—Validity of option [MAURAY v. DURLEY CHINE (INVESTMENTS), LTD.] 712

OVERRIDING INTEREST

Liability of registered land to. *See* LAND REGISTRATION.

	PAGE
PARLIAMENT Publication of libel to member— <i>Privilege—Publication within precincts of Parliament— Publication not connected with proceedings of House of Commons</i> [RIVLIN v. BILAINKIN] ..	534
PARTIES Action, to. See PRACTICE.	
PARTNERSHIP Dissolution— <i>Ownership of assets—No partnership agreement except as to division of profits</i> [MILES v. CLARKE] ..	779
PASSENGER Carriage. See CARRIAGE OF PASSENGERS.	
PATENT Licence— <i>Compulsory licence—Medicine—Application for compulsory licence within three years from grant—Effect of International Convention for Protection of Industrial Property, art. 5— Patents Act, 1949 (c. 87), s. 41 (1) (b), s. 45 (3) [R. v. COMPTROLLER-GENERAL OF PATENTS, Ex parte PARKE, DAVIS & Co.]</i> ..	862
PERPETUITIES Accumulation. See ACCUMULATION.	
PERSISTENT CRUELTY See JUSTICES (Husband and wife).	
PERSONAL INJURIES See NEGLIGENCE.	
PESTS Rats and mice— <i>Destruction—Notice to owner of land—Validity—Instruction to carry out "poison treatment or other work of no less effectual character"—Prevention of Damage by Pests Act, 1949 (c. 55), s. 4 (1) [PERRY v. GARNER]</i> ..	285
PETITION Divorce. See DIVORCE (Practice).	
PHYSICAL TRAINING Promotion of, as charitable object. See CHARITY.	
PILOT See HARBOUR.	
PLANNING See TOWN AND COUNTRY PLANNING.	
PLANT Profits from letting— <i>Charge to income tax. See INCOME TAX (Profits).</i> Wear and tear— <i>Income tax allowance. See INCOME TAX.</i>	
POISON Sale by retail— <i>Sale by or under supervision of registered pharmacist—Chemist's "self-service" shop—Pharmacist supervising transaction at time of payment—Pharmacy and Poisons Act, 1933 (c. 25), s. 18 (1) (a) (iii) [PHARMACEUTICAL SOCIETY OF GREAT BRITAIN v. BOOTS CASH CHEMISTS (SOUTHERN), LTD.]</i> ..	482
POLICE Evidence by— <i>Production of notebooks—Denial of collaboration in preparing notes—Refusal by court to allow jury to inspect notebooks [R. v. BASS]</i> .. Questions to person in custody— <i>Need of caution. See CRIMINAL LAW (Evidence).</i>	1064
POLL Company meeting. See COMPANY (Meeting).	
POLLUTION River. See WATER AND WATERCOURSES.	
POWER OF APPOINTMENT Fraudulent exercise— <i>Intention to benefit non-object—Absence of moral suasion [Re DICK (dec'd.)]</i> Unascertainable class of objects— <i>Uncertainty—Validity of power [Re GESTETNER (dec'd.)]</i> ..	559 1150
PRACTICE Divorce. See DIVORCE. Parties— <i>Misnomer—Amendment—Plaintiffs a French trading firm—Wrongly described as corporate body—Addition of names of members of firm—R.S.C., Ord. 16, r. 2, Ord. 72, r. 2 [ETABLISSEMENT BAUDELLOT v. R. S. GRAHAM & Co., LTD.]</i> .. <i>Representation order—Members' club—Action in tort—Claim for damages by servant of club for injury on club premises—Assistant honorary secretary and chairman of house committee made defendants—Order authorising them to defend action in representative capacity—R.S.C., Ord. 16, r. 9 [CAMPBELL v. THOMPSON]</i> .. Service— <i>Service out of jurisdiction—Non-delivery of cargo—Action against shipowners by con- signees abroad—Charterparty between foreigners for carriage between foreign countries— Charterparty in English—Signature on behalf of shipowners by English agents—Bill of lading in English signed by master abroad—R.S.C., Ord., 11, r. 1 (e) (ii) (iii) [THE METAMORPHOSIS]</i> Stay of proceedings— <i>Divorce petition presented in England—Proceedings against petitioner begun by respondent abroad—Advantage to petitioner from proceeding in England—Delay by respondent [SEALEY (OTHERWISE CALLAN) v. CALLAN]</i> .. Striking out pleading— <i>Answer to divorce petition. See DIVORCE (Practice).</i> Substituted service— <i>Divorce petition. See DIVORCE (Practice).</i> Summary judgment— <i>Negligence—Claim arising out of accident causing death or personal injury —Defence mere denial of negligence and damage—Tribunal to assess damages—R.S.C., Ord. 14, r. 1 [DUMMER v. BROWN]</i> .. Trial— <i>Submission of no case—Time to make submission—Power of judge to enter judgment on case as whole—R.S.C., Ord. 36, r. 39 [GRINSTED v. HADRILL]</i> ..	149 831 723 942 1158 1188
PREFERENCE SHAREHOLDERS Cumulative preference shares— <i>Underpayment of dividend—Distribution of aggregate sum in respect of underpayment—Period of deficiency—Shareholders entitled to share in distribution —Rate of income tax deductible [GODFREY PHILLIPS, LTD. v. INVESTMENT TRUST CORPN., LTD.]</i> .. Rights "affected"— <i>Increase of ordinary share capital. See COMPANY (Alteration of members' rights).</i>	7

PREVENTIVE DETENTION

See CRIMINAL LAW (Sentence).

PRIVILEGE

Libel. See LIBEL.

Slander. See SLANDER.

PRIVY COUNCIL

Nigeria—*Contempt of court—Right of appeal to West African Court of Appeal—“Convicted”*—*Person in contempt ordered to pay fine, with imprisonment in default—West African Court of Appeal Ordinance (c. 229 of the Laws of Nigeria), s. 10 [IZUORA v. REGINAM]* 827

PRIZE LAW

Condemnation—*Partly constructed ship not capable of floating—Ship under construction in building yard—Seizure at same time as capture of port—No intention by captors to seize as immediate prize—Seizure after surrender of belligerent [SCHIFFAHR-TREUHAND, G.m.b.H. v. H.M. PROCURATOR-GENERAL]* 364

PROBATE

Will—*Lost will—Parol evidence of contents—Standard of proof [In the Estate of WIPPERMANN]* 764

PROBATION

See CHILDREN AND YOUNG PERSONS.

PROFITS TAX

Relief—*Non-distribution relief—Company ordinarily resident both within and outside the United Kingdom—Finance Act, 1947 (c. 35), s. 39 (1) [UNION CORPN., LTD. v. INLAND REVENUE COMRS., JOHANNESBURG CONSOLIDATED INVESTMENT CO., LTD. v. SAME, TRINIDAD LEASEHOLDS, LTD. v. SAME]* 729

PROHIBITION

Grant where right of appeal—*Patents Act, 1949 (c. 87), s. 44 (1) [R. v. COMPTROLLER-GENERAL OF PATENTS, Ex parte PARKE, DAVIS & CO.]* 862

Justices—*Prohibition against proceeding in excess of jurisdiction [R. v. WIMBLEDON JUSTICES, Ex parte DERWENT]* 390

Power of court to issue order directed to private arbitrator [R. v. DISPUTES COMMITTEE OF THE NATIONAL JOINT COUNCIL FOR THE CRAFT OF DENTAL TECHNICIANS, Ex parte NEATE, R. v. SAME] 327

PROSTITUTION

See CRIMINAL LAW (Vagrancy).

PROTECTION

Children and young persons. See CHILDREN AND YOUNG PERSONS.

PUBLIC AUTHORITY

Limitation of action—*British Overseas Airways Corporation—Performance of public duties—Control of finances by government—Limitation Act, 1939 (c. 21), s. 21 (1) [LITTLEWOOD v. GEORGE WIMPEY & CO., LTD., BRITISH OVERSEAS AIRWAYS CORPN. (SECOND DEFENDANTS AND THIRD PARTIES)]* 583

Soldier on duty—Member of Canadian forces—Visiting Forces (British Commonwealth) Act, 1933 (c. 6), s. 2 (3) (b)—Limitation Act, 1939 (c. 21), s. 21 (1) [REEVES v. DEANE-FREEMAN] 461

PURCHASE TAX

Chargeable goods—*“Pictures”—Pictorial coupons—Use in trader's gift book advertisement scheme—Finance Act, 1943 (c. 49), s. 20 (1), sched. VIII, Part I, Group 25 [STEPHENSON BROS., LTD. v. COMRS. OF CUSTOMS AND EXCISE, KING AND JARRETT, LTD. v. SAME]* 469

QUARTER SESSIONS

Place of trial. See CRIMINAL LAW (Trial).

Summary offence—*Election by offender of trial by jury—Committal for trial for summary offence—Substitution in indictment of different offence—Summary Jurisdiction Act, 1879 (c. 49), s. 17 (1)—Administration of Justice (Miscellaneous Provisions) Act, 1933 (c. 36), s. 2 (2) (a) (i) [R. v. PHILLIPS]* 968

QUIT

Notice to. See AGRICULTURE (Agricultural holding); MORTGAGE (Attornment clause).

RAILWAY

Charges. See BRITISH TRANSPORT COMMISSION.

Fence—*Quality of fence required—Railways Clauses Consolidation Act, 1845 (c. 20), s. 68 [COOPER v. RAILWAY EXECUTIVE (SOUTHERN REGION)]* 477

Injury to passenger—*Snow on station platform—Delay in sanding and salting—Porter responsible otherwise urgently engaged—Liability of Railway Executive [TOMLINSON v. RAILWAY EXECUTIVE]* 1

Negligence—*Invitee—Passenger slipping on patch of oil—No delay in precautionary measures [BLACKMAN v. RAILWAY EXECUTIVE]* 4

Wagon—*Profits from letting on hire—Charge to income tax [NORTH CENTRAL WAGON & FINANCE CO., LTD. v. FIFIELD]* 1009

RAT

See PESTS.

RATES

Water. See WATER SUPPLY.

RECEIVING STOLEN PROPERTY

See CRIMINAL LAW.

RECREATION

Promotion of, as charitable object. See CHARITY.

REGISTRATION

Land. See LAND REGISTRATION.

REGULATION OF EMPLOYMENT

See EMPLOYMENT.

RELIGION

Charitable purpose. See CHARITY.

	PAGE
RENT CONTROL	
Excessive rent— <i>Requirement to pay—Rent under lease reduced—Option by deed to renew lease at original rent—Validity of option—Furnished Houses (Rent Control) Act, 1946 (c. 39), s. 4 (1) (a)</i> [MAURAY v. DURLY CHINE (INVESTMENTS), LTD.]	712
RENT RESTRICTION	
Closing order— <i>Dwelling-house subject to closing order made under Public Health (London) Act, 1936 (c. 50), sched. V, para. 8—Housing Act, 1936 (c. 51), s. 156 (1) (e)</i> [MARELA, LTD. v. MACHOROWSKI]	960
Possession— <i>House required by landlord—Landlord becoming such by purchase after Sept. 1, 1939—Purchase of house and granting of tenancy to vendor who remained in occupation—Rent and Mortgage Interest Restrictions (Amendment) Act, 1933 (c. 32), sched. I, para. (h) (as amended by Rent and Mortgage Interest Restrictions Act, 1939 (c. 71), sched. I)</i> [NEWTON v. BIGGS]	99
<i>Personal occupation—Occupation as "home"—House in country and flat in London—Occupation for sleeping five or six times a year</i> [BECK v. SCHOLZ]	814
Recovery of overpaid rent— <i>Bankruptcy of landlord—Right of tenant to deduct amount of rent overpaid from rent payable to trustee</i> [HOLE v. CUZEN]	87
Statutory tenant— <i>Non-occupying tenant—Licence to defendant to occupy—Defendant's occupation not to preserve premises for tenant's return—Tenant's right to maintain action for trespass—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (c. 17), s. 15 (1)</i> [THOMPSON v. WARD]	1169
<i>Previous order against tenant's mother for possession of other premises on condition that landlord provided alternative accommodation—Death of mother while in occupation of alternative accommodation—Claim by daughter to protection as statutory tenant—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (c. 17), s. 12 (1) (g)</i> [STRUTT v. PANTER]	445
<i>Retention of possession after end of contractual tenancy—Agreement by contractual tenant to pay on expiration of tenancy "£40 towards re-decoration"—Incorporation of agreement in statutory tenancy—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (c. 17), s. 15 (1)</i> [BOYER v. WARBEY]	269
Sub-tenancy— <i>Covenant by sub-tenant not to assign without consent of both superior landlord and tenant—Assignment with consent of tenant only—Enforcement of covenant by superior landlord—Breach or non-performance of obligation—Assignment of whole of dwelling-house without landlord's consent—Rent and Mortgage Interest Restrictions (Amendment) Act, 1933 (c. 32), sched. I (a), (d)—Sub-tenant deemed to become tenant of landlord on determination of tenant's interest—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (c. 17), s. 15 (1), s. 15 (3)</i> [DRIVE YOURSELF HIRE CO. (LONDON), LTD. v. STRUTT]	1036
Termination of statutory tenancy— <i>Premises vacated by tenant—Failure to give notice—Liability for rent—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (c. 17), s. 15 (1)</i> [BOYER v. WARBEY]	269
REPRESENTATION ORDER	
Parties to action. <i>See PRACTICE (Parties).</i>	
REQUISITION	
Transfer of requisition— <i>Power of competent authority—Defence (General) Regulations, 1939 (S.R. & O., 1939, No. 927, as amended), reg. 51 (1), (2)</i> [BLOUNT v. THE WAR OFFICE]	1071
RES IPSA LOQUITUR	
<i>See NEGLIGENCE.</i>	
RES JUDICATA	
Possession clause— <i>Claim in county court on ground of trespass by defendants, and, alternatively, assignment to them without landlord's consent—Claim in trespass beyond jurisdiction of county court—Election to proceed on alternative ground—Subsequent claim in trespass in High Court</i> [ROSENFELD v. NEWMAN]	840
RESIDENCE	
Income tax. <i>See INCOME TAX.</i>	
RIGHT OF WAY	
<i>See EASEMENT.</i>	
RIVER	
<i>See WATER AND WATERCOURSES.</i>	
ROAD HAULAGE	
<i>See BRITISH TRANSPORT COMMISSION.</i>	
ROOF	
Fragile roof— <i>Work above—Provision of ladders and boards</i> [HARRIS v. BRIGHT'S ASPHALT CONTRACTORS, LTD., ALLARD & SAUNDERS, LTD. (THIRD PARTIES)]	395
SAILOR	
<i>See MERCANTILE MARINE.</i>	
SALE OF GOODS	
Agent, sale by— <i>Signature to contract "for account of our [disclosed] principal"—Liability of principal for defect in goods sold</i> [LESTER v. BALFOUR WILLIAMSON MERCHANT SHIPPERS, LTD.]	1146
Contract— <i>Distinction from contract for work and labour done and materials supplied—Contract to make fur jacket to order—Colour of skins and style selected by purchaser—Enforcement of contract—Need for note or memorandum signed by purchaser—Sale of Goods Act, 1893 (c. 71), s. 4 (1)</i> [J. MARCEL (FURRIERS), LTD. v. TAPPER]	15
"Self-service" shop. <i>See SHOP.</i>	
Trade description— <i>Mutual ignorance as to deficiency in quality—Goods of contract description supplied—Validity of contract</i> [HARRISON & JONES, LTD. v. BUNTEN & LANCASTER, LTD.]	903
SALE OF LAND	
Contract— <i>Agreement to purchase "subject to formal contract to be prepared by the vendors' solicitors if the vendors shall so require"</i> [RILEY v. TROLL]	966
Mines and minerals— <i>Reservation. See MINE (Minerals).</i>	
SAND BLASTING	
Prevention of dust. <i>See FACTORY.</i>	

SCAFFOLD

- Negligence—*Erection for repair of house—Children injured by scaffold being pulled over by boys—Foreseeable danger of young persons interfering with scaffold* [CUTTRESS v. SCAFFOLDING (GREAT BRITAIN), LTD.] 165
- Provision for work on roof [HARRIS v. BRIGHT'S ASPHALT CONTRACTORS, LTD., ALLARD & SAUNDERS (THIRD PARTIES)] 395

SCHOOL

- Approved. *See* CHILDREN AND YOUNG PERSONS.
- See also* EDUCATION.

SCHOOLMASTER

- Negligence. *See* NEGLIGENCE (Schoolmaster).

SCOTLAND

- Charity—*Income tax—Law to be applied* [INLAND REVENUE COMRS. v. CITY OF GLASGOW POLICE ATHLETIC ASSN.] 747

SECURITY FOR COSTS

- Assisted person. *See* LEGAL AID.
- Divorce. *See* DIVORCE.

SEEDS

- Particulars on sale—*Failure to deliver statement—Misrepresentation as to type of seed—Buyer's right to sue for breach of warranty* [MARLES v. PHILIP TRANT & SONS, LTD. (MACKINNON, THIRD PARTY) (No. 1)] 645
- Presumption of correctness—Proof by purchaser that goods supplied not in accordance with particulars—Seeds Act, 1920 (c. 54), s. 6 (1)* [MARLES v. PHILIP TRANT & SONS, LTD. (MACKINNON, THIRD PARTY) (No. 2)] 651

SENTENCE

- See* CRIMINAL LAW.

SERVICE

- Divorce petition and orders. *See* DIVORCE (Practice).
- Writ. *See* PRACTICE.

SETTLEMENT

- Income Tax. *See* INCOME TAX (Settlement).
- Hotchpot—*Life interest—Basis of valuation—Actual or actuarial value—Interest on actuarial value* [Re THOMSON SETTLEMENT TRUSTS] 1139
- Power of appointment. *See* POWER OF APPOINTMENT.
- Variation of trusts—*Jurisdiction of court to authorise transaction not authorised by settlement or by law—No administrative problem—Settled Land Act, 1925 (c. 18), s. 64 (1)—Trustee Act, 1925 (c. 19), s. 57 (1) (Re DOWNSHIRE'S SETTLED ESTATES, Re CHAPMAN'S SETTLEMENT TRUSTS, Re BLACKWELL'S SETTLEMENT TRUSTS)* 103

SEWAGE

- Pollution of river by. *See* WATER AND WATERCOURSES.

SEWER

- Discharge of effluent into—*Trade effluent—Trade premises—Discharge from premises before 1937—New premises added in 1946—Effluent from both premises same in nature and amount as before 1937—Need for notice of discharge of effluent after 1946—Public Health (Drainage of Trade Premises) Act, 1937 (c. 40), s. 2 (1), s. 4 (1), s. 14 (1)* [YORKSHIRE DYEING AND PROOFING CO., LTD. v. MIDDLETON BOROUGH COUNCIL] 540

SHAREHOLDER

- Bankrupt—*Right to vote* [MORGAN v. GRAY] 213

SHIP

- Winch—*Duty to fence—"So far as is practicable without impeding the safe working of the ship"—Docks Regulations, 1934 (S.R. & O., 1934, No. 279), reg. 26* [RITCHIE v. T. G. IRVING & Co., LTD.] 37

SHIPPING

- Bill of lading—*Evidence of contract of carriage—Express incorporation of terms, conditions and exceptions of charterparty—Plaintiffs suing for non-delivery of cargo as consignees, not as charterers* [THE METAMORPHOSIS] 723
- Collision—*Lights—"Vessel from any accident not under command"—"Accident"—Vessel towed and tugs under command—Standard of lighting—Regulations for Preventing Collisions at Sea (Sea Regulations, 1910 (S.R. & O., 1910, No. 1113)), art. 4 (a), art. 29—Merchant Shipping Act, 1894 (c. 60), s. 419 (1)* [THE ALBION] 978
- Limitation of liability—Actual fault or privity of owner—Local traffic signals ignored—Compulsory pilot on board* [THE HANS HOTH] 218
- Lights. *See* Collision, *ante*.

SHOCK

- Mental shock—*Damages. See* DAMAGES.

SHOP

- New lease. *See* LANDLORD AND TENANT.
- New tenancy. *See* LANDLORD AND TENANT (Shop).
- "Self-service" shop—*Sale of goods—Transaction completed by acceptance of price* [PHARMACEUTICAL SOCIETY OF GREAT BRITAIN v. BOOTS CASH CHEMISTS (SOUTHERN), LTD.] 492

SHOT FIRING

- Coal mine, in—*Safety regulations. See* COAL MINING.

SLANDER

- Privilege—*Qualified privilege—Words alleging cheating in examination to qualify for professional appointment—Statement made by invigilator to remainder of examinees—No reflection on plaintiff in way of trade or profession* [BRIDGMAN v. STOCKDALE] 1166

SLANDER OF TITLE

- No proof of malice or damage—*Power of court to declare right to title—R.S.C., Ord. 25, r. 5* [Re LEWIS'S DECLARATION OF TRUST] 1005

SODOMY

With wife—*Persistent cruelty. See JUSTICES (Husband and wife).*

SOLDIER

Limitation of action against—*Act done while on duty* [REEVES v. DEANE-FREEMAN] 461

SOLICITOR

Negligence—*Damages—Tenant in tail—Failure to advise disentailment—Death of tenant in tail—Diminution of estate—Damages recoverable by personal representative of tenant in tail* [OTTER v. CHURCH, ADAMS, TATHAM & CO. (A FIRM)] 168

SPECIAL CONTRIBUTION

"Investment income"—*Exclusion of "income arising to persons carrying on a trade . . . from property occupied . . . by them for the purposes thereof"*—*Land let to farmer by his wife—Farmer's land occupied by him in partnership—Finance Act, 1948 (c. 49), s. 49 (2) (b)* [WORTH v. INLAND REVENUE COMRS., INLAND REVENUE COMRS. v. WORTH] 930

SPECIAL EXAMINER

Evidence before. *See EVIDENCE.*

STAMP DUTY

Charity—*Moral, social, and physical training and recreation—Whether object charitable—Finance Act, 1947 (c. 35), s. 54 (1)* [BADDELEY v. INLAND REVENUE COMRS.] 63

Company—*Exemption—Capital duty—Increase of capital to acquire shares in Northern Ireland company—"Existing company"* [NESTLÉ CO., LTD. v. INLAND REVENUE COMRS.] 877

STATUTORY TENANT

See RENT RESTRICTION.

STAY OF PROCEEDINGS

See PRACTICE.

STREET TRAFFIC

Accident—*Failure to report—Motor car struck by motor cycle—Driver of car giving name and address to driver of motor cycle—Obligation to report to police—Road Traffic Act, 1930 (c. 43), s. 22 (1), (2)* [GREEN v. DUNN] 550

Charge of motor vehicle while under influence of drink—"In charge"—*Vehicle left in public yard—Road Traffic Act, 1930 (c. 43), s. 15 (1)* [HAINES v. ROBERTS] 344

Driving uninsured motor vehicle—*Admission of liability by insurer—Reasonable interpretation of policy—Road Traffic Act, 1930 (c. 43), s. 35 (1)* [CARNILL v. ROWLAND] 486

Permitting motor vehicle to be used on road without policy of insurance being in force—*Permission by person in charge of vehicle, not the owner—Road Traffic Act, 1930 (c. 43), s. 35 (1)* [LLOYD v. SINGLETON] 291

Licence—*Goods vehicle—Carriage of goods for trade or business—Van used by window cleaner—Carriage of ladders, buckets, and articles for cleaning—Road and Rail Traffic Act, 1933 (c. 53), s. 1 (1) (b), s. 2 (4), s. 36 (1)* [CLARKE v. CHERRY] 268

Offence—Prosecution of driver as well as owner—Undesirability—Road and Rail Traffic Act, 1933 (c. 53), s. 1 (1)—Vehicles (Excise) Act, 1949 (c. 89), s. 13 (1) [CARPENTER v. CAMPBELL] 280

Utility van towing unladen caravan—Vehicles (Excise) Act, 1949 (c. 89), s. 27 (1) [PEARSON v. BOYES] 492

Unlicensed vehicle—User attracting higher rate of duty—Not a summary offence—Liability to excise penalty—Vehicles (Excise) Act, 1949 (c. 89), s. 13 (2) [BROWN v. ALLWEATHER MECHANICAL GROUTING CO., LTD.] 474

"Motor vehicle"—*Dual purpose vehicle—Bicycle fitted with auxiliary engine—Use as pedal cycle—No removal of essential parts of engine—Need of third-party insurance and driving licence—Road Traffic Act, 1930 (c. 43), s. 1, s. 4 (1), s. 35 (1)* [FLOYD v. BUSH] 265

Person by whom vehicle "used"—*Vehicle hired by owner to another person—Driver paid by owner—Vehicle used to carry goods for hire or reward for greater distance than permitted by owner's licence—Road and Rail Traffic Act, 1933 (c. 53), s. 1 (3)* [SYKES v. MILLINGTON] 1098

STRIKING OUT PLEADING.

See DIVORCE (Practice).

SUBSTITUTED SERVICE

Divorce petition and orders. *See DIVORCE (Practice).*

SUMMARY JURISDICTION

See JUSTICES.

SUNDAY ENTERTAINMENT

"Musical entertainment"—*Imitations and "patter" by single performer accompanied by piano—Sunday Entertainments Act, 1925 (c. 51), s. 5* [BARNES v. JARVIS] 1061

SUPERVISION

Discharged prisoner. *See CRIMINAL LAW (Sentence—Supervision).*

TENANT

Rent Restrictions Acts, under. *See RENT RESTRICTION.*

TENANT IN TAIL

Failure of solicitor to advise disentailment—*Death of tenant in tail—Diminution of estate—Damages recoverable by personal representative of tenant in tail* [OTTER v. CHURCH, ADAMS, TATHAM & CO. (A FIRM)] 168

THEATRE

Sunday entertainment. *See SUNDAY ENTERTAINMENT.*

TORT

Joint tortfeasors—*Contribution—Action against two defendants—Action against second defendant not commenced within statutory period—First defendant's right to contribution from second defendant—Law Reform (Married Women and Tortfeasors) Act, 1935 (c. 30), s. 6 (1) (c)* [LITTLEWOOD v. GEORGE WIMPEY & CO., LTD., BRITISH OVERSEAS AIRWAYS CORPN. (SECOND DEFENDANTS AND THIRD PARTIES)] 583

[MORGAN v. ASHMORE, BENSON, PEAKE & CO., LTD.] 328

	PAGE
TOWN AND COUNTRY PLANNING	
Enforcement notice— <i>Development prior to July 1, 1948—Town and Country Planning Act, 1947 (c. 51), s. 23 (1), s. 75 (1) [LINCOLN COUNTY COUNCIL (PARTS OF LINDSEY) v. HENSHALL]</i> ..	1143
Enforcement of planning control— <i>Enforcement notice—Invalid notice—Application by occupier for continuance of user and appeal to the Minister of Town and Country Planning—Estoppel from denying invalidity—Town and Country Planning Act, 1947 (c. 51), s. 16 (1), s. 23 (1) [SWALLOW AND PEARSON (A FIRM) v. MIDDLESEX COUNTY COUNCIL]</i> ..	580
Interim development— <i>Conditional permission—Limitation of time for commencement and completion of work—No reason given for imposing condition—Validity of condition—Town and Country Planning Act, 1932 (c. 48), s. 10 (3) [LONDON COUNTY COUNCIL v. MARKS & SPENCER, LTD.]</i> ..	1095
"Works for the erection of a building"— <i>Demolition of existing buildings and clearance of site—Erection of new building not begun—Town and Country Planning Act, 1947 (c. 51), s. 78 (1) [LONDON COUNTY COUNCIL v. MARKS & SPENCER, LTD.]</i> ..	1095
TRADE DESCRIPTION	
Sale by. <i>See</i> SALE OF GOODS.	
TRADE DISPUTE	
<i>See</i> MASTER AND SERVANT.	
TRADE EFFLUENT	
<i>See</i> SEWER.	
TRANSFERRED UNDERTAKING	
Compensation to discharged employee. <i>See</i> BRITISH TRANSPORT COMMISSION.	
TRANSPORT TRIBUNAL	
Appeal from order— <i>Jurisdiction of Court of Appeal to entertain—Transport Act, 1947 (c. 49), sched. X, para. 5—Railway and Canal Commission (Abolition) Act, 1949 (c. 11), s. 8 (2) [BRITISH TRANSPORT COMMISSION v. LONDON COUNTY COUNCIL]</i> ..	801
TREASURY CONTROL	
Borrowing of money. <i>See</i> MONEY.	
TRESPASS	
Damages— <i>Exemplary damages—Way forced into flat—Shock, but no injuries, inflicted [LOUDON v. RYDER]</i> ..	741
Premises subject to Rent Restrictions Acts— <i>Non-occupying tenant—Licence to defendant to occupy—Defendant's occupation not to preserve premises for tenant's return—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (c. 17), s. 15 (1). [THOMPSON v. WARD]</i> ..	1169
TRIAL	
Committal for. <i>See</i> CRIMINAL LAW.	
Place of. <i>See</i> CRIMINAL LAW.	
<i>See also</i> PRACTICE.	
TRUST AND TRUSTEE	
Remuneration of trustee— <i>Bank appointed administrator of intestate's estate—Power of court to authorise remuneration—Trustee Act, 1925 (c. 19), s. 42 [Re MASTERS (decd.)]</i> ..	19
Trust for sale of land— <i>Trustees' refusal to sell—Vesting order—"Person interested"—Receiver of trustee's interest appointed by way of equitable execution—Equitable interest in land—Law of Property Act, 1925 (c. 20), s. 30, s. 195 (1), s. 205 (x) [Re No. 39 CARR LANE, ACOMB]</i> ..	700
Variation of trusts by the court— <i>No administrative problem—Trustee Act, 1925 (c. 19), s. 57 (1) [Re DOWNSHIRE'S SETTLED ESTATES, Re CHAPMAN'S SETTLEMENT TRUSTS, Re BLACKWELL'S SETTLEMENT TRUSTS]</i> ..	108
TUG	
Right of owners to perform services in harbour— <i>"Shipping and unshipping goods"—Tugs employed in towing vessels into and out of docks—Harbours, Docks and Piers Clauses Act, 1847 (c. 27), s. 33 [J. H. PIGOTT & SON v. DOCKS AND INLAND WATERWAYS EXECUTIVE]</i> ..	22
VAGRANCY	
<i>See</i> CRIMINAL LAW.	
VERDICT	
Substitution by Court of Criminal Appeal. <i>See</i> CRIMINAL LAW (Appeal).	
WAGES	
<i>See</i> MASTER AND SERVANT.	
WAGON	
Railway. <i>See</i> RAILWAY.	
WARRANTY	
Breach— <i>Illegal performance of contract by one party—Right of other party to sue for breach of warranty—Sale of seeds—Failure to deliver statutory particulars—Misrepresentation as to type of seed [MARLES v. PHILIP TRANT & SONS, LTD. (MACKINNON, THIRD PARTY) (NO. 1)]</i> ..	645
WATER AND WATERCOURSES	
Pollution of river— <i>Untreated sewage matter—Action by riparian owner and fishery owner against local authority—Rivers Pollution Prevention Act, 1876 (c. 75), s. 3—Derby Corporation Act, 1901 (c. cclxvii), s. 109 (1), s. 113 [PRIDE OF DERBY AND DERBYSHIRE ANGLING ASSN., LTD. v. BRITISH CELANESE, LTD.]</i> ..	179
WATER SUPPLY	
Rates and charges— <i>Summary recovery—Order by court of summary jurisdiction for payment—Direction to levy distress in default of payment—"Final order" against debtor—Bankruptcy notice [Re A DEBTOR (NO. 48 OF 1952), Ex parte AMPHILL RURAL DISTRICT COUNCIL v. THE DEBTOR]</i> ..	545
Rating of undertaking— <i>Assessment on "profits basis"—Indirectly productive hereditament—Water intake—Departure from usual method of calculation on profits basis—Special circumstances—Altitude of hereditament—Rating and Valuation Act, 1925 (c. 90), s. 22 (1) (b) [METROPOLITAN WATER BOARD v. HERTFORD CORPN., HERTFORD CORPN. v. METROPOLITAN WATER BOARD]</i> ..	1047
WIDOW	
Provision for, under Inheritance (Family Provision) Act, 1938. <i>See</i> FAMILY PROVISION.	

WIFE

Maintenance. *See* DIVORCE; HUSBAND AND WIFE; JUSTICES.

WILL

Advancement clause— <i>Advancement in "business"</i> — <i>Medical practice</i> — <i>Purchase of dwelling-house</i> [Re WILLIAMS' WILL TRUSTS]	536
Class gift— <i>Gift postponed to life interest</i> — <i>Substituted gift for children of member of class dead at decease of life tenant</i> — <i>Vesting of gift on testator's death</i> — <i>Children of member living at date of will, but not children of member then dead, entitled to share as joint tenants</i> [Re BROOKE'S WILL TRUSTS]	668
Condition— <i>Certainty</i> — <i>Devise to person "who shall be a member of the Church of England and an adherent to the doctrine of that church"</i> [Re ALLEN (dec'd.)]	308
<i>Gift to housekeeper if she continued in service of testatrix's husband</i> — <i>Marriage between husband and housekeeper</i> [Re KENDREW (dec'd.)]	551
Falsa demonstratio non nocet— <i>Identity of beneficiary</i> [Re NESBITT'S WILL TRUSTS]	936
False description of beneficiary— <i>Validity of gift</i> — <i>Need to prove fraud</i> [Re POSNER (dec'd.)]	1123
Forfeiture clause— <i>Forfeiture on annuitant, in opinion of trustee, having "social or other relationship" with named person</i> [Re JONES (dec'd.)]	357
Gift of "all my furniture and movables . . . not consisting of mortgages shares bonds or securities"— <i>"Movables"</i> — <i>Exclusion of sums of money</i> [Re WALSH (dec'd.)]	982
Gift to "charitable institutions referred to by me in this my will"— <i>Unitarian church</i> [Re NESBITT'S WILL TRUSTS]	936
Lapse— <i>Gift to ear, nose and throat hospital at a particular address</i> — <i>Work of hospital at that address closed down after date of will and before testator's death</i> — <i>Patients transferred to special wing of general hospital</i> — <i>Assets transferred to general hospital exclusively for benefit of special wing</i> [Re HUTCHINSON'S WILL TRUSTS]	996
<i>Statutory exception from lapse</i> — <i>Death of beneficiary intestate</i> — <i>Distribution of interests saved from lapse</i> — <i>Time of ascertainment of persons entitled to interests on beneficiary's intestacy</i> — <i>Wills Act, 1837 (c. 26), s. 33</i> [Re BASIOLI (dec'd.), Re DEPAOLI (dec'd.)]	301
Legacy— <i>Gift of income until marriage</i> — <i>Thereafter disposition of corpus</i> — <i>Death of legatee unmarried</i> — <i>Devolution of corpus</i> [Re HENRY WILL TRUST]	531
Lost will— <i>Proof of contents.</i> <i>See</i> PROBATE.	
Revocation— <i>Will made in contemplation of marriage</i> —"I bequeath unto my fiancée . . ."— <i>Law of Property Act, 1925 (c. 20), s. 177 (1)</i> [Re LANGSTON (dec'd.)]	928

WINCH

Ship's winch— <i>Duty to fence</i> [RITCHIE v. T. G. IRVING & CO., LTD.]	37
---	----

WINDING-UP

Company, of. *See* COMPANY.

WINDOW CLEANER

Invitee— <i>Duty of occupier</i> — <i>Protection against unusual danger</i> — <i>Danger created by occupier</i> [BATES v. PARKER]	768
--	-----

WOODWORKING REGULATIONS

See FACTORY.

WORK AND LABOUR

Contract— <i>Supply of clothing</i> — <i>Contract for sale of goods</i> [J. MARCEL (FURRIERS), LTD. v. TAPPER]	15
---	----

WRIT

Fatal accidents, in action under. *See* FATAL ACCIDENT.

YOUNG PERSON

See CHILDREN AND YOUNG PERSONS.

STATUTES, ETC., REFERRED TO

PUBLIC GENERAL STATUTES

	PAGE
Administration of Justice (Miscellaneous Provisions) Act, 1933 (<i>c.</i> 36), <i>s.</i> 2 (2) (<i>a</i>) (i)	968
Adoption Act, 1950 (<i>c.</i> 26), <i>s.</i> 10 (1), (2)	891
Agricultural Holdings Act, 1948 (<i>c.</i> 63)—	
<i>s.</i> 25 (1) (<i>a</i>)	1182
<i>s.</i> 57 (3) (<i>a</i>)	155
Arbitration Act, 1950 (<i>c.</i> 27)—	
<i>ss.</i> 22 (1), 23 (2)	843
<i>s.</i> 25 (4)	257
Bankruptcy Act, 1914 (<i>c.</i> 59), <i>s.</i> 1 (1) (<i>g</i>)	545
Betting and Lotteries Act, 1934 (<i>c.</i> 58), <i>s.</i> 13 (1), (2)	642
Borrowing (Control and Guarantees) Act, 1946 (<i>c.</i> 58), <i>s.</i> 4 (2) (<i>a</i>)	436
British Nationality Act, 1948 (<i>c.</i> 56), <i>s.</i> 3 (2) (<i>a</i>)	1126
Building Materials and Housing Act, 1945 (<i>c.</i> 20), <i>s.</i> 7 (1)	390
Carriage by Air Act, 1932 (<i>c.</i> 36), <i>sched.</i> I, <i>art.</i> 28 (1), <i>art.</i> 30 (1)	675
Catering Wages Act, 1943 (<i>c.</i> 24), <i>s.</i> 1 (2), (4)	226
Children and Young Persons Act, 1933 (<i>c.</i> 12)—	
<i>s.</i> 62 (1) (<i>c</i>) (<i>d</i>)	320
<i>ss.</i> 70 (2), 90 (2), (3)	525
Cinematograph Films Act, 1938 (<i>c.</i> 17), <i>ss.</i> 25 (1), 44 (1)	615
Companies Act, 1948 (<i>c.</i> 38), <i>s.</i> 212 (1) (<i>g</i>)	791
Copyright Act, 1911 (<i>c.</i> 46), <i>s.</i> 1 (1)	759
County Courts Act, 1934 (<i>c.</i> 53), <i>s.</i> 105	350
Criminal Appeal Act, 1907 (<i>c.</i> 23), <i>s.</i> 5 (2)	294
Criminal Justice Act, 1925 (<i>c.</i> 86), <i>s.</i> 14 (2), (3)	641
Criminal Justice Act, 1948 (<i>c.</i> 58)—	
<i>s.</i> 12 (1)	1156
<i>s.</i> 21 (1)	340
(<i>b</i>), (2) (<i>b</i>), 22 (1) (<i>a</i>)	206
Debtors Act, 1869 (<i>c.</i> 62), <i>s.</i> 5	424
Education Act, 1944 (<i>c.</i> 31), <i>ss.</i> 39 (2) (<i>c</i>), 55 (2) (as amended by Education (Miscellaneous Provisions) Act, 1948 (<i>c.</i> 40), <i>s.</i> 11, <i>sched.</i> I, <i>Part</i> I)	705
Factories Act, 1937 (<i>c.</i> 67)—	
<i>s.</i> 14 (1)	447
<i>s.</i> 47 (1)	97
<i>s.</i> 49	375
<i>s.</i> 151 (1), (6)	29
Fatal Accidents Act, 1846 (<i>c.</i> 93), <i>s.</i> 2	925, 1130
Fatal Accidents Act, 1864 (<i>c.</i> 95), <i>s.</i> 1	925
Finance Act, 1894 (<i>c.</i> 30)—	
<i>s.</i> 2 (1) (<i>b</i>)	418
(<i>d</i>)	408
Finance Act, 1921 (<i>c.</i> 32), <i>s.</i> 30 (1) (<i>c</i>), (3) (as substituted by Finance Act, 1927 (<i>c.</i> 10), <i>s.</i> 24)	747
Finance Act, 1927 (<i>c.</i> 10), <i>s.</i> 55 (1)	877
Finance Act, 1936 (<i>c.</i> 34)—	
<i>s.</i> 21 (9) (<i>b</i>)	1102
<i>s.</i> 22 (2)	1009
Finance Act, 1939 (<i>c.</i> 41), <i>s.</i> 30 (1)	403
Finance Act, 1941 (<i>c.</i> 30), <i>sched.</i> I, <i>para.</i> 5	388
Finance Act, 1947 (<i>c.</i> 35)—	
<i>s.</i> 39 (1)	729
<i>s.</i> 54 (1)	63
Finance Act, 1948 (<i>c.</i> 49)—	
<i>s.</i> 20 (1)	469
<i>s.</i> 49 (2) (<i>b</i>)	930
<i>sched.</i> VIII, <i>Part</i> I, <i>Group</i> 25	469
Furnished Houses (Rent Control) Act, 1946 (<i>c.</i> 34), <i>s.</i> 4 (1) (<i>a</i>)	712
Gas Act, 1948 (<i>c.</i> 67)—	
<i>ss.</i> 14 (2), 17 (5)	762
<i>s.</i> 37 (1), (2)	54
Harbours, Docks, and Piers Clauses Act, 1847 (<i>c.</i> 27), <i>s.</i> 33	22
Highway Act, 1835 (<i>c.</i> 50), <i>s.</i> 91	963
Housing Act, 1936 (<i>c.</i> 51)—	
<i>ss.</i> 9 (1), (3), 15 (1)	1014
<i>s.</i> 156 (1) (<i>e</i>)	960
Income Tax Act, 1918 (<i>c.</i> 40)—	
<i>s.</i> 169	388
<i>sched.</i> D, <i>Case</i> III, <i>r.</i> 1 (<i>a</i>)	1075
<i>Case</i> V, <i>r.</i> 2	1090
Income Tax Act, 1945 (<i>c.</i> 32), <i>s.</i> 59 (3) (<i>b</i>)	16
Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (<i>c.</i> 17)—	
<i>s.</i> 12 (1) (<i>g</i>)	445
<i>s.</i> 14 (1)	87
<i>s.</i> 15 (1)	269, 1036, 1169
(3)	1036
Inheritance (Family Provision) Act, 1938 (<i>c.</i> 45), <i>s.</i> 1 (3) (<i>b</i>), (4)	318
Ireland Act, 1949 (<i>c.</i> 41), <i>s.</i> 3 (1) (<i>a</i>) (i), (2) (<i>a</i>)	1126
Land Registration Act, 1925 (<i>c.</i> 21), <i>s.</i> 70 (1) (<i>g</i>)	951
Landlord and Tenant Act, 1927 (<i>c.</i> 36), <i>ss.</i> 4 (1), 25 (1)	361
Larceny Act, 1916 (<i>c.</i> 50)—	
<i>s.</i> 1 (1)	1068
<i>s.</i> 43 (1) (<i>b</i>)	341
Law of Property Act, 1925 (<i>c.</i> 20)—	
<i>s.</i> 30	699
<i>s.</i> 164 (1) (<i>b</i>)	920
<i>s.</i> 177 (1)	928
<i>ss.</i> 195 (1), 205 (<i>x</i>)	699
Law Reform (Married Women and Tortfeasors) Act, 1935 (<i>c.</i> 30), <i>s.</i> 6 (1) (<i>c</i>)	328, 583
Leasehold Property (Temporary Provisions) Act, 1951 (<i>c.</i> 38)—	
<i>s.</i> 10 (1)	50, 332
<i>s.</i> 20 (1)	50

Legal Aid and Advice Act, 1949 (c. 51)—

s. 1 (5)	970
s. 6 (5), (6)	626
s. 12 (2) (b) (ii)	70
<i>sched. III</i>	626
<i>para. 4 (1)</i>	970
Limitation Act, 1939 (c. 21), s. 21 (1)	461, 583
Married Women's Property Act, 1882 (c. 75), s. 17	382
Matrimonial Causes Act, 1950 (c. 25)—	
s. 1 (1) (d), (2) (a) (d)	1185
s. 19 (3)	171
s. 23 (1)	798
Merchant Shipping Act, 1894 (c. 60), s. 419 (1)	978
Money Payments (Justices Procedure) Act, 1935 (c. 46), s. 8 (1) (a)	1002
National Health Service Act, 1946 (c. 81)—	
s. 54 (1), (2)	223
s. 72	596
National Service Act, 1948 (c. 64), s. 34 (4) (b) (c)	1126
Patents Act, 1949 (c. 87)—	
s. 41 (1) (b)	862
s. 44 (1)	862
s. 45 (3)	862
Pharmacy and Poisons Act, 1933 (c. 25), s. 18 (1) (a) (iii)	482
Prevention of Damage by Pests Act, 1949 (c. 55), s. 4 (1)	285
Public Health (London) Act, 1936 (c. 50), <i>sched. V, para. 8</i>	960
Public Health (Drainage of Trade Premises) Act, 1937 (c. 40), <i>ss. 2 (1), 4 (1), 14 (1)</i>	540
Railway and Canal Commission (Abolition) Act, 1949 (c. 11), s. 8 (2)	801
Railways Clauses Consolidation Act, 1845 (c. 20), s. 68	477
Rating and Valuation Act, 1925 (c. 90), s. 22 (1) (b)	1047
Rent and Mortgage Interest Restrictions (Amendment) Act, 1933 (c. 32)—	
<i>sched. I (a), (d)</i>	1036
(<i>h</i>), as amended by Rent and Mortgage Interest Restrictions Act, 1939 (c. 71), <i>sched. I</i>	99
Rivers Pollution Prevention Act, 1876 (c. 75), s. 3	179
Road and Rail Traffic Act, 1933 (c. 53)—	
s. 1 (1)	280
(<i>b</i>)	267
(3)	1098
<i>ss. 2 (4), 36 (1)</i>	267
Road Traffic Act, 1930 (c. 43)—	
<i>ss. 1, 4 (1)</i>	265
s. 15 (1)	344
s. 22 (1), (2)	550
s. 35 (1)	265, 291, 486
Sale of Goods Act, 1893 (c. 71), s. 4 (1)	15
Seeds Act, 1920 (c. 54)—	
s. 1 (1)	645
s. 6 (1)	651
s. 8 (1)	645
Settled Land Act, 1925 (c. 18), s. 64 (1)	103
Summary Jurisdiction Act, 1879 (c. 49)—	
s. 17 (1)	968
s. 21 (1)	495
s. 33 (1)	324
s. 35	545
Summary Jurisdiction (Married Women) Act, 1895 (c. 89), s. 9	495
Sunday Entertainments Act, 1932 (c. 51), s. 5	1061
Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 31 (1) (e)	601
Town and Country Planning Act, 1932 (c. 48), s. 10 (3)	1095
Town and Country Planning Act, 1947 (c. 51)—	
s. 16 (1)	580
s. 23 (1)	580, 1143
s. 75 (1)	1143
s. 78 (1)	1095
Transport Act, 1947 (c. 49)—	
s. 47 (3)	736
s. 79 (1) (i)	801
<i>sched. IX, paras. 1, 2 (1)</i>	736
<i>sched. X, para. 5</i>	801
Trustee Act, 1925 (c. 19)—	
s. 42	19
s. 57 (1)	103
Vagrancy Act, 1824 (c. 83), s. 3	282
Vehicles (Excise) Act, 1949 (c. 89)—	
s. 13 (1)	280
(2)	474
s. 27 (1)	492
Visiting Forces (British Commonwealth) Act, 1933 (c. 6), s. 2 (3) (b)	461
Water Act, 1945 (c. 42), s. 38 (3)	545
Wills Act, 1837 (c. 26), s. 83	301

LOCAL STATUTES

Derby Corporation Act, 1901 (c. cclxvii), <i>ss. 109 (1), 113</i>	179
Derbyshire and Nottinghamshire Electric Power Act, 1929 (c. lxxxvi), s. 37 (1) (2)	179
Doncaster Corporation Act, 1926 (c. xxvii), <i>ss. 71, 72</i>	54
Exeter Corporation Act, 1935 (c. cli), <i>ss. 108 (1), 109 (1), 112 (1) (b)</i>	502
Middlesex County Council Act, 1944 (c. xxi), s. 260 (1) (2)	1014

DOMINION STATUTE

West African Court of Appeal Ordinance (c. 229 of the Laws of Nigeria), s. 10	827
---	-----

RULES

	PAGE
Bankruptcy Rules, 1952 (S.I., 1952, No. 2113), <i>rr.</i> 130, 389	776
County Court Rules, 1936—	
<i>Ord.</i> 37, <i>r.</i> 2	350
<i>Ord.</i> 40A, <i>r.</i> 7, <i>Form</i> 342A, <i>para.</i> 2 (<i>h</i>), <i>para.</i> 2 (<i>k</i>), added by County Court (Amendment) Rules, 1951	332
Designs Rules, 1949 (S.I., 1949, No. 2368), <i>r.</i> 26	759
Judges' Rules, <i>r.</i> 3	1065
Matrimonial Causes Rules, 1950 (S.I., 1950, No. 1940)—	
<i>r.</i> 4 (1) (<i>h</i>)	797
<i>r.</i> 62 (2)	857
<i>r.</i> 65 (3)	70
R.S.C.—	
<i>Ord.</i> 2, <i>r.</i> 3	925
<i>Ord.</i> 3, <i>r.</i> 4	925
<i>Ord.</i> 11, <i>r.</i> 1 (<i>e</i>) (ii), (iii)	723
<i>Ord.</i> 14, <i>r.</i> 1	1158
<i>Ord.</i> 16, <i>r.</i> 2	149
<i>r.</i> 9	831
<i>Ord.</i> 25, <i>r.</i> 5	783, 1005
<i>Ord.</i> 36, <i>r.</i> 39	1188
<i>Ord.</i> 37, <i>r.</i> 17	764
<i>Ord.</i> 65, <i>r.</i> 27 (29)	970
(48)	698
<i>Ord.</i> 67, <i>r.</i> 6	857
<i>Ord.</i> 72, <i>r.</i> 2	149

REGULATIONS

Building (Safety, Health and Welfare) Regulations, 1948 (S.I., 1948, No. 1145)—	
<i>reg.</i> 4 (i)	694
<i>reg.</i> 5	395, 694
<i>reg.</i> 31 (3) (<i>a</i>), (<i>b</i>)	395
Defence (General) Regulations, 1939 (S.R. & O., 1939, No. 927, as amended)—	
<i>reg.</i> 51 (1), (2)	1071
<i>reg.</i> 56A (as amended); <i>sched.</i> VI, <i>Part</i> II	494
Docks Regulations, 1934 (S.R. & O., 1934, No. 279)—	
<i>reg.</i> 9	299
<i>reg.</i> 26	37
General Regulations, 1913 (S.R. & O., 1913, No. 748), <i>reg.</i> 1, made under the Coal Mines Act, 1911 (<i>c.</i> 50), <i>s.</i> 86	1194
Grinding of Metals (Miscellaneous Industries) Regulations, 1925 (S.R. & O., 1925, No. 904), <i>reg.</i> 13	97
Legal Aid (General) Regulations, 1950 (S.I., 1950, No. 1359)—	
<i>reg.</i> 8 (1)	1176
<i>reg.</i> 15 (2)	614
<i>reg.</i> 17 (1) (<i>a</i>)	1192
<i>reg.</i> 18 (3)	626, 1176
Protection of Eyes Regulations, 1938 (S.R. & O., 1938, No. 654), <i>sched.</i>	375
Regulations for Preventing Collisions at Sea (Sea Regulations, 1910 (S.R. & O., 1910, No. 1113)), <i>art.</i> 4 (<i>a</i>), <i>art.</i> 29	978
Transferred Undertakings (Compensation to Employees) Regulations, 1950 (S.I., 1950, No. 1083), <i>sched.</i> II, <i>para.</i> 4 (1) (i)	687
Woodworking Machinery Regulations, 1922 (S.R. & O., 1922, No. 1196), <i>reg.</i> 17	236

ORDERS

Assizes and Quarter Sessions (Convenient Court) Order, 1926 (S.R. & O., 1926, No. 774), <i>art.</i> 1 (<i>d</i>)	641
Control of Borrowing Order, 1947 (S.R. & O., 1947, No. 945), <i>art.</i> 2 (1)	436
Dock Workers (Regulation of Employment) Order, 1947 (S.R. & O., 1947, No. 1189), <i>cl.</i> 16 (2) (<i>b</i>)	1113
Double Taxation Relief (Estate Duty) (Canada) Order, 1946 (S.R. & O., 1946, No. 1884), <i>art.</i> V	76
Explosives in Coal Mines Order, 1934 (S.R. & O., 1934, No. 6), <i>cl.</i> 2 (<i>e</i>), (<i>h</i>)	1194
Industrial Disputes Order, 1951 (S.I., 1951, No. 1376), <i>art.</i> 10	593
Pre-packed Foods (Weights and Measures: Marking) Order, 1950 (S.I., 1950, No. 1125), <i>art.</i> 6 (3)	1146

MISCELLANEOUS

Institute Time Clauses (Freight), <i>cl.</i> 8	893
International Convention for Protection of Industrial Property, <i>art.</i> 5	862

WORDS AND PHRASES

	PAGE
<i>Above</i>	395
<i>Accident</i>	978
<i>Act or default</i>	1146
<i>Affected</i>	40
<i>All my furniture and movables . . . not consisting of mortgages shares bonds or securities</i>	982
<i>All practicable measures</i>	97
<i>Annual payment</i>	1075
<i>As administratrix</i>	1130
<i>As riparian owner . . . upon the river</i>	179
<i>Assisted person</i>	70
<i>Business</i>	536
<i>Charitable institutions referred to by me in this my will</i>	936
<i>Considered as ordinarily resident</i>	257
<i>Convicted</i>	827
<i>Debited . . . in the accounts of the gas undertaking . . . and credited . . . in . . . other account</i>	54
<i>Debt</i>	791
<i>Deemed to be employed</i>	226
<i>Employment in undertaking</i>	226
<i>Evection</i>	1109
<i>Existing company</i>	877
<i>Existing officer or servant</i>	687
<i>Final order</i>	545
<i>For account of</i>	1146
<i>For account of our [disclosed] principal</i>	1146
<i>Free of legacy duty and all other death duties</i>	76
<i>Good cause shown</i>	776
<i>Home</i>	814
<i>I bequeath unto my fiancée</i>	928
<i>In the interests of efficient farming</i>	1182
<i>Income arising to persons carrying on a trade . . . from property occupied . . . by them for the purposes thereof</i>	930
<i>Interest</i>	418
<i>Interest purchased or provided</i>	403
<i>Investment income</i>	930
<i>Just cause</i>	910
<i>Limit of re-charge</i>	16
<i>Loss</i>	663
<i>Most efficient guard</i>	236
<i>Motor vehicle</i>	265
<i>Movables</i>	982
<i>Musical entertainment</i>	1061
<i>Need</i>	223
<i>No charge</i>	344
<i>Not Guilty</i>	684
<i>Ordinarily resident in Great Britain</i>	1126
<i>Patter</i>	1061
<i>Person interested</i>	699
<i>Petroleum</i>	451
<i>Pictures</i>	469
<i>Place</i>	29
<i>Poison treatment or other work of no less effectual character</i>	285
<i>Predecessors in title</i>	361
<i>Previous occasions</i>	206
<i>Previous proceedings</i>	797
<i>Profits basis</i>	1047
<i>Reasonable maintenance</i>	798
<i>Reasonable travelling expenses</i>	705
<i>Retail trade or business</i>	50
<i>Right of payment of compensation</i>	687
<i>Self-service</i>	482
<i>Shipping and unshipping goods</i>	22
<i>Show under a separate heading or division</i>	54
<i>So far as is practicable without impeding the safe working of the ship</i>	37
<i>Social or other relationship</i>	357
<i>Subject to force majeure conditions</i>	94
<i>Subject to formal contract to be prepared by the vendors' solicitors if the vendors shall so require</i>	96
<i>Sufficient or candid</i>	601
<i>Suitable arrangements</i>	705
<i>To any three hospitals in . . . Devon which . . . are most in need of it</i>	223
<i>To show under a separate heading or division</i>	502
<i>Total time occupied by trial</i>	698
<i>Until re-marriage</i>	171
<i>Used</i>	1098
<i>Vessel from any accident not under command</i>	978
<i>Who shall be a member of the Church of England and an adherent to the doctrine of that church</i>	308
<i>Widow and administratrix</i>	925, 1130
<i>Works for the erection of a building</i>	1095
<i>£40 toward re-decoration</i>	269

CORRIGENDA

[1952] 2 All E.R.

- p. 940. WHITELEY v. WILSON. Line D.5: for "s. 8 (1) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920" read "s. 2 (2) of the Landlord and Tenant (Rent Control) Act, 1949".
- p. 1035. BARTHOLOMEW v. BARTHOLOMEW. Line B.5: for "interference" read "inference".

[1953] 1 All E.R.

- p. 5. BLACKMAN v. RAILWAY EXECUTIVE. Line 5: for "hear the plaintiff" read "hear the foreman".
- p. 246. DICKSON v. FLACK. Solicitors: for "*J. S. Coules & Co.*" read "*J. F. Coules & Co.*".
- p. 327. R. v. DISPUTES COMMITTEE OF THE NATIONAL JOINT COUNCIL FOR THE CRAFT OF DENTAL TECHNICIANS. Counsel: add "*Astell Burt* for the committee".
- p. 346. R. v. NORFOLK QUARTER SESSIONS. Line G.5: for "examining justices at Thetford", read "examining justices of the Grimshoe division sitting at Methwold, Norfolk".
- p. 361. FASMORE v. WHITBREAD & CO., LTD. Line F.2: after "commencement, of his tenancy", read "and five and a half years after the commencement of the tenancy".
- p. 614. KING v. T. & W. FARMILOE, LTD. Line H.3: read "He further ordered that both parties' costs should be taxed under reg. 18 (3) of the Legal Aid (General) Regulations, 1950, the plaintiff's costs to be taxed as between solicitor and client", instead of as printed.
- p. 637. Re JON BEAUFORTE (LONDON), LTD. Solicitors: for "*Burley & Geach*, Petersfield", read "*A. Mason Amery & Co.*, Cheltenham".
- p. 826. NICOLENE, LTD. v. SIMMONDS. Solicitors: read "*Lucien Fior* (for the defendant); *Gouldens* (for the plaintiffs)", instead of as printed.
- p. 844. DAVID TAYLOR & SON, LTD. v. BARNETT. Counsel: for "*S. Bolton*" read "*A. E. Bolton*".

THE ALL ENGLAND LAW REPORTS

INCORPORATING THE
LAW TIMES REPORTS
AND THE
LAW JOURNAL REPORTS

TOMLINSON v. RAILWAY EXECUTIVE.

C [COURT OF APPEAL (Somervell, Jenkins and Hodson, L.JJ.), November 3, 4, 1952.]

Carriage of Passengers—Injury to passenger—Snow on station platform—Delay in sanding and salting—Porter responsible otherwise urgently engaged—Liability of Railway Executive.

D Following a snowstorm snow on the platform of a railway station occupied by the defendants was trodden down and it became congealed and slippery. The only porter available started promptly to put sand and salt on the snow, but he had to stop doing so before the work was completed in order, in accordance with standing instructions, to light emergency lamps to prevent the station from being plunged into darkness in the event of a cut in electric power such as had recently been experienced. The plaintiff, a passenger, while alighting from a train, slipped on snow which had not been treated with sand and salt, fell, and was injured.

E
F HELD: under the contract under which the defendants carried the plaintiff they were under an obligation to provide her with safe means of egress from the train, but in the circumstances they had not failed to take reasonable care to see that the platform was reasonably safe, and, therefore, had not failed in their duty to the plaintiff.

AS TO SAFETY OF STATION PLATFORMS, see HALSBURY, Hailsham Edn., Vol. 4, pp. 67-69, para. 102; and FOR CASES, see DIGEST, Vol. 8, pp. 85, 86, Nos. 586-594.

G APPEAL by the defendants, the Railway Executive, against an order of PARKER, J., dated May 19, 1952, whereby he gave judgment for the plaintiff in an action for damages for personal injuries.

H The plaintiff was a passenger in one of the defendants' trains, and alighted at their railway station at Heathway, Dagenham. Just beforehand there had been a snowstorm, and the snow had been trodden down and had congealed into ice and become slippery. The defendants had provided buckets of sand and salt and had issued instructions as to sanding and salting snow to the only porter available. This porter had begun to sand and salt the snow, but he had had to break off to carry out the duty, imposed on him by standing instructions, of lighting emergency lamps without which the whole station would have been plunged into complete darkness in the event of a cut in electric power such as had recently been experienced. The plaintiff slipped on snow which had not been sanded and was injured, and in the present action she contended that

the defendants had not taken reasonable care to see that the premises were reasonably safe for her to use.

John Stephenson for the plaintiff.

Humfrey Edmunds for the defendants.

SOMERVELL, L.J.: Counsel for the defendants suggested that PARKER, J., had misdirected himself. He posed the question as being whether the defendants had taken reasonable care to see that the premises were reasonably safe. Of that the defendants do not complain, but they point out that in two other parts of the judgment the judge did use words which, if taken out of their context, might indicate that he was proceeding on the basis of an absolute duty in the defendants to see that the premises were reasonably safe. Reading the judgment as a whole, however, I am satisfied that he applied the law in the way in which he states it in the passage to which I first referred and that the other phrases he used were simply a "shorthand" for the duty as he had first expressed it.

There was argument before us whether the duty owed by the defendants to a passenger in respect of possible injury from snow on that part of the platform on which a passenger alights from a train arose under the contract of carriage or was to be found in the law of tort in relation to invitor and invitee. Though it probably does not make any difference in this case, I have come to the conclusion that the duty as defined by the learned judge arose under the contract of carriage.

We are concerned here with a particular sort of danger, the danger from snow. There is no question of an independent contractor employed by the defendants, or of whether the duty is to take reasonable care to make safe or to have premises as safe as reasonable care can make them. None of those questions arises because it is common ground that, if there was a failure here, it was a failure by the defendants or their servants to take reasonable care with regard to the snow. The learned judge found that the defendants had foreseen the possibility of snow getting on this platform and becoming slippery, but that they had failed to take reasonable care. I have come to a different conclusion. It was a very short time after the snowstorm that the accident happened. It seems to me it would be an impossible burden on people in the position of the defendants qua snowstorms to say that the snow must be sanded or salted as soon as it falls. If that was an absolute duty, it is difficult to see how reasonable care could provide for its performance. It was an unfortunate coincidence for the plaintiff that the duty of lighting the lamps coincided with the snowstorm, but no one can expect snow to be sanded or salted instantaneously. Everyone appreciates the danger of snow being slippery, although that does not mean that the defendants need not take reasonable steps to prevent its remaining in that condition. I cannot find that the plaintiff established a failure to take reasonable care. I would allow the appeal.

JENKINS, L.J.: I agree. I think the duty of the defendants to the plaintiff as regards the conditions of the platform at Heathway station was a contractual duty, for it must be an incident of a contract to carry a passenger by train that the passenger will be provided with means of ingress and egress into and from the train, and further that reasonable care will be taken by the carrier, in this case the defendants, to see that such means of ingress and egress are reasonably safe. In other words, I agree with the basis on which the learned judge put the duty.

That being the nature of the duty, the question whether it has been complied with in any given case is necessarily a question of fact and degree, on which one naturally hesitates to differ from the judge of first instance, but in the present case I think the extreme shortness of the time into which the relevant sequence of events was compressed is most significant. As I understand the

A learned judge's findings, the snow fell at some time between 3 and 3.45 p.m., the time of the accident. It was not until about 3.30 p.m. that the snow had accumulated and become trodden to an extent enabling the porter to appreciate that it might be a source of danger unless speedy measures by way of sanding and salting or shovelling the snow away were taken. The operation of sanding, it was said, would take some fifteen minutes. Therefore, it appears that the platform could only just have been made safe by 3.45, when the plaintiff alighted, if the time when the operation began, described as "about 3.30", was, in fact, not later than 3.30, even by a few minutes, and if the time required for the operation, put at fifteen minutes, was not under-estimated, even to a very slight extent. Owing to the necessity for the porter's presence elsewhere to prepare the lamps against the possibility of a power cut, he did not complete the work of sanding, which he might otherwise just have been able to do, by the time the plaintiff's train came in and the accident ensued.

B In my judgment, that is not to say that the defendants failed to take reasonable care. If that were so, their duty as regards unforeseeable and irregular climatic occurrences, such as sudden falls of snow, would be, not to take reasonable care to clear the snow away as soon as reasonably practicable, but to take measures, at I know not what expense, to ensure that at all times their resources in the way of staff and apparatus at the station were such that they would be in a position to clear away occasional unexpected falls of snow immediately on their occurrence. I agree with my Lord that the effect of this would be to cast a palpably higher duty on the defendants than the law warrants, and, in my opinion, the learned judge was in error in coming to a contrary conclusion. Accordingly, I would allow the appeal.

D HODSON, L.J.: I also agree. I agree with the learned judge that the duty on the defendants to take reasonable care as to the condition of the platform was a contractual obligation and did not derive, as counsel for the defendants sought to argue, from some relationship of the parties which gave rise to legal obligations external to the contract itself. It is conceded by the defendants that it does not make any difference whether one approaches the problem from that point of view or from that of applying the law as to invitor and invitee. The learned judge, having directed himself in that way, came to the conclusion that the defendants had not taken reasonable care. In considering that question he, I think, came to a wrong conclusion. This is not a case in which the Court of Appeal will not interfere because the judge has arrived at conclusions of fact on conflicting evidence. The facts are clearly set out in the judgment, and there is no dispute about them. The only question is: What is the inference to be drawn from those facts? With respect to the learned judge, I think it is impossible to draw the conclusion that the defendants did not take reasonable care with regard to this platform, and, therefore, I agree that the appeal should be allowed.

Appeal allowed.

G Solicitors: *G. Howard & Co.* (for the plaintiff); *M. H. B. Gilmour* (for the defendants).

[*Reported by F. A. AMIES, ESQ., Barrister-at-Law.*]

BLACKMAN v. RAILWAY EXECUTIVE.

[QUEEN'S BENCH DIVISION (Hilbery, J.), December 1, 2, 3, 1952.]

323.

Negligence—Invitee—Railway station—Passenger slipping on patch of oil—Duty owed by Railway Executive.

Part of a railway station occupied by the defendants was used for the loading and unloading of mail vans, for mail bags and trolleys, and for standing barrows used to convey mail bags to platforms, but there was nothing to show that passengers should not go on that part. On the removal of certain of the barrows the foreman on duty noticed a patch of oil which had dripped on the ground and had previously been hidden by the barrows. He at once tried to stop people passing that way and directed a trolley driver to get sawdust and put it on the oil. The plaintiff, while crossing the part of the station in question and not hearing the foreman, who did not see her, slipped on the oil, fell, and was injured.

HELD: the plaintiff was an invitee of the defendants: *Bloomstein v. Railway Executive* ([1952] 2 All E.R. 418) applied; the defendants had not failed to exercise reasonable care to keep the part of the station in question reasonably safe for passengers; and, therefore, they were not liable to the plaintiff for negligence.

Tomlinson v. Railway Executive, ante, p. 1, applied.

AS TO DUTY TO INVITEES, see HALSBURY, Hailsham Edn., Vol. 23, pp. 600-609, paras. 851-858; and FOR CASES, see DIGEST, Vol. 36, pp. 35-45, Nos. 208-281.

Cases referred to:

(1) *Bloomstein v. Railway Executive*, [1952] 2 All E.R. 418.

(2) *Tomlinson v. Railway Executive*, ante, p. 1.

(3) *Stowell v. Railway Executive*, [1949] 2 All E.R. 193; [1949] 2 K.B. 519; [1949] L.J.R. 1482; 2nd Digest Supp.

ACTION for damages for negligence.

The defendants, the Railway Executive, were the occupiers of Paddington Station, London. One entrance to the station from the approach road leading out of Praed Street comprised a narrow roadway with a pavement for foot passengers on either side and leading into the great hall of the station. On the right of this entrance there was a cloak-room for the deposit of baggage and on the left the "urgent parcels office" and a bookstall. The entrance was used by mail vans, and all that part of the station, except in front of the cloak-room and round the bookstall and the way to a lost property office in the corner, was used for the loading and unloading of mail vans, for mail bags and trolleys, and for standing barrows (four-wheeled, flat barrows, with iron wheels on iron axles, which, when loaded with mail bags, could be hooked on to each other to form a train drawn by a motor trolley to the platform for the loading of the mail bags into their train). This part of the station, except the corner where the lost property office was, was shut off on the south-east side by the station buildings used by railway employees and on the north-east side by a large train arrival indicator and movable barriers, but it was open on the north-west and south-west sides for the barrows to get away to the platforms. There was no need for passengers to go across this part of the station, and while the mail vans and barrows were there passengers were obstructed from going across it. There was no marking to show the bounds within which a passenger entering by the entrance was intended to move or to denote that he should not go on that part of the station.

On May 19, 1948, shortly after 5 p.m., the removal of barrows from this part of the station revealed to the foreman on duty there a thick patch of oil which had dripped on the ground and had previously been hidden by the barrows. He at once tried to stop people coming round that way, keeping them

as close as he could to the front of the bookstall, and he shouted to a trolley driver to get sawdust and put it on the oil. The plaintiff came in by the entrance which has been described on her way to the underground station and went across where the barrows had been standing as the nearest way to get round the train arrival indicator. She did not hear the plaintiff shout and he did not see her go behind him. She slipped on the oil, fell, and was injured.

The defendants denied negligence.

Merriton for the plaintiff.

N. Lawson for the defendants.

HILBERY, J., stated the facts, assessed the plaintiff's damages at £500, and continued: As the plaintiff was coming on the railway premises to become a passenger on the underground railway I had to ascertain first whether she was an invitee or merely a licensee on Paddington Station which is part of the premises of the western section of the Railway Executive and not underground railway premises of the London Transport Executive. That matter was examined by PARKER, J., in *Bloomstein v. Railway Executive* (1), in which he held that such a passenger was an invitee of the Railway Executive because, he said ([1952] 2 All E.R. 418):

"Under the Transport Act, 1947, s. 12 (1), all the properties of the railway undertakers specified in sched. III, Part I, which properties included both Euston Station, which had belonged to the London, Midland and Scottish Railway Co. and also the underground railway undertaking of the London Passenger Transport Board, vested in the British Transport Commission. The powers, liabilities and duties of the commission have been delegated to the various executives including the Railway Executive and the London Transport Executive. Section 5 (4) of the Act provides: 'Each executive shall, as agents for the commission, exercise such functions of the commission as are for the time being delegated to them by or under a scheme made by the commission and approved by the Minister.' Sub-section (9) provides: 'As respects matters for the time being falling within the scope of any such delegation, the following provisions shall have effect except as between the executive and the commission, that is to say—(a) any rights, powers and liabilities of the commission shall be treated as rights, powers and liabilities of the executive, and the executive only . . .' It seems to me that the duty of invitor to invitee is owed by the British Transport Commission in respect of its properties, and for convenience those duties of the commission are to be treated as the duties of the executive in question. Accordingly, it seems to me that under the Act of 1947 the duty that the commission owed to the plaintiff as a passenger on the underground part of their transport system is to be treated as a duty of the executive within whose premises the plaintiff's injury was received . . ."

Therefore, he came to the conclusion that the plaintiff, although on Euston Station, intending to be a passenger on the underground railway, was an invitee of the Railway Executive. In those circumstances I treat the plaintiff in the present case as an invitee of the defendants, but an invitee of the defendants where? There is nothing at Paddington Station to show passengers that they are not entitled to cross this part of the station and they cannot do so when it is obstructed by the barrows unless they choose to thread a way between the barrows, but the very presence of a large number of standing barrows and mail vans there is, I think, ordinarily a sufficient indication that passengers are not invited to go that way. I think that anybody coming in by that entrance would know that a passenger is intended to turn to the left close to the bookstall, or to the right close along the front of the cloak-room, but there is no particular marking to show the bounds within which a passenger is intended

to move and nothing to denote to a passenger that this part of the station where the mail barrows are is a place on which a passenger must not go. Passengers do cross there when taking a short cut from the entrance to certain platforms. In the circumstances, therefore, I treat the plaintiff as an invitee on this part of the station.

What, then, is the measure of the duty which the defendants owed the plaintiff? I have been referred to *Tomlinson v. Railway Executive* (2), a recent decision of the Court of Appeal which bears many resemblances to the present case. [HIS LORDSHIP stated the facts of the case and read from the judgment of SOMERVELL, L.J., ante, p. 2 and continued:] The Court of Appeal treated the case as one where there was a duty to take reasonable care to have the premises reasonably safe for the passengers. The patch of oil here is not unlike a snow-fall. Just as sand was kept available in case of snow, so here sand and sawdust were kept available to meet cases where something made the surface of the ground slippery. On the other hand, in *Stowell v. Railway Executive* (3) where one of the platforms of a railway station, which had been used during the night for fish traffic, was found to have been left in a slippery condition so that a person coming to meet passengers slipped and fell and injured himself, the Railway Executive were held liable.

I have to ask myself whether there was any failure to exercise reasonable care to keep this part of Paddington Station reasonably safe for passengers. Just as the recent fall of snow in *Tomlinson v. Railway Executive* (2) left little time for the porter to complete sanding and do his other jobs, so here the oil patch was not apparent as anything that might affect passengers until the barrows were moved. The foreman immediately took steps to eliminate the possible danger. The purpose for which this part of the station is used necessitates its being on the same level as the rest of the great hall, and prevents its being permanently fenced off against use by passengers. In the circumstances, in my opinion, although everyone, including the defendants, knows that, wherever motor vehicles stand for any length of time with well-oiled axles and wheels, oil is liable to drip and form a slippery patch, there was no failure to observe that such an oil patch had been formed within a reasonable time, or to take prompt steps to remove the danger. The foreman saw the oil at once and set about removing it at once. Can it fairly be said that the steps which he took were not reasonably sufficient steps? The defendants, as occupiers of these premises, are not insurers. They do not guarantee a person coming on the premises against any accident or against slipping or falling. All they must do is to take reasonable steps to keep the premises as free from danger as they reasonably can be kept. Whether reasonable steps have been taken is a question of degree. Different courts might take different views of the matter, but I think the plaintiff has failed to show that the accident was due to a failure on the part of the defendants' employees to exercise reasonable care. There will be judgment for the defendants.

Judgment for the defendants.

Solicitors: *A. Bieber & Bieber* (for the plaintiff); *M. H. B. Gilmour* (for the defendants).

[Reported by F. A. AMIES, ESQ., Barrister-at-Law.]

GODFREY PHILLIPS, LTD. v. INVESTMENT TRUST
CORPORATION, LTD., AND OTHERS.

[CHANCERY DIVISION (Wynn-Parry, J.), November 11, December 10, 1952.]

Company—Dividend—Underpayment—Cumulative preference shares—Distribution of aggregate sum in respect of underpayment—Period of deficiency—Shareholders entitled to share in distribution—Rate of income tax deductible.

A From 1939 the plaintiff company used a certain method of computing the cumulative dividend payable on the "B" cumulative preference shares. In September, 1948, this method was challenged by a holder of those shares, and on July 26, 1951, the House of Lords held that, on the true construction of the company's article which defined the rights in regard to dividend of the "B" cumulative preference shares, the method of computation employed by the company since 1939 was wrong, and, in consequence, the dividend had been underpaid. Throughout this period the dividends on cumulative preference shares which ranked after the "B" preference shares were paid in full, and dividends were paid on the ordinary shares. The company now sought the opinion of the court on the questions (i) whether the first dividend which was to be regarded as deficient was the payment made on Oct. 31, 1939, or the payment made on Oct. 31, 1948; (ii) whether the aggregate sum which should be paid to the holders of the "B" preference shares in respect of the underpayment (a) should be distributed among the holders of those shares registered at the respective times when the deficient dividends were paid; or (b) should be paid wholly to those registered at the time of the payment of the aggregate sum; and (iii) whether the income tax which, under s. 184 (1) of the Income Tax Act, 1952 (replacing r. 20 of the All Schedules Rules in sched. I to the Income Tax Act, 1918, as amended by s. 39 (1) of the Finance Act, 1927), the company was entitled to deduct when distributing the aggregate sum by way of dividend should be computed at the various standard rates in force at the dates when the deficient dividends were paid or at the standard rate in force at the time when the aggregate sum was distributed.

HELD: (i) too small a dividend on the "B" preference shares having been declared on each occasion since Oct. 31, 1939, on no such occasion was any debt created in regard to the amount by which the dividend was deficient, but the continued existence of the rights of the holders of those shares was not affected by the fact that full effect had not been given to those rights, and, although they could not sue for the recovery of the amount by which the dividend was short, they could sue for a declaration that the company was not entitled to pay any dividend on any inferior class of shares without first satisfying their rights in full, and for an injunction on the footing of such a declaration; in such a claim, no statutory period of limitation would be applicable, and, therefore, apart from any question of waiver or estoppel, they would be entitled to maintain their claim in respect of the amount by which they had been underpaid; on the facts, these shareholders had not waived their rights as regards past years, nor was there any such representation of fact on their part as would be necessary to found an estoppel; and, therefore, in calculating the aggregate sum which ought to be paid to them as representing the amount by which the sums already paid to them on account of the cumulative preferential dividend on the "B" preference shares fell short of the sums which ought to have been paid, the earliest payment which was to be regarded as deficient was that made on Oct. 31, 1939.

Matthews v. Great Northern Ry. Co. (1859) (28 L.J.Ch. 375), distinguished.

(ii) when the aggregate sum payable to the holders of the "B" preference shares in regard to the deficiency on the sums already paid to

them was distributed the distribution would take the form of a dividend, and, although that dividend would be calculated by reference to a period extending back to October, 1939, it would be solely in respect of the year in which it was declared, and, therefore, it could be paid only to those persons who were registered as the holders of "B" preference shares at the time when it was declared.

Re Wakley ([1920] 2 Ch. 205), applied.

(iii) the rate of income tax which the company was entitled to deduct, under the Income Tax Act, 1952, s. 184 (1), when distributing the aggregate sum by way of dividend, was the standard rate in force when the dividend was declared.

AS TO DIVIDENDS ON PREFERENCE SHARES, see HALSBURY, 1949 Edn., Vol. 5, p. 456, para. 723; and FOR CASES, see DIGEST, Vol. 9, pp. 597, 598, Nos. 3985-3994.

Cases referred to:

- (1) *Friends Provident & Century Life Office v. Investment Trust Corpn., Ltd.*, [1951] 2 All E.R. 632; 2nd Digest Supp.
- (2) *Mathews v. Great Northern Ry. Co.*, (1859), 28 L.J.Ch. 375; *sub nom. Mathews v. Great Northern Ry. Co.*, 32 L.T.O.S. 355; 10 Digest 1161, 8214.
- (3) *Birmingham Canal Co. v. Lloyd*, (1812), 18 Ves. 515; 34 E.R. 413; 28 Digest 428, 522.
- (4) *Great Western Ry. Co. v. Oxford, Worcester & Wolverhampton Ry. Co.*, (1853), 3 De G.M. & G. 341; 43 E.R. 133; 28 Digest 548, 1554.
- (5) *Fullwood v. Fullwood*, (1878), 9 Ch.D. 176; 47 L.J.Ch. 459; *sub nom. Fulwood v. Fulwood*, 38 L.T. 380; 28 Digest 391, 207.
- (6) *Re Wakley*, [1920] 2 Ch. 205; 89 L.J.Ch. 321; 123 L.T. 150; 9 Digest 598, 3994.

SPECIAL CASE, submitted under R.S.C., Ord. 34, r. 1, for the determination of certain questions of law arising out of the decision of the House of Lords, given on July 26, 1951, and reported [1951] 2 All E.R. 632, in *Friends Provident & Century Life Office v. Investment Trust Corpn., Ltd.* (1), whereby their Lordships determined the correct method of computing the cumulative dividend payable on the "B" cumulative preference shares of the plaintiff company, Godfrey Phillips, Ltd.

The effect of their Lordships' decision was that the dividend must be regarded as having been underpaid for several years past, and, by the indorsement of claim on the writ in the present action, the plaintiff company claimed, *inter alia*:

"(1) A declaration that, in calculating the aggregate sum which ought to be paid to the holders of the 'B' cumulative preference shares in the capital of the plaintiff company, as representing the amount by which the sums already paid by the plaintiff company on account of the cumulative preferential dividend on such shares falls short of the sums which ought to have been paid on account thereof, the earliest half-yearly payment on account of such dividend which is to be regarded as having been deficient (which payment is hereinafter referred to as 'the relevant payment') was that made on Oct. 31, 1948. (2) Alternatively, a declaration that the relevant payment was that made on Oct. 31, 1939. (3) A declaration that the said aggregate sum is divisible exclusively among the holders of the said 'B' cumulative preference shares appearing as such on the register of members of the plaintiff company at the time of payment of the said aggregate sum. (4) Alternatively, a declaration that so much of the said aggregate sum as represents the deficiency of a particular half-yearly payment of the said dividend is divisible among the persons who

appeared as holders of the said 'B' cumulative preference shares on the said register at the time when that half-yearly payment was paid, whether or not such persons shall appear as such at the time of payment of the said aggregate sum. (5) A declaration that the rate of income tax which the plaintiff company is entitled to deduct from the said aggregate sum is the standard rate in force at the date of payment thereof. (6) Alternatively, a declaration that the rate of income tax which the plaintiff company is entitled to deduct from so much of the said aggregate sum as represents the deficiency of a particular half-yearly payment of the said dividend is the standard rate in force at the date when that half-yearly payment was paid."

The following summary of the facts is taken from the Special Case. The plaintiff company was incorporated on Dec. 10, 1908, under the Companies Acts, 1862 to 1907, as a company limited by shares. Its present issued share capital was £2,365,990, divided into two hundred and fifty thousand cumulative preference shares of £1 each, three hundred thousand "B" cumulative preference shares of £1 each, three hundred thousand "C" cumulative preference shares of £1 each, £1,431,827 ordinary stock, and 841,630 ordinary shares of 2s. each. All the shares were fully paid up. The ordinary shares and stock ranked *pari passu* in all respects. The rights conferred on the holders of the "B" cumulative preference shares, which had been in the same form ever since these shares were created and issued in 1919, were now contained in art. 5 (A) (ii) of the company's present articles, which were adopted in 1949. Article 5 (A) (ii) reads:

"The 'B' cumulative preference shares confer the right to a fixed cumulative preferential dividend at such rate that after deduction of income tax thereon at the current rate for the time being (irrespective of any allowance or rebate in the case of a particular shareholder) the amount remaining shall be the clear sum of six per cent. per annum on the capital paid up thereon less the amount of any income tax for the time being payable in excess of 6s. in the pound computed on the gross sum of six per cent. per annum on such capital, such dividend to rank next after the dividend payable in respect of the said two hundred and fifty thousand cumulative preference shares and in priority to the dividend on the said three hundred thousand 'C' cumulative preference shares and also on the ordinary shares for the time being of the company, but no further right to participate in the profits of the company."

By art. 71 of the present articles (replacing art. 71 of the articles of 1935), the "B" cumulative preference shares were not to confer on the holders thereof the right to attend or vote at any general meeting unless (*inter alia*) the dividend thereon should be in arrear for more than one month. By art. 120, art. 121 and art. 124 of the present articles (replacing, respectively, art. 120, art. 121 and art. 124 of the articles of 1935 which were in identical terms):

"120. The profits of the company available for dividend and resolved to be distributed shall be applied in the payment of dividends to the members in accordance with their respective rights and priorities. The company in general meeting may declare dividends accordingly. 121. No dividend shall be payable except out of the profits of the company, or in excess of the amount recommended by the directors. 124. The directors may, if they think fit, from time to time pay to the members in respect of those shares in the capital of the company which confer on the holders thereof deferred rights as well as in respect of those shares which confer on the holders thereof preferential rights with regard to dividend such interim dividends as appear to the directors to be justified by the profits of the company, and provided that the directors act *bona fide* they shall not incur any responsibility to the holders of shares conferring

a preference for any damage that they may suffer by reason of the payment of an interim dividend on any shares having deferred rights. The directors may also pay half-yearly, or at other suitable intervals to be settled by them, any dividend which may be payable at a fixed rate if they are of opinion that the profits justify the payment."

An amount purporting to be the dividend on the "B" cumulative preference shares had been paid half-yearly, on Apr. 30 and Oct. 31 in each year, since the shares were issued. Until the end of 1948 each half-yearly payment was made without any formal resolution of the directors in regard to the payment, the procedure in regard thereto being that the dividend warrants, bearing a printed facsimile signature of one of the directors and initialled by the secretary of the company or his authorised deputy, were sent out by the secretary on every payment date and the accounts containing a corresponding appropriation out of the profits of the company were adopted at the next succeeding annual general meeting. Before 1951 notices of these meetings were not sent to holders of the "B" cumulative preference shares, and during the period from 1939 to 1950 inclusive the holders of these shares did not vote as such on any resolutions of the company in general meeting except on the special resolution adopting the present articles of the company. The standard rate of income tax first rose above 6s. in the pound for the fiscal year 1939-40 and had remained above that rate ever since. From 1939 until Apr. 30, 1951, the company calculated the dividend on the "B" cumulative preference shares in accordance with the following example for a holding of a hundred shares, a dividend for a full year, and a standard rate of tax at 9s. in the pound:

	£	s.	d.
Six per cent. on one hundred shares of £1 each	6	0	0
Equivalent to gross (at 6s. in the pound)... ..	8	11	5
Less income tax at 6s. in the pound	2	11	5
	6	0	0
Less income tax at 3s. in the pound calculated on the gross sum of £8 11s. 5d.	1	5	8
	4	14	4

In September, 1948, a holder of "B" cumulative preference shares challenged this method of calculation, and on Dec. 22, 1948, the company commenced proceedings by originating summons for a declaration on the true construction of art. 5 (A) (ii). By an order of VAISEY, J., made on Feb. 23, 1949, the company's method of calculation was approved. By an order dated Oct. 25, 1950, the Court of Appeal reversed the order of VAISEY, J., and held that, for any year in which the rate of income tax was more than 6s. in the pound, the deduction in respect of the excess ought to be calculated on the amount of £6 per centum on the capital paid up and not on that amount grossed up at 6s. in the pound, so that for a year in which the rate of income tax was 9s. in the pound the net amount of the dividend on £100 "B" cumulative preference shares (fully paid up) would be £6 less 18s., or £5 2s. On July 26, 1951, the decision of the Court of Appeal was affirmed by the House of Lords. From Apr. 30, 1949, to Apr. 30, 1951, the half-yearly dividends on the "B" cumulative preference shares were paid pursuant to resolutions of the directors of the company, but were made on the basis now held to be erroneous. Payments made after Apr. 30, 1951, were calculated in accordance with the decision of the House of Lords. For every year in which the dividend on the "B" cumulative preference shares was underpaid the dividend on the "C" cumulative preference

shares (which rank subsequently to the "B" cumulative preference shares) was paid in full, and interim and final dividends were paid on the ordinary shares and stock. For each of the years from 1939 to 1951 the final dividends paid on the ordinary shares and stock were paid pursuant to resolutions of the directors recommending such dividends and to declarations of such dividends by the company in general meeting.

A The questions on which the company now sought the opinion of the court, stated shortly, were (a) from what date the dividend payable on the "B" cumulative preference shares had been underpaid, (b) whether the balance of the dividend should be distributed among the holders of the "B" cumulative preference shares registered at the respective times when the deficient dividends were paid or should be paid wholly to those registered at the time when the balance was hereafter paid, and (c) whether the income tax which the company was entitled under s. 184 (1) of the Income Tax Act, 1952 (replacing r. 20 of the All Schedules Rules as amended by the Finance Act, 1927, s. 39 (1)), to deduct from the balance should be computed at the various standard rates in force at the dates when the deficient dividends were paid or at the standard rate in force at the time when the balance was paid.

B *R. J. T. Gibson* for Godfrey Phillips, Ltd.

Instone for Investment Trust Corporation, Ltd., a holder of "B" cumulative preference shares.

R. W. Goff for Friends Provident and Century Life Office, a holder of "C" cumulative preference shares, and for a holder of ordinary shares and stock.

D *Victor Coen* for the executor of a former holder of "B" cumulative preference shares who sold her shares in 1949 (and died on Dec. 14, 1951).

Cur. adv. vult.

Dec. 10. WYNN-PARRY, J., read the following judgment. I propose to deal first with para. 1 and para. 2 of the indorsement on the writ, which ask for alternative declarations. Between them they raise this question. In calculating the aggregate sum which ought to be paid to the holders of the "B" preference shares in the capital of the company as representing the amount by which, having regard to the decision of the House of Lords in *Friends Provident & Century Life Office v. Investment Trust Corp'n., Ltd.* (1), the sums already paid on account of the cumulative preferential dividend on such shares falls short of the sums which ought to have been paid on account thereof, the earliest half-yearly payment on account of such dividend which is to be regarded as having been deficient is that which was made on Oct. 31, 1948, the date of the half-yearly payment made next after the date when the old method of calculating the dividend was first challenged, or, alternatively, that made on Oct. 31, 1939, the date of the half-yearly payment made next after the standard rate of income tax first rose above 6s. in the pound.

G It is well established that, in respect of a right to dividend on a share, no debt is created until a dividend is declared. Over the maximum period involved, which goes back to Oct. 31, 1939, too small a dividend was declared on each occasion. In respect of each dividend actually declared a debt was created in favour of each holder of "B" preference shares, but, in respect of what I may call the "shortfall", on no such occasion was any debt created. Full effect was not given to the rights of the holders of the "B" preference shares, but the continued existence of those rights was not affected by reason of such failure. It follows that, apart from any question of waiver or estoppel, which I will consider later, the holders of the "B" preference shares could insist as against the company and the holders of the shares and stock of the inferior classes that before any further distribution of profits should be made the amount by which the payment of dividend in respect of the "B" preference shares over the period from Oct. 31, 1939, was short should first be distributed in respect of those shares.

It is argued, however, that, having regard to the facts set out in the Special Case, outside which, of course, I cannot go, the holders of the "B" preference shares cannot so insist, because they have barred themselves by acquiescence or laches or waiver or are estopped from asserting their right so as to insist in respect of any earlier period than that beginning on Oct. 31, 1948. In his argument counsel for the holders of the "C" preference shares and of ordinary shares and stock sought to rely on *Matthews v. Great Northern Ry. Co.* (2), the headnote of which reads as follows:

A

"By an Act of Parliament it was enacted, that it should be lawful for any shareholder who should have paid up one half the amount of any share or shares of the G.N.R. Company, to require each share to be converted into two half-shares, whereof the one half which should be so fully paid up should be denominated deferred half-share, and the other half of such share should be denominated guaranteed half-share; and thenceforth in respect of each whole share so divided, the whole of the interest and dividends which would in each year have accrued should be applied in or towards payment, in the first place, of interest or dividend after the rate of £6 per cent. per annum on the amount paid upon the half-share so denominated 'guaranteed', and the remainder, if any, should alone be payable to the half-share so denominated 'deferred', provided that the company should not pay any other or greater amount of interest or dividend upon the two half-shares than was for the time being paid on each undivided share:—*Held*, upon the construction of this section, that the holders of guaranteed half-shares were entitled to be paid their £6 per cent. in each year not only out of the dividends accruing in that year, but out of all subsequent dividends; and, therefore, if in any year the dividends were more than sufficient to pay £6 per cent. on the guaranteed half-shares, the surplus must be applied in payment, in the first place, of all arrears due on those half-shares in respect of past deficiencies before any dividend could be declared on the deferred half-shares. The holders of the guaranteed half-shares having in a former year acquiesced in the declaration of a dividend on the deferred half-shares, whilst there was an arrear of dividend due on the guaranteed half-shares,—*Held*, that although they had precluded themselves from making any claim in respect of those particular arrears, they had not thereby renounced their rights in respect of subsequent arrears."

B

C

D

E

The argument for the defendants is reported as follows:

F

"*Mr. Rolt, Mr. Denison and Mr. T. Stevens*, for the defendants, contended that, according to the true construction of the Act of Parliament of 1848, the guaranteed dividends for each year were to be made good only out of the dividends declared for that year, and if in any year there was not sufficient to pay £6 per cent. the holders of B stock were not entitled to have the arrears paid up out of dividends declared in subsequent years. This construction was acquiesced in in 1854, and could not now be dissented from."

G

Most of the judgment of Wood, V.-C., was devoted to a consideration of the scope of the rights of the holders of the guaranteed half-shares and the deferred half-shares. Towards the end of his judgment, however, he said (28 L.J.Ch. 382):

H

"Then comes the question of laches. It does not appear that I can hold parties to be precluded, because they stand by acquiescing in a certain sense, that is to say, not asserting their rights upon a construction adverse to their view taken by the directors as it was taken in the report of 1854. When I say adverse, I do not quite coincide with what Mr. Denison urged, that it does not appear that there was any assertion of right. The directors

announced their view, and nobody said anything. They were content to take their dividend. Upon that I hold that they cannot call back the dividends which have been paid down to that time, but I do not think that that precludes them for all time from saying that they have not renounced their rights, or that the persons who may have bought A. shares with the notion that their rights were different from what the court has now held them to be, can say to the B. shareholders, You who, rather than go into litigation, acquiesced in having the money, which might have been paid in a particular way, appropriated in a different way during a certain period of time, are therefore bound in all time to give up that right. There is nothing in the shape of misrepresentation or fraudulent holding out to make me say, there is an equity to be fastened on all the B. shareholders for all time by reason of their acquiescing in the view which might have been then taken."

It is to be observed that in the argument it was urged that there had been acquiescence in the past, but that this was put forward with a view to sustaining the point that such acquiescence operated to alter the rights of the holders of the guaranteed stock for the future. The judgment of Wood, V.-C., proceeds on the basis that there had been acquiescence as regards the prior period, for which conclusion he gives no express reason, but that such acquiescence could not affect the future. He treats it as a case in which a plea of laches could have been advanced against any attempt to "call back" the dividend, to use his own phrase.

I have felt it necessary to refer to that case, because, as I have said, it was relied on in argument, and because the doctrine of acquiescence appears to have been relied on by Wood, V.-C. It is not, however, necessary for me, I think, to say more about that case than that, in my view, it does not touch the present case, in which neither acquiescence nor laches can, to my mind, play any part. The matter may be tested in this way. So long as no dividend or an insufficient dividend is declared, a holder of "B" preference shares has no right to sue for the recovery of any money. His only right would be to sue for a declaration that the company is not entitled to pay any dividend on any inferior class of shares without first satisfying in full the rights of the holders of "B" preference shares and for an injunction on the footing of such a declaration. Such an action would be for the enforcement of a legal right, and the injunction would be sought merely in aid of that legal right. Now, where an injunction is sought merely in aid of a legal right, then lapse of time, unaccompanied by anything else, does not bar the right to the injunction, at any rate at the trial of the action, unless it would have barred the corresponding action at law: see *Birmingham Canal Co. v. Lloyd* (3), *Great Western Ry. Co. v. Oxford, Worcester & Wolverhampton Ry. Co.* (4), and *Fullwood v. Fullwood* (5). In such a claim as I am considering no statutory period of limitation would be applicable, and, therefore, *prima facie*, the holders of "B" preference shares would be entitled to maintain their claim in respect of the amount by which they have been underpaid.

It was argued that either they must be taken to have waived their rights as regards past years, or else as regards those years they would be estopped from asserting their rights. As regards waiver, I can find nothing in the Special Case to indicate that there has been anything in the nature of waiver. As regards estoppel, it is clear that the holders of "B" preference shares could not be precluded from asserting the true construction of the articles of association, because that construction has been pronounced on by the House of Lords in *Friends Provident & Century Life Office v. Investment Trust Corpn., Ltd.* (1), and must apply for the future. Even if an estoppel could be pleaded in respect of the past years, I am unable to see how it could be established on the evidence in the Special Case and the accompanying documents. I cannot

find any such representation of fact as would be necessary to found an estoppel, nor, assuming that difficulty to be overcome, is there any sufficient evidence that the company altered its position to its detriment.

An argument was advanced on behalf of the holders of "B" preference shares who have parted with their shares, which I had great difficulty in following. It involved the assertion, no doubt in a writ, by such a holder that the company owed him the amount by which he had been underpaid in the past as a debt presently payable. This assertion, the argument admitted, was completely false, but it was contended that the company could not, itself, assert the falsity. Apparently, the action would have progressed by the company putting in a defence pleading that no dividend had been declared, whereupon the former holder of "B" preference shares would have put in a reply pleading that the company was estopped from setting up the plea of no declaration of dividend. This analysis must demonstrate the hopelessness of such an argument, because it involves completely forgetting that estoppel can only be a matter of defence and cannot be used, even in a reply, to found a cause of action. I, therefore, conclude that the relevant payment was that made on Oct. 31, 1939, and I shall, therefore, make a declaration in the sense of para. 2 of the indorsement on the writ.

I now proceed to deal with para. 3 and para. 4 of the indorsement on the writ, which raise the question whether the aggregate sum to which I have referred is divisible exclusively among the holders of the "B" preference shares appearing as such on the register of members of the company at the time of payment of the aggregate sum, or whether, in fact, persons who were holders of "B" preference shares during the material period, but who have sold them, are entitled to share in such distribution in the manner specified in para. 4 of the indorsement on the writ. Subject as below mentioned, in my view, this question must be answered in the former sense, for the simple reason that, when the aggregate sum is distributed, the distribution will—as, indeed, it must—take the form of a dividend, and, although that dividend will be calculated by reference to a period extending back to October, 1939, it will be a dividend solely in respect of the year in which profits are declared for division, the amount being by virtue of art. 5 (A) (ii) of the company's articles, as construed by the House of Lords in *Friends Provident & Century Life Office v. Investment Trust Corpn., Ltd.* (1), determined by the whole amount of the aggregate sum: see *Re Wakley* (6). Such a dividend could only be paid to those persons who are registered as the holders of "B" preference shares at the time of the declaration of the dividend. I shall, therefore, make a declaration in the sense of para. 3 of the indorsement on the writ, but the declaration will refer to the time of the declaration of the dividend by which the aggregate sum is distributed instead of to the time of payment of the aggregate sum. As regards para. 5 and para. 6 of the indorsement on the writ, it follows from what I have said in dealing with para. 3 and para. 4 that the rate of income tax which the company is entitled to deduct when distributing the aggregate sum by way of dividend is the standard rate in force when the dividend is declared.

Declarations accordingly.

Solicitors: *Gouldens* (for all parties).

[Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.]

J. MARCEL (FURRIERS), LTD. v. TAPPER.

[QUEEN'S BENCH DIVISION (Hilbery, J.), November 28, December 3, 1952.]

Sale of Goods—Contract—Distinction from contract for work and labour done and materials supplied—Contract to make fur jacket to order—Colour of skins and style selected by purchaser—Enforcement of contract—Need for note or memorandum signed by purchaser—Sale of Goods Act, 1893 (c. 71), s. 4 (1).

The defendant ordered from the plaintiffs, retail furriers who made up furs and fur garments for women customers, a mink jacket for his wife. After inspecting several skins he chose a colour and selected a style for a jacket. The price was £950, but there was no written note or memorandum of the contract signed by the defendant.

HELD: the contract was one, not for work and labour to be done and materials to be supplied, but for the sale of goods to a special order, and, in the absence of a memorandum in writing signed by the defendant, it was unenforceable by virtue of the Sale of Goods Act, 1893, s. 4 (1).

Lee v. Griffin (1861) (1 B. & S. 272), applied.

AS TO DISTINCTION BETWEEN CONTRACT OF SALE AND CONTRACT FOR WORK AND LABOUR, see HALSBURY, Hailsham Edn., Vol. 29, p. 14, para. 11; and FOR CASES, see DIGEST, Vol. 39, pp. 359, 360, Nos. 3-10.

Cases referred to:

- (1) *Lee v. Griffin*, (1861), 1 B. & S. 272; 30 L.J.Q.B. 252; 4 L.T. 546; 121 E.R. 716; 39 Digest 360, 9.
- (2) *Robinson v. Graves*, [1935] 1 K.B. 579; 104 L.J.K.B. 441; 153 L.T. 26; Digest Supp.

ACTION for a sum alleged to be due for work done and materials supplied.

The plaintiffs were retail furriers carrying on business at 31 New Bond Street, London. They kept a stock of furs made up ready for sale, and they also made up furs, coats, jackets, and boleros for women customers. According to the evidence which the court accepted, but which the defendant denied, the defendant and his wife visited the plaintiffs' showroom early in May, 1952, to order a mutation mink jacket, mutation mink being a cross-bred, farm-bred mink (as distinguished from a wild mink), the crossing producing a mink in various shades of colour known by various designations. The defendant and his wife took away skins to look at in order to choose between two shades called "royal pastel" and "breath of spring". In the end they chose royal pastel, and returned to discuss the style. Against the advice of the plaintiffs' manager they chose from the pattern book a style for a hip-length jacket, the jacket to be made up with the skins running horizontally. The coat was made up and was invoiced as follows: "Hip-length mutation mink jacket (royal pastel) £950." There was no note or memorandum of the contract signed by the defendant. The jacket was rejected by the defendant who submitted that any obligation arising under the contract was an obligation under a contract for the sale of goods to the value of £10 and upwards, and, by virtue of s. 4 (1) of the Sale of Goods Act, 1893, was not enforceable against the defendant in the absence of a note or memorandum signed by him.

Levy, Q.C., and *Leonard Caplan* for the plaintiffs.

Finer for the defendant.

HILBERY, J., stated the facts and continued: I have to determine whether or not the substance of the contract was skill and labour to be exercised for the production of the article or the production of something to be sold

to the customer. If the claim is in the first of those two classes, s. 4 (1) of the Sale of Goods Act, 1893, does not apply. If it is in the second class, s. 4 (1) does apply, as in *Lee v. Griffin* (1) referred to in *Robinson v. Graves* (2), in a passage of GREER, L.J.'s judgment which I was paraphrasing when I spoke of the two classes into which this transaction might be said to fall. The present case is almost exactly the same as that of a man ordering a suit of clothes from his tailor. In *Lee v. Griffin* (1), where the contract in question was one to make a set of artificial teeth, CROMPTON, J., said (1 B. & S. 276):

A

"Here, however, the subject-matter of the contract was the supply of goods. The case bears a strong resemblance to that of a tailor supplying a coat, the measurement of the mouth and fitting of the teeth being analogous to the measurement and fitting of the garment".

A high degree of skill and craftsmanship goes into the making up of a fur jacket such as was made for the defendant in this case, but it was no more than making an article for sale to the defendant on his special order. I cannot discover anything to distinguish this from the case of an ordinary article which it is part of someone's business to supply and which he makes up to special measurements for the customer. It requires skill, labour, and materials to make it, but the purpose of the transaction is the supply of the complete article and the receipt of the price. That is exactly what it was here. The invoice reads: "Hip-length mutation mink jacket (royal pastel) £950". The £950 is the price of the article and not a charge made for work and labour done and materials supplied. I am, therefore, bound to give effect to s. 4 (1) of the Act of 1893, and the plaintiffs' claim must fail.

B

C

Judgment for the defendant.

D

Solicitors: *Edward, Davis, Nelson & Co.* (for the plaintiffs); *Arnold A. Finer* (for the defendant).

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

PRIOR (INSPECTOR OF TAXES) v. GEORGE MARTIN (FULHAM), LTD.

E

[CHANCERY DIVISION (Harman, J.), November 28, December 1, 1952.]

Income Tax—Deduction against profits—Wear and tear—Plant or machinery—Sale by person having control over buyer—Sale at market price—Restriction of wear and tear allowances by reference to "limit of re-charge"—Application of restriction to sale taking place before Income Tax Act, 1945, received Royal Assent—Income Tax Act, 1945 (c. 32), s. 59 (3) (b).

F

One M. acquired four lorries for the purposes of his business at a cost to him of £915. On Apr. 1, 1944, he sold these lorries to the taxpayers, a body of persons over whom he had control within the meaning of s. 59 (1) of the Income Tax Act, 1945. The sale price was £1,500, which was admitted to be the current market price. The taxpayers claimed wear and tear allowances, under r. 6 of the Rules Applicable to Cases I and II of sched. D to the Income Tax Act, 1918, for the years 1946-47 to 1949-50, calculated on the price of £1,500 which they had paid for the lorries. The Crown contended that, under s. 59 (3) (b) of the Income Tax Act, 1945, the allowance was to be restricted by being computed as though the lorries had been sold for a price equal to the "limit of re-charge". The "limit of re-charge", as defined by s. 59 (3) (i) of the Act, was the sum of £915 which the lorries had cost the seller.

G

H

Held: section 59 (3) (b) of the Income Tax Act, 1945, did not apply to a sale at the market price, and, therefore, the buyers' wear and tear allowances were not to be restricted by reference to the "limit of re-charge".

Wilsons (Dunblane), Ltd. v. Inland Revenue Comrs. (1952) (31 A.T.C. 339), followed.

FOR THE INCOME TAX ACT, 1945, s. 59 (3) (b), see HALSBURY'S STATUTES, Second Edn., Vol. 12, p. 664.

Case referred to:

(1) *Wilsons (Dunblane), Ltd. v. Inland Revenue Comrs.*, (1952), 31 A.T.C. 339.

CASE STATED by the Special Commissioners of Income Tax.

The taxpayers, a limited company, claimed wear and tear allowances, calculated by reference to the purchase price of the lorries, for the years 1946-47 to 1949-50 in respect of four lorries which, on Apr. 1, 1944, they had purchased from a seller who had control over the company within the meaning of s. 59 (1) (a) of the Income Tax Act, 1945*. The Crown sought to limit the allowances by reference to the "limit of re-charge" under s. 59 (3) (b) of the Act of 1945. The company contended that the provisions of the Act of 1945 were not retrospective except where specific provision was made to that effect, and that, accordingly, s. 59, which limited capital allowances where the buyer was a body of persons over whom the seller had control, had no application to a sale taking place before the Act received the Royal Assent on June 15, 1945, and in any case could not extend to a sale which took place, over a year previously, on Apr. 1, 1944. The Crown contended that no question of retrospective legislation arose as it was not sought to apply the provisions of s. 59 to any assessment before 1946-47, but only to base the calculations of the allowances due for 1946-47 and subsequent years on events which took place in earlier years. The Special Commissioners held that s. 59 did not apply to sales of machinery or plant taking place before the year 1945-46, and allowed the company's appeal. The Crown appealed. Before HARMAN, J., the company raised the additional contention that, in accordance with the decision since given in *Wilsons (Dunblane), Ltd. v. Inland Revenue Comrs.* (1), s. 59 (3) did not apply to a sale at market price.

C. Montgomery White, Q.C., and Sir Reginald Hills for the Crown.
Borneman, Q.C., and H. M. Allen for the taxpayers.

HARMAN, J., stated the contentions of the parties, and continued: This is an appeal by way of Case Stated turning on the effect of s. 59 of the Income Tax Act, 1945. As argued before the commissioners and as stated to me, the Case raises one point, and that is whether this section, which in certain cases cuts down the allowances given by r. 6 of the Rules Applicable to Cases I and II of sched. D to the Income Tax Act, 1918, to traders in respect of wear and tear to machinery or plant, is limited in its effect to sales occurring either after the Act came into force or after the Act received the Royal Assent, the Royal Assent being given on June 15, 1945, and the Act being brought into force on Apr. 6, 1946, that being the appointed day mentioned in various places in the Act and given effect by s. 18 of the Finance (No. 2) Act, 1945. On the one hand, it is said by the taxpayers that, if the Crown is right, the Act will have retrospective effect, and retrospective effect is not given to legislation unless that intention is clearly provided for. On the other hand, it is said by the Crown that there is no question of a retrospective effect being given to the Act, but that this is merely a case where, in dealing with a liability arising after the Act came into force, regard must be paid to things which happened before it came into force since, in considering whether a taxpayer can pass the test provided by s. 59, matters in the past have to be considered. The commissioners held that s. 59 "does not apply in the case of sales of machinery or plant taking place before the year 1945-46", by which, I think, they must mean Apr. 6, 1945. The sale in point was on Apr. 1, 1944.

* See now Income Tax Act, 1952, s. 327, sched. 14.

I agree that an Act will not be held to have retrospective force unless it very clearly appears that the legislature intended that result to follow, but, in my judgment, no question of retrospective effect arises here. I cannot see any reason why s. 59 should not apply to sales which occurred before the Act came into force in a case where the taxpayer wishes to get the allowance which the rule affords. The Act in many places specifically mentions the "appointed day" and speaks of things that happen or are to happen after the appointed day. When it does not do so, it seems to me that the present tense is used perfectly generally to apply to the past as much as it applies to the future. It cannot be said that because the present tense is used the Act is only referring to one moment of time, for then it might be argued that it did not apply after the Act came into force. I see no reason why it should not apply to previous events. If you want to get these allowances, you have to put yourself outside the limiting provisions of s. 59 and prove that at the time of sale the buyer was not under the seller's control or satisfy whatever other test is imposed. In my judgment, therefore, the commissioners were wrong on this point, and, so far, there is no reason why the section should not apply to this particular sale. That is how the matter stands on the Case Stated.

But since the case was heard by the commissioners and this Case was stated by them, there has been a decision of the Scottish Court of Session, *Wilsons (Dunblane), Ltd. v. Inland Revenue Comrs.* (1), sitting in its exchequer jurisdiction. That is a court from which an appeal lies only to the House of Lords and not to the Inner House in Scotland, and it is a court of the very greatest authority. Whether or no, strictly speaking, its decisions bind me, I should not have any hesitation in following them in a case where, this being taxing legislation, the same statutory provisions apply in both countries. It has always been considered that it is very undesirable that in such cases there should be different conclusions reached in the two countries. The point taken is that s. 59 (2) does not apply, and, therefore, sub-s. (3) (b) does not come into effect. It is conceded now that the price at which these lorries were sold, which was £1,500, was, in fact, their current market value. Therefore, s. 59 (2) on the face of it does not apply. Sub-section (3) (b) is a shocking example of legislation by reference twice over. The Scottish court held that the reference back is not sufficiently accurate, and that the words "the reference to the price which the property would have fetched if sold in the open market", which appear in sub-s. (3) (b), refer back to the second time where something rather like that is said in sub-s. (2) and not to the first time, and, therefore, it held that sub-s. (3), which replaces market value by the limit of re-charge, cannot be effective in any case where property is sold at the market price and so does not come within sub-s. (2). It is conceded by the Crown that the decision in *Wilsons (Dunblane), Ltd. v. Inland Revenue Comrs.* (1) covers this case. That being so, I do not propose to express any opinion on the correctness or otherwise of the decision of the court in Scotland, but to follow it. If that decision is right, the restriction of relief imposed by s. 59 cannot apply to these taxpayers and the commissioners' decision was right, though not for the reasons which they gave for it. The result, therefore, is that the appeal must be dismissed.

Appeal dismissed.

Solicitors: *Solicitor of Inland Revenue* (for the Crown); *Parfitt, Cresswell & Williams* (for the taxpayers).

[Reported by C. N. BEATTIE, ESQ., Barrister-at-Law.]

Re MASTERS (deceased). COUTTS & CO. v. MASTERS AND OTHERS.

[CHANCERY DIVISION (Danckwerts, J.), December 18, 1952.]

Trust and Trustee—Remuneration of trustee—Bank appointed administrator of intestate's estate—Power of court to authorise remuneration—Trustee Act, 1925 (c. 19), s. 42.

A *Executor and Administrator—Administrator—Remuneration—Appointment of trust corporation—Power of court to authorise remuneration—Trustee Act, 1925 (c. 19), s. 42.*

B On Mar. 9, 1949, M. died intestate leaving a widow and three infant children. Letters of administration were granted to the widow and a bank, the estate being sworn at £95,600 gross. On the question of the bank's remuneration as administrator and as trustee,

Held: the court had power to authorise remuneration (a) under the Trustee Act, 1925, s. 42, and also (b) under its inherent jurisdiction.

In the Estates of Young (1934) (103 L.J.P. 75), followed.

C *Re Freeman's Settlement Trusts* (1887) (37 Ch.D. 148) and *Marshall v. Holloway* (1820) (2 Swan. 432), applied.

AS TO REMUNERATION OF TRUST CORPORATION, see HALSBURY, Hails-ham Edn., Vol. 33, pp. 347-349, paras. 615-617; and FOR CASES, see DIGEST, Vol. 43, pp. 773-775, Nos. 2136-2147.

Cases referred to:

- D* (1) *In the Estates of Young*, (1934), 103 L.J.P. 75; 151 L.T. 221; Digest Supp.
 (2) *Re Freeman's Settlement Trusts*, (1887), 37 Ch.D. 148; 57 L.J.Ch. 160; 57 L.T. 798; 40 Digest 780, 3110.
 (3) *Marshall v. Holloway*, (1820), 2 Swan. 432; 36 E.R. 681; 43 Digest 775, 2155.
 (4) *Re Macadam*, [1945] 2 All E.R. 664; [1946] Ch. 73; 115 L.J.Ch. 14; 173 L.T. 395; 2nd Digest Supp.

E ADJOURNED SUMMONS for an order (inter alia) that, notwithstanding the absence of any power in that behalf in the statutory trusts arising under the Administration of Estates Act, 1925, s. 46 and s. 47, on the intestacy of Leslie Ninian Masters, deceased, the applicant, Coutts & Co., might be authorised, by virtue of the Trustee Act, 1925, s. 42, to charge remuneration for its services as administrator and trustee of the estate of the intestate in accordance with its usual scale of charges (with certain amendments).

McMullen for the applicant.

M. Browne for the first respondent, the widow, the second administrator.

Stranders for the remaining respondents, the children of the intestate.

G **DANCKWERTS, J.:** On Mar. 9, 1949, Leslie Ninian Masters died intestate, leaving surviving him a widow and three children, who at that date were all under the age of twenty-one years. On Nov. 22, 1949, a grant of administration of his estate was made (as infants were involved in the beneficial interests) to two administrators, and the administrators so appointed were Coutts & Co., a trust corporation, and Mrs. Masters, the widow. The estate was a substantial one, it being sworn for the purposes of probate at £95,600 gross, with net personalty £80,056. Even after death duties and the costs of administration had been paid, when the summons in this case was taken out on Apr. 17, 1951, £45,500 remained as the capital value of the estate. In the circumstances it was thought reasonable to have a trust corporation appointed as one of the administrators, for there was a good deal of work to be done in the administration of the estate and in the carrying out of the trusts under the Administration of Estates Act, 1925.

The summons raises a number of matters of an administrative kind which have mostly been dealt with in chambers already, but one of them is the question of the remuneration of Coutts & Co., acting as administrators and trustees. That has been adjourned into court because of a doubt raised as to the jurisdiction of the court to authorise remuneration to be paid out of the estate to the bank. It is plain that there is jurisdiction to authorise such remuneration under the Trustee Act, 1925, s. 42. That section provides:

"Where the court appoints a corporation, other than the Public Trustee, to be a trustee either solely or jointly with another person, the court may authorise the corporation to charge such remuneration for its services as trustee as the court may think fit."

In s. 68, the definition section of the Act, one finds this provision:

"(17) 'Trust' does not include the duties incident to an estate conveyed by way of mortgage, but with this exception the expressions 'trust' and 'trustee' extend to implied and constructive trusts, and to cases where the trustee has a beneficial interest in the trust property, and to the duties incident to the office of a personal representative, and 'trustee' where the context admits, includes a personal representative, and 'new trustee' includes an additional trustee."

Section 69 (1) of the Act provides:

"This Act, except where otherwise expressly provided, applies to trusts including, so far as this Act applies thereto, executorships and administratorships constituted or created either before or after the commencement of this Act."

That, I think, shows that the duties of an administrator are included in the duties of a trustee for the purposes of this Act, and that, therefore, s. 42 will apply, as regards the power to award remuneration, to the case of a trust corporation which is appointed to be administrator of the estate. That view has, in fact, been adopted in the Probate Division in a decision of LANGTON, J., *In the Estates of Young* (1) when the court was appointing the National Bank of Scotland, which was a trust corporation, to be administrator of two estates, and the judge ordered the grants to issue directing that the grantees should, in both cases, have power to charge according to their authorised scale.

Apart from the statutory jurisdiction conferred by s. 42, it is also plain that there is inherent jurisdiction in the court to authorise remuneration of the trustee, whether appointed by the court or not. Authority for that is to be found in *Re Freeman's Settlement Trusts* (2) and *Marshall v. Holloway* (3). The same course was in fact adopted in *Re Macadam* (4), on the question of the accountability of the trustee for certain directors' fees. According to his judgment as reported ([1945] 2 All E.R. 672), COHEN, J., left to be decided in that case the question whether in the circumstances he should authorise the trustee to retain the directors' fees under the inherent jurisdiction of the court. That course was, however, to my knowledge adopted, and the remuneration was in fact authorised.

I also remember a case before EVE, J., in which I appeared as counsel, before the passing of the Act of 1925 in which, though I do not remember the exact name of the trust, I do remember that the very same bank, Coutts & Co., as trustee of an estate, were authorised by EVE, J., to receive remuneration. There is, in my view, no doubt whatever about the inherent jurisdiction of this court to authorise remuneration.

Order accordingly.

Solicitors: *Ravenscroft, Woodward & Co.* (for the applicant); *Gibson & Weldon*, agents for *Bellamy-Knights & Griffin*, Shoreham, Sussex (for the first respondent); *Farrer & Co.* (for the remaining respondents).

[Reported by R. D. H. OSBORNE, Esq., Barrister-at-Law.]

R. v. YOUNG AND ANOTHER.

[COURT OF CRIMINAL APPEAL (Lord Goddard, C.J., Hilbery and Parker, JJ.),
December 8, 1952]

Criminal Law—Receiving stolen property—Proof of theft.

Cohen v. March ([1951] 2 T.L.R. 402) laid down no principle of law,
but the decision depended entirely on its own facts.

AS TO RECEIVING STOLEN GOODS, see HALSBURY, Hailsham Edn., Vol. 9,
pp. 550-558, paras. 935-947; and FOR CASES, see DIGEST, Vol. 15, pp. 960-977,
Nos. 10,733-10,927.

Case referred to:

(1) *Cohen v. March*, [1951] 2 T.L.R. 402; 2nd Digest Supp.

APPEAL against conviction.

The appellants, Henry Stephen Young, and Ronald William Spiers, were
convicted at the West Kent Quarter Sessions of receiving metal and were
sentenced to nine months' imprisonment and three years' corrective training,
respectively. The ground of the appeal was that, the property not having been
identified and Young having given an explanation of where he found it, there was
no evidence on which the jury could find that the property was stolen.

Dorothy Dix for the appellants.

R. I. S. Bax for the Crown.

LORD GODDARD, C.J., delivered the following judgment of the court.

The appellants were convicted at the West Kent Quarter Sessions of receiving
stolen metal. There were four counts, two of larceny and two of receiving
against each of them. The first two counts had reference to 143 lb. of brass and
phosphor bronze. The second two counts related to some lead hammers and a
brass bearing bush, which were identified as the property of a particular firm,
and no point arises about them. On the first two counts it is suggested that there
was no evidence against the appellants because the property was not identified.

The police went to the premises of the appellant, Spiers, and said they were
looking for metal, which he denied having. They then found this metal hidden
away and Spiers said, which very likely was true, that he had paid the appellant
Young £5 for it the day before. When Young was seen, he said that he had
picked the metal from a dump. At the trial he went into the box and swore that
it had not been stolen, but it has been laid down over and over again that the
circumstances of a case may justify a jury in coming to the conclusion that there
is a larceny or receiving of the property. In the present case the metal was new,
untarnished, and recently milled, and there was a considerable quantity of it.
In those circumstances the jury found that it was stolen metal, but it is said that
we ought to quash the conviction on the ground that there was no evidence.

Reliance is placed on *Cohen v. March* (1), which was a case in which there had
been a charge in respect of some stolen razor blades and the court came to the
conclusion that some untruth which had been told to the policeman when he
first interviewed the prisoner did not justify an inference that the goods were
stolen. I expressly said in giving judgment that the case depended entirely
on its own facts. I said ([1951] 2 T.L.R. 404):

"I suppose there might be a case—circumstances differ so infinitely—
in which a person makes a statement on which a jury would be justified
in finding that he did know that the goods were stolen."

The court was not there intending to lay down any principle of law. They were
merely dealing with the particular facts of the case, and they came to the con-
clusion that the evidence did not justify the jury in finding that the goods were
stolen.

In the present case again they so found, and, in the opinion of the court, there was evidence on which they could do so. There was a very careful summing-up by the deputy chairman, and the jury, having seen the metal and heard the appellant, Young, tell a story on oath which they rejected, it is not surprising that they came to the conclusion that he had stolen the property. It is one thing to make some answer to a policeman, it is quite another to give evidence on oath at the trial, and, if the jury found that they disbelieved Young on oath, they might think he had a good reason for telling a perjured story and they could find him guilty of stealing. There was ample evidence from the circumstances in which the goods were found to justify the conviction of Spiers of receiving the goods knowing them to have been stolen.

The same points have been made on behalf of Young as Spiers, and, in the opinion of the court, there is no ground for interfering with the conviction. We are not laying down any point of law in this case.

Appeal dismissed.

Solicitors: *Registrar of Court of Criminal Appeal* (for the appellants); *Solicitor, Metropolitan Police* (for the Crown).

[Reported by J. D. PENNINGTON, ESQ., *Barrister-at-Law.*]

J. H. PIGOTT & SON v. DOCKS AND INLAND WATERWAYS EXECUTIVE.

[QUEEN'S BENCH DIVISION (Sellers, J.), December 3, 4, 5, 16, 1952].

Harbour—Tug—Right of owners to perform tug services—“Shipping and unshipping goods”—Tugs employed in towing vessels into and out of dock—Harbours, Docks, and Piers Clauses Act, 1847 (c. 27), s. 33.

In 1951 the plaintiffs, who were tug owners, extended their services to Immingham Dock, Grimsby. This dock had been constructed pursuant to the Humber Commercial Railway and Dock Acts, 1901 and 1904 (which incorporated the Harbours, Docks, and Piers Clauses Act, 1847), and had become vested in the defendants by virtue of the Transport Act, 1947. In March, 1952, the defendants threatened to exclude the plaintiffs' tugs from providing tug services for vessels entering and leaving the dock and to restrict the necessary towage services to tugs belonging to, or hired by, the defendants. In an action by the plaintiffs for a declaration to establish their right to continue to provide tug services in the dock,

HELD: under s. 33 of the Harbours, Docks, and Piers Clauses Act, 1847, whereby “upon payment of the rates . . . the harbour, dock, and pier shall be open to all persons for the shipping and unshipping of goods . . .”, the tug-owner, like the carrier who brought the goods to the dock for shipment or removed them when they had been unshipped, or the owner of the ship which carried the goods, performed services without which goods could not be shipped or unshipped by vessels using the port; s. 33 was made expressly subject to the provisions of any special Act, but, as the defendants were a statutory body, the powers conferred on them by the Acts of 1901 and 1904 must be treated as limiting the rights conferred and prohibiting the exercise of the more extensive rights which the defendants might have by virtue of the ownership of property, and by the proviso to s. 70 of the Act of 1901 the defendants were expressly prohibited from compelling ships to use their (the defendants') tugs; and, therefore, there was no power by virtue of which the defendants were entitled to exclude the plaintiffs from providing towage services to vessels “shipping or unshipping goods” in the dock, and the plaintiffs were entitled to the declaration which they claimed.

London & North-Eastern Ry. Co. v. British Trawlers' Federation, Ltd. ([1934] A.C. 279), applied.

AS TO PAYMENT OF HARBOUR RATE, see HALSBURY, Hailsham Edn., Vol. 30, p. 974, para. 1354; and FOR CASES, see DIGEST, Vol. 41, pp. 961-963, Nos. 8546-8560.

FOR THE HARBOURS, DOCKS, AND PIERS CLAUSES ACT, 1847, s. 33, see HALSBURY'S STATUTES, Second Edn., Vol. 23, p. 1132.

Cases referred to:

- A (1) *London & North-Eastern Ry. Co. v. British Trawlers' Federation, Ltd.*, [1934] A.C. 279; 103 L.J.K.B. 311; *sub nom. British Trawlers' Federation v. London & North-Eastern Ry. Co.*, 150 L.T. 461; *affg. with variation*, [1933] 2 K.B. 14; Digest Supp.
- (2) *Dick v. Badart*, (1883), 10 Q.B.D. 387; 48 L.T. 391; 47 J.P. 422; 41 Digest 960, 8540.
- B (3) *Great Central Ry. Co. v. North-Eastern Steam Fishing Co., Ltd.*, (1906), 22 T.L.R. 520; 41 Digest 963, 8560.
- (4) *Barker v. Midland Ry. Co.*, (1856), 18 C.B. 46; 25 L.J.C.P. 184; 20 J.P. 582; 139 E.R. 1281; *sub nom. Parker v. Midland Ry. Co.*, 27 L.T.O.S. 107; 8 Digest 177, 1124.
- (5) *Perth General Station Committee v. Ross*, [1897] A.C. 479; 66 L.J.P.C. 81; 77 L.T. 226; 8 Digest 147, 967.
- C (6) *London Asscn. of Shipowners & Brokers v. London & India Docks Joint Committee*, [1892] 3 Ch. 242; 62 L.J.Ch. 294; 67 L.T. 238; 13 Digest 325, 603.
- (7) *Port of London Authority v. Cairn Line of Steamships, Ltd.*, [1913] 1 K.B. 497; 82 L.J.K.B. 340; 108 L.T. 217; 41 Digest 973, 8637.
- D (8) *Toronto (City) Municipal Corpn. v. Virgo*, [1896] A.C. 88; 65 L.J.P.C. 4; 73 L.T. 449; 33 Digest 567, 528.

ACTION by the plaintiffs for a declaration to establish their right to continue to employ their tugs to tow into and out of the Immingham Dock vessels using that dock for the shipping or unshipping of goods.

- E *Sir Robert Aske, Q.C.*, and *Honeyman* for the plaintiffs.
Mocatta, Q.C., and *J. P. Ashworth (R. J. Parker with them)* for the defendants.

Cur. adv. vult.

- Dec. 16. **SELLERS, J.**, read the following judgment. The plaintiffs are steam tug owners at Union Dock, Grimsby. The business is a family concern which has provided tug services at Grimsby since 1886, but during 1951 and this
- F year the plaintiffs extended their services to the Immingham Dock and acquired two additional tugs for the purpose. By this action the plaintiffs seek a declaration to establish their right to continue to employ their tugs to tow into and out of the Immingham Dock vessels which are using this dock for the shipping or unshipping of goods (and presumably for the embarking and landing of passengers if and in so far as it might arise, although it does not do so in the
- G present case). This right has been challenged by the defendants, who, in March, 1952, threatened generally to exclude tugs (which were for the most part the plaintiffs' tugs only) from providing tug services for vessels entering and leaving the Immingham Dock and to restrict and reserve the necessary towage services to tugs belonging to the defendants or hired by them under a formal hiring agreement. The defendants submitted a draft of such an agreement to the plaintiffs and
- H form stated that they were prepared to enter into agreement with the plaintiffs for the hire of their tugs, but, in fact, the defendants' documents appear to disclose that the defendants had little intention of calling on the services of the plaintiffs' tugs under any agreement entered into. For reasons which are not manifest in such inquiry as has taken place in this court, the defendants preferred to hire the tugs from a firm in the somewhat more remote port of Hull.

The defendants' position must be briefly stated. The Humber Commercial Railway and Dock Act, 1901, authorised the construction of a dock adjoining

the existing docks at Grimsby. The Humber Commercial Railway and Dock Act, 1904, empowered the Humber Commercial Railway and Dock Company to construct a new dock and abandon that which had been authorised under the Act of 1901. Both the Acts, by s. 2 respectively, incorporated the Harbours, Docks, and Piers Clauses Act, 1847 (except so far as expressly varied by or inconsistent with the Acts), and by s. 17 of the Act of 1904 various sections, including ss. 66 and 70, of the Act of 1901 were made to apply to the dock, railway and other works authorised by the Act of 1904 as if they had been re-enacted in that Act. Provision was made for the abandonment of the original works, and s. 53 of the Act of 1904 authorised a lease for 999 years of the new dock and works to the Great Central Railway Company. By reason of the Railways Act, 1921, and S.R. & O., 1923, No. 826, the London & North-Eastern Railway acquired the rights of both the lessors and the lessees and became owners of the whole undertaking. Then, by the Transport Act, 1947, the dock became vested in the Transport Commission, and by an executive order came under the control of the defendants to this action in 1948.

The relevant facts are few. The defendants have had for some time two tugs, each just over one hundred feet long and of approximately one thousand horse power and nine hundred horse power respectively. Up to 1951 these two tugs performed most of the towage services required at the Immingham Dock, and the tugs of the plaintiffs and others from Hull made only occasional visits, but in the last two years the export of coal from Grimsby (mainly, I apprehend, coastwise) has greatly increased. The British Electrical Authority, in particular, has been loading regular cargoes of coal from the port. In response to direct requests and because there was an obvious need for tugs, the defendants acquired two small sized tugs suitable for the type of vessels frequenting Immingham in the last two years. The plaintiffs, undoubtedly, supplied services which were required. Their tugs have been available, have frequently patrolled the river off Immingham awaiting engagement, and have been much employed. Although the traffic of the dock has greatly increased, the defendants' evidence was that their own tugs, which had for years been the only tugs operating at Immingham, had often been idle recently and had lost the trade to their competitors, who, it would seem, were supplying a more attractive service. It was admitted that the object of the exclusion of the plaintiffs' tugs which the defendants seek was and is to prevent this competition so that full employment may be provided for their own tugs. It was further admitted that there was a greater demand for towage services than the defendants could supply with their own tugs, but it was proposed to meet this by an arrangement for hiring additional tugs as and when required from Hull. The whole question, therefore, depends on whether the defendants, as the body responsible for the dock undertaking, are entitled to exclude tugs of the plaintiffs and others and to reserve towage services to their own tugs or such as they wish to hire to assist the services.

The plaintiffs claim that s. 33 of the Harbours, Docks, and Piers Clauses Act, 1847, gives them a right to take their tugs into the defendants' dock for such purposes, at least, as they have been recently doing and as, solely, they contemplate doing in the future. The section is as follows :

“ Harbour, dock, and pier to be free to the public on payment of rates.— Upon payment of the rates made payable by this and the special Act, and subject to the other provisions thereof, the harbour, dock, and pier shall be open to all persons for the shipping and unshipping of goods, and the embarking and landing of passengers.”

The section provides that the docks shall be open to all persons. It does not say to all ships or vessels, but it clearly includes them. The freedom of access is limited by the words “ for the shipping and unshipping of goods ”. In order to be open for the shipping and unshipping of goods a dock must of necessity be open for many and varied activities in and about the dock without which there

could be no shipping or unshipping of goods. There could be no shipping of goods without a ship or without goods. Both must enter the dock. In ordinary circumstances, and certainly those which exist at Immingham, goods destined for shipment require a vehicle of some kind to get them to the ship's side, and in many cases, and frequently at Immingham, a ship requires a tug or tugs to get her to her berth for loading. Likewise goods have to be removed by vehicle from the quay after discharge, and ships have to be moved out after loading or discharge.

A A tidal river flows outside Immingham Dock, and a vessel entering and leaving has to allow for the effect of the current on the ship's course and manoeuvres. There is a risk of fouling the piers or jetties at the entrance, and for this and for safe movement to and from a berth in the dock a tug is frequently used by a vessel entering or leaving, and some vessels use more than one tug. For shipping and unshipping to take place in any commercial or business sense it is necessary

B to employ skilled stevedores and labourers to load, discharge, trim, stow or otherwise handle the cargo in the ship and on the quay.

In interpreting the section, I would hold that any of the persons providing any of the facilities which I have mentioned and the persons engaged in such activities were persons to whom a dock must be open if it is to be open for the shipping and unshipping of goods. I can see no real distinction between the contractor who,

C by his vehicles, brings in the goods for shipment or removes them after discharge, and the tug owner, who, by his tugs, brings in and takes out vessels engaged in the shipping and unshipping of goods, and the shipowner who brings his ship to the port aided or unaided by tugs. They are all performing services without which goods could not be shipped or unshipped by vessels using the port, and the section makes no discrimination between persons. Providing

D they resort to the docks for the shipping and unshipping of goods they are on an equality, and the shipowner does not appear to have any greater or better right than a stevedore or a haulage contractor, or, I could add, a tug owner, though the rights of all are subject to the payment of the appropriate dues which the dock authority may prescribe and subject to any regulation and control which the authority may have power, expressly or impliedly, to exercise.

E The section in question has been considered by the courts and once by the House of Lords, but the present case is not, I think, precisely covered by authority, and, having stated the view to which I incline on the construction and application of the section, I must turn to see whether authority supports or refutes it. In *London & North-Eastern Ry. Co. v. British Trawlers' Federation, Ltd.* (1) LORD TOMLIN, in referring to this s. 33 of the Act of 1847, said ([1934]

F A.C. 298):

"I do not think that the words 'shipping' and 'unshipping' are to be confined to the narrow operation of lifting goods from the quay to the ship or from the ship to the quay, nor do I think that the access under the section can be limited to access in person without any vehicle. It must I think be such

G access with such vehicle as the party seeking it bona fide deems necessary, but it is an access always subject to be controlled by valid and operative by-laws."

LORD MACMILLAN expressed his opinion in this way (*ibid.*, 301):

"The harbour is to be open to all for the purpose of unshipping goods. It is manifest that this must include the consequential purpose of removing

H the goods unshipped, and such removal necessitates the employment of the appropriate vehicles."

Those are not the narrow interpretations for which the defendants contend, and I think they support and do not curtail the views expressed in the Court of Appeal in the same case (*sub nom. British Trawlers' Federation v. London & North-Eastern Ry. Co.*). I propose to read a few extracts from the judgments of

each of the learned lords justices who expressed a view about s. 33 of the Act of 1847. SCRUTTON, L.J., said ([1933] 2 K.B. 29):

"A great deal of discussion took place as to the true meaning of this section. Counsel for the railway company argued, without, I think, much conviction, that 'unshipping' had a very limited meaning; it only covered the operation of transferring goods from the ship to the quay, and the dock company had full control over the subsequent operation of taking the goods from the quay out of the dock premises. This argument, besides being quite unbusinesslike, gave no effect, in my opinion, to the words 'shall be open to the public'. The passenger has a right to 'embark' by entering the dock premises, proceeding to the ship and embarking thereon; he has a right to 'land' by leaving the ship and proceeding over the dock premises to their limits. The 'shipper' of goods has a right to bring them on to the dock premises, and through those premises to the ship on which they are shipped. He has a right to 'unship' them by taking them from the ship and out of the dock premises."

SCRUTTON, L.J., continued (*ibid.*, 31):

"I am clearly of opinion that the unshipper has a right to the use of reasonable vehicles, motor or horse-drawn, subject to reasonable regulation by the dock company as to pace, place and time, having regard to the reasonable rights of other members of the public and of the dock company. I am also of opinion that the dock company has no right to impose limitations on what the vehicles properly used in shipping or unshipping shall do outside the dock premises."

LAWRENCE, L.J., said (*ibid.*, 47):

"In my opinion, the provision in s. 33 of the 1847 Act, that upon payment of rates, the harbour and dock shall be open to all persons for shipping and unshipping goods, necessarily implies that all persons shall have the free right to remove the goods landed on the quays by the usual commercial means."

GREER, L.J., said (*ibid.*, 58):

"... I think it is necessarily implied in s. 33 of the Harbours, Docks, and Piers Clauses Act, 1847, that their docks and quays should be open to all such persons as were interested in the shipment or unshipment of fish to remove the fish so unshipped by usual commercial methods, including the removal by means of motor or other vehicles, or by their agents or contractors in that behalf by such vehicles."

In *Dick v. Badart* (2) CAVE, J., held that s. 33 must include not only ship-owners and owners of goods, but also their respective servants. He held a bye-law to exclude "lumpers" to be invalid, and said (10 Q.B.D. 393):

"A by-law that lumpers should only be employed subject to good character might be within the company's power to regulate the duties and conduct of persons employed in the dock, but a by-law by which lumpers are altogether excluded from the dock could not possibly be within it."

Another case on the section is *Great Central Ry. Co. v. North-Eastern Steam Fishing Co., Ltd.* (3), the report of which the defendants supplemented by a transcript of the judgment of WALTON, J. The decision is an authority for the proposition that s. 33 of the Act of 1847 does not give trawler owners a right to keep a tug inside the dock for the purpose of rendering towage services as and when required to their own trawlers which regularly go in and out. The plaintiffs did not challenge this case, and have made no claim to keep a tug inside the Immingham Dock or to ply for hire within the dock or at the jetties, which plying for hire, other than by the defendants' tugs, can only be done in pursuance

of a licence issued by the dockmaster; that is bye-law 18. WALTON, J., did not seek to interpret the section except to say that it did not give the defendants, the trawler owners, the right to keep a tug inside the dock without the consent of the dock authority. In the argument of counsel for the defendants the facts were stated to be as follows (22 T.L.R. 520):

- A “The tug was required to move the trawlers sometimes to the wharf or to a place awaiting their turn to unload, or to a place where coal could be loaded, or to bring coal lighters alongside, or to move the trawlers to a place in the dock where ice (required for the purposes of the next fishing voyage) could be taken on board. The tug was necessary to move the trawlers after the boilers had been blown, in accordance with the by-laws. Such assistance was absolutely necessary and was used in the ordinary course of business”,
- B If the facts were found as they had been so stated I doubt respectfully if I would have taken the same view of them as WALTON, J., appears to have done. It would depend, I think, on the frequency with which those services were normally rendered by the tug kept in attendance, but the actual decision is as I have stated and it does not bear on the present case.

- C On behalf of the defendants certain railway cases were relied on, namely, *Barker v. Midland Ry. Co.* (4) and *Perth General Station Committee v. Ross* (5), but they are of no application. It was so held in the *British Trawlers* case (1). Section 33 of the Act of 1847 did not, of course, arise for consideration at all in those cases. I am, therefore, of opinion that authority does not refute the interpretation I have given to s. 33, but substantially supports it, and, as it stands, s. 33 would entitle the plaintiffs to enter the dock with their tugs in the manner which has been their recent practice and which is their present demand.
- D The section is, however, made expressly subject to any special Act, and the defendants relied, further, on their powers as owners and undertakers, and on s. 66 and s. 70 of their Act of 1901. Before considering those two sections, I will briefly refer to authority which defines the position of a statutory body in the position of the defendants. In the *British Trawlers* case (1) in the Court of Appeal, SCRUTTON, L.J., quoted ([1933] 2 K.B. 35) with approval the observations of LINDLEY, L.J., in *London Asscn. of Shipowners & Brokers v. London & India Docks Joint Committee* (6) ([1892] 3 Ch. 251), to which I need not refer more fully, as follows:

- E “The legislature has expressly conferred upon the company many powers which the company, as the owner of property, could have exercised without any express statutory authority. Whenever this is the case, the powers expressly given must be treated either as superfluous or as purposely inserted in order to define, that is, limit the right conferred, and as implying a prohibition against the exercise of the more extensive rights which the company might have by virtue of its ownership of property. That the latter is the true mode of regarding statutory powers conferred on bodies created for public purposes and authorized to acquire land for such purposes cannot, I think, admit of any doubt’.”
- F
- G

H GREER, L.J., pointed out the distinction between companies created by charter which are deemed to have all the powers of a natural person and companies created by statute. He quoted the then current edition of BUCKLEY ON THE COMPANIES ACTS [11th ed. p. 9 : see now 12th ed. p. 25] and the statement therein that a

“statute does not create a corporation at common law. It creates a statutory creature, which cannot go beyond its statute for the reason that to the statute it owes its whole existence.”

Section 70 of the Act of 1901 of the defendants’ predecessors empowered them to build, purchase, hire or license steamers and tugs for the purpose of and

in connection with the dock and to make charges in respect of the use of any such vessels provided and used, and at the end of the section there is this proviso:

"Provided always that nothing in this Act contained shall be deemed or construed to authorise the company to require any owner agent master consignee or other person having charge of any vessel lighter or river craft to employ hire or use any such steamer tug lighter or other ship or boat."

The defendants, therefore, cannot make it compulsory for ships to use their tugs, and since the use of tugs, lighters, or boats will or may from time to time be necessary, and since the port has to be open to the public for the shipping and unshipping of goods, it follows, I think, that, if tugs other than the defendants' tugs were excluded, the rights of the users of the port would be curtailed and infringed. If shipowners wished to use the port at all, and if tug assistance was essential to enable them to do so in safety, the use of the defendants' tugs (and this would include those chartered or hired by them) would, in effect, be compulsory, and the defendants would thus achieve that which they are so definitely prohibited by the proviso from doing. Far from giving the defendants the right to exclude tugs as they now claim to do, in my opinion, s. 70 effectively prohibits them from so doing. The proviso does not refer only to the section, but also to "nothing in this Act". The proviso, therefore, refers equally to s. 66 (1) on which the defendants placed, perhaps, their greatest reliance.

Section 66 in terms gives the company powers

"With regard to the management use and regulation of the dock works of the company and the regulation and control of vessels resorting thereto"

Nowhere is an express power given to exclude tugs. It was submitted on behalf of the defendants that s. 66 (1) by implication gave that power. In the face of the proviso to s. 70, to which I have just referred, I do not find it possible to make such an implication. Section 66 (3) empowers the company to employ persons

" . . . to work or remove or to discharge or load or perform any service in connection with any vessel",

when there is delay or default in the working or removing of any vessel in the dock. Section 66 (1) makes these rights of the company

"Subject to the right of the owner or master of any vessel to employ his crew in the performance of any of the services"

mentioned in the other three sub-sections of s. 66. The whole section gives defined powers to the company, but it does not give them exclusive powers or any power to exclude which they do not otherwise possess. In contrast, s. 82 of the Harbours, Docks, and Piers Clauses Act, 1847, which relates to meters and weighers, expressly provides that

" . . . the master of any vessel, or the owner of any goods shipped, unshipped, or delivered within or upon the harbour, or dock, or pier, shall not employ any person other than a weigher or meter licensed by the undertakers"

This was referred to by CAVE, J., in *Dick v. Badart* (2); and see also *Port of London Authority v. Cairn Line of Steamships, Ltd.* (7). Similar clear clauses are to be found in many other Acts, to some of which I was referred, where some exclusive right to undertakers was intended to be given. There is no such provision here relating to tugs. The words of LORD DAVEY in *Toronto (City) Municipal Corp'n. v. Virgo* (8) ([1896] A.C. 93) may be applied to the present case:

"No doubt the regulation and governance of a trade may involve the imposition of restrictions on its exercise both as to time and to a certain

extent as to place where such restrictions are in the opinion of the public authority necessary to prevent a nuisance or for the maintenance of order. But their Lordships think there is marked distinction to be drawn between the prohibition or prevention of a trade and the regulation or governance of it, and indeed a power to regulate and govern seems to imply the continued existence of that which is to be regulated or governed."

A In my judgment, the plaintiffs have established the right for their tugs to enter the Immingham Dock at least to the extent for which they claim, and there is no power in any statute affecting the defendants' rights which entitles the defendants to exclude tugs operating in the way the plaintiffs' tugs have been doing. The inter-departmental correspondence of the defendants to which I was referred revealed less desire on the part of those responsible for the port's administration to have the tug services at Immingham highly efficient and adequate than to stultify competition to benefit their own tugs, which, apparently, could not hold their own in a busy port. So far as I understand the position, the decision at which I have arrived is more likely to provide efficient and suitable towage services at this important port than if the defendants' claim for a monopoly had prevailed. I grant the following declaration: That upon payment of the rates made payable under the Humber Commercial Railway and Dock Act, 1901, and any statutory amendment or modification thereof the plaintiffs are entitled in the ordinary course of their business to employ their tugs in providing towage services to vessels entering or leaving Immingham Dock for the shipping or unshipping of goods and/or embarking or landing of passengers.

Order accordingly.

D Solicitors: *Theodore Goddard & Co.*, agents for *Andrew M. Jackson & Co.*, Hull (for the plaintiffs); *M. H. B. Gilmour* (for the defendants).

[*Reported by F. A. AMIES, Esq., Barrister-at-Law.*]

THOMAS v. BRITISH THOMSON-HOUSTON CO., LTD.

E [QUEEN'S BENCH DIVISION (Havers, J.), December 3, 4, 5, 8, 1952.]

Factory—"Place" used for purpose other than processes carried on in factory—*Restaurant within curtilage*—Use by administrative staff—*Exclusion of workmen*—*Dining room in restaurant occasionally used for conferences*—*Games room for apprentices*—*Factories Act, 1937 (c. 67), s. 151 (1), (6).*

F A factory occupied by the defendants included in its curtilage a restaurant (a separate building comprising three dining rooms which were used by executive and administrative employees and guests and from which workmen were excluded except to carry out duties under instructions, canteens for their use being provided in the factory itself), a dining room used by women supervisors belonging to the administrative staff, a restaurant manageress's office and store, a games room used by apprentices, and a caretaker's flat. One of the dining rooms was used occasionally for conferences between representatives of the management and shop stewards. The plaintiff, an employee of the defendants, was injured while cleaning one of the restaurant windows, and he brought an action against the defendants for alleged breaches of their duty to him under s. 26 (1) and (2) of the Factories Act, 1937.

H HELD: though the restaurant was within the curtilage of a factory, and, therefore, within the definition of a "factory" in s. 151 (1) of the Factories Act, 1937, it was "solely used for some purpose other than the processes carried on in the factory" within s. 151 (6) and so was not to be deemed to form part of the factory for the purposes of the Act, and the defendants were under no duty under the Act to the plaintiff of which they were in breach.

Wood v. London County Council ([1941] 2 All E.R. 230), applied.

For the FACTORIES ACT, 1937, s. 151 (1) and (6), see HALSBURY'S STATUTES, Second Edn., Vol. 9, pp. 1113 and 1115.

Cases referred to:

- (1) *Lavender v. Diamints, Ltd.*, [1949] 1 All E.R. 532; [1949] 1 K.B. 585; [1949] L.J.R. 970; 2nd Digest Supp.
- (2) *Cardiff Revenue Officer v. Cardiff Assessment Committee & Western Mail, Ltd.*, *Cardiff Revenue Officer v. Cardiff Assessment Committee & David Duncan & Sons, Ltd.*, *Westminster Revenue Officer v. Daily Mirror Newspapers, Ltd.*, [1931] 1 K.B. 47; 99 L.J.K.B. 672; 143 L.T. 500; 94 J.P. 146; Digest Supp.
- (3) *London Co-operative Society, Ltd. v. Southern Essex Assessment Committee*, [1941] 3 All E.R. 252; [1942] 1 K.B. 53; 111 L.J.K.B. 113; 165 L.T. 409; 105 J.P. 399; 2nd Digest Supp.
- (4) *Street v. British Electricity Authority*, [1952] 1 All E.R. 679; [1952] 2 Q.B. 399.
- (5) *Wood v. London County Council*, [1940] 4 All E.R. 149; [1940] 2 K.B. 642; 109 L.J.K.B. 981; 163 L.T. 408; *on appeal*, C.A., [1941] 2 All E.R. 230; [1941] 2 K.B. 232; 110 L.J.K.B. 641; 165 L.T. 131; 105 J.P. 299; 2nd Digest Supp.
- (6) *Simmonds Aerocessories (Western), Ltd. v. Pontypridd Area Assessment Committee*, [1944] 1 All E.R. 264; [1944] K.B. 231; 113 L.J.K.B. 145; 170 L.T. 231; 108 J.P. 66; 2nd Digest Supp.
- (7) *Hendon Corp'n. v. Stanger*, [1948] 1 All E.R. 377; 112 J.P. 199; *sub nom. Stanger v. Hendon Borough Council*, [1948] 1 K.B. 571; [1948] L.J.R. 1008; 2nd Digest Supp.
- (8) *Nash v. Hollinshead*, [1901] 1 K.B. 700; 70 L.J.K.B. 571; 84 L.T. 483; 65 J.P. 357; 24 Digest 901, 29.
- (9) *Thorogood v. Van Den Berghs & Jurgens, Ltd.*, [1951] 1 All E.R. 682; 115 J.P. 237; *sub nom. Thurogood v. Van Den Berghs & Jurgens, Ltd.*, [1951] 2 K.B. 537; 2nd Digest Supp.

ACTION for damages for negligence and breach of statutory duty.

The defendants were manufacturers of electrical equipment and appliances and occupied a factory at Willesden, London, employing about 2,500 workmen. Within the curtilage of the factory, but constituting a separate building, was the Vicarage Restaurant, which comprised: on the ground floor, three dining rooms used chiefly for lunches (usually ninety a day), and occasionally for teas, by the higher executive staff, the senior staff and the sales staff (all either executive or administrative employees), and by guests. The restaurant was also used by one shop foreman only as a concession to his long service. This restaurant was not used by the workmen employed in the industrial part of the factory who had their own canteens in that part of the factory and were not permitted to enter the restaurant except to carry out some duty on instructions. One of the dining rooms was used every three months—sometimes once a month—for conferences at which representatives of the management and shop stewards met to discuss matters such as wages, welfare, and conditions of service. On the same floor was a games room reserved for apprentices being trained in the duties of the various departments (engineering, draftsmanship, manufacturing, etc.) who were paid for work on the industrial side and assisted in the production of manufactured articles. On the first floor was a flat comprising a kitchen, bedroom and dining room used by the caretaker; a dining room used by women supervisors employed by the defendants, all administrative members of the staff such as senior secretaries; and a restaurant manageress's office and store.

The plaintiff was employed by the defendants as a handyman, with general duties in connection with the restaurant. While cleaning a window of the restaurant on a ladder he fell and was injured. He alleged that owing to the

negligence or breach of statutory duty of the defendants the ladder moved and so caused his fall. He contended that they were negligent in that they had failed to provide a safe system of work, to make the place of employment safe, or to provide proper appliances. He submitted that the restaurant was a "factory" within the meaning of the Factories Act, 1937, s. 151 (1), and that the defendants were in breach of statutory duty as follows: (i) under the Building (Safety, Health and Welfare) Regulations, 1948 (S.I., 1948, No. 1145), reg. 5 (but the plaintiff did not rely on this point before HAVERS, J., in view of the decision of the Court of Appeal in *Lavender v. Diamints, Ltd.* (1)), and (ii) under s. 26 (1) and (2) of the Factories Act, 1937, relating to safe means of access and the provision of means for ensuring the safety of persons working where they were liable to fall a distance of more than ten feet and there was no secure foothold and hand-hold. The defendants denied that the restaurant was a "factory" within the meaning of the Factories Act, 1937, or that the Building (Safety, Health and Welfare) Regulations, 1948, were applicable. They also denied that there was any breach of statutory duty, or that they were negligent at common law, or, alternatively, that the plaintiff's fall and injuries were due to any breach or negligence, and they alleged contributory negligence in the plaintiff.

Ruttle for the plaintiff.

Berryman, Q.C., and *Anwyl-Davies* for the defendants.

HAVERS, J., reviewed the evidence, found as a fact that it was impossible to determine how the accident had happened, and continued: I have to consider whether the restaurant comes within the definition of a factory in s. 151 (1) of the Factories Act, 1937. It is obviously not a factory in the dictionary sense of the word or as the word is used in ordinary language, but s. 151 provides:

"(1) Subject to the provisions of this section, the expression 'factory' means any premises in which, or within the close or curtilage or precincts of which, persons are employed in manual labour in any process for or incidental to any of the following purposes, namely:—(a) the making of any article or of part of any article; or (b) the altering, repairing, ornamenting, finishing, cleaning, or washing, or the breaking up or demolition of any article; or (c) the adapting for sale of any article; being premises in which, or within the close or curtilage or precincts of which, the work is carried on by way of trade or for purposes of gain and to or over which the employer of the persons employed therein has the right of access or control . . . (6) Where a place situate within the close, curtilage, or precincts forming a factory is solely used for some purpose other than the processes carried on in the factory, that place shall not be deemed to form part of the factory for the purposes of this Act, but shall, if otherwise it would be a factory, be deemed to be a separate factory."

I think the restaurant clearly comes within the first part of s. 151 since it is within the close, curtilage, or precincts of a factory and, therefore, *prima facie* is a factory.

I now have to consider whether the first part of sub-s. (6) takes it out of that category. Is it solely used for some purpose other than processes carried on in the factory? *Cardiff Revenue Officer v. Cardiff Assessment Committee & Western Mail, Ltd.* (2), a decision of the Divisional Court (AVORY, TALBOT and FINLAY, JJ.), concerned a question of rating under the Rating and Valuation (Apportionment) Act, 1928, s. 3 (1). The headnote states that:

"Printing offices and works in which a newspaper was composed, printed, and published, were included in the Special List under the Rating and Valuation (Apportionment) Act, 1928, as an industrial hereditament, and an apportionment was made of the net annual value of the hereditament

according as its various parts were used for industrial or non-industrial purposes . . . ”

The second part of the finding was:

“ . . . that the annual value of the hereditament must be apportioned according to the occupation and use thereof for industrial purposes, and the occupation and use for other purposes; that those portions of the premises which were occupied and used for printing, composing, engraving, publishing and circulating were used for industrial purposes and entitled to be de-rated, but that those portions of the premises which were occupied and used for the editorial department, general administrative offices and clerical staff, advertising department, stationery counter, and returns store were used for non-industrial purposes and not entitled to be de-rated.”

AVORY, J., said this ([1931] 1 K.B. 70):

“ My opinion is that in each of these cases the items which are included under the head of ‘ Printing, composing, engraving, etc.’, are all clearly used for industrial purposes, with the exception in the Western Mail case of the item of 270 square feet which is described as a ‘ canteen ’, and in the David Duncan case with the exception of the item of 1,152 square feet which is described as ‘ mess-room and cook-house ’ . . . ”

TALBOT, J., says this (*ibid.*, 78):

“ I do not wish to add anything to what has been already said about the details of the apportionment, but I would add one thing with the consent of my brother AVORY. I think that what he said with regard to the mess-room and cook-house in the case of David Duncan & Sons may not have been wholly unambiguous. I have his authority for saying this, and it is also my own view; I do not think that he intended to say that the mess-room and cook-house necessarily came out of the industrial part of the building. Whether they do or not must depend upon the persons for whose accommodation they are provided and used: according to whether they relate to the industrial part, the factory proper, if I may use the term, or to the clerical and editorial part of the hereditament.”

That case was followed in 1942 by *London Co-operative Society, Ltd. v. Southern Essex Assessment Committee* (3). The headnote reads:

“ A laundry, which was an industrial hereditament within the meaning of the Rating and Valuation (Apportionment) Act, 1928, used a part of its premises as a canteen. The laundry was about three quarters of a mile from the nearest town, and it was contended that the canteen was necessary for the welfare of the workers and the efficiency of the laundry and was, therefore, occupied for industrial purposes. The canteen was not run with a view to making a profit and the employees, who alone used the canteen, were treated in every way as customers at one of the society’s retail shops. For this reason it was contended by the rating authority that the canteen was a retail shop and, as such, could not be a part of an industrial hereditament:—*Held*: in the circumstances the canteen was not a place used solely for some purpose other than the manufacturing process or handicraft carried on in the laundry within the meaning of the Factory and Workshop Act, 1901, s. 149 (4), and was, therefore, part of the industrial hereditament.”

TUCKER, J., thought that the decisive element was that the canteen was essential for the welfare and efficiency of the workers engaged in the admittedly industrial part of the undertaking. That was the criterion which he applied. He said ([1941] 3 All E.R. 255):

“ The difficulty which I have felt in this case is as to whether it is not a pure question of fact with regard to which it is difficult to say that quarter

sessions have come to a wrong conclusion in law, but, on the whole, I agree that, on the facts as set out, this does raise a question of law, and that, on those facts, quarter sessions came to an erroneous decision. The element in the case which to my mind is decisive is that I think that the facts as stated really show that the canteen in this particular case was a necessary and essential feature of the premises for the welfare and efficiency of the workers engaged in the industrial part of the undertaking. It is quite true that the words in the Case are that the appellants consider the canteen necessary for the welfare of the workers and that quarter sessions have not said that they consider it essential, but I think that that is really too narrow a view to be taken of those words. Having regard to the whole of the facts as set out, I think that it is apparent that in this particular case this canteen was an essential and necessary part of the factory . . .”

Street v. British Electricity Authority (4) was on rather a different point. *Wood v. London County Council* (5), related to a kitchen in a hospital and the headnote reads:

“The appellant, who was employed by the respondents at the Bexley Mental Hospital, met with an accident while working an electric mincer in the kitchen of that institution. Although she had been shown how to use both the machine and the plunger for pushing the meat on to the mincing-knife, she put her hand through an aperture in the guard for the purpose of dislodging a piece of meat which had become attached to the side of the hopper. The aperture was of such a size that, while it would be impossible for a man to get his hand through it, it was quite possible for a young girl to get her hand through, and, in the latter case, the guard was an insufficient protection. It was contended that the appellant had not been guilty of contributory negligence. For the respondents, it was contended that the kitchen was not a factory within the Factories Act, 1937:—*Held*: (i) the kitchen was not a factory within the Factories Act, 1937 . . .”

The decision of TUCKER, J., was reversed on this point. He had held that persons were employed in

“‘manual labour in [a] process for or incidental to . . . (a) the making of any article [that is, mince] . . . or (b) the altering . . . of any article [that is, corned beef] . . .’”

It seems to me that, generally speaking, the ordinary work in a kitchen necessarily involves some alteration of the article. Potatoes, meat, fruit, and things like that, originally in their raw state, come out in their cooked state, and, therefore, there must necessarily be some sort of alteration in the article. In a restaurant there is always, I think, an adaptation for sale, and, of course, there are also washing-up machines, and so on. But, notwithstanding that, the Court of Appeal held on the facts that the kitchen was not a factory. MACKINNON, L.J., said this ([1941] 2 All E.R. 233):

“It is said that this was a factory by reason of s. 151 of the [Factories Act, 1937]. The headnote of that section is, ‘Interpretation of expression “Factory”’ . . . [His Lordship read the material part of sub-ss. (1) and (9)]. It is said that the plaintiff was employed in manual labour. That is true. She was employed in manual labour in a process for or incidental to that of one of the following purposes—namely, the breaking up or demolition of any article, which I think is the principal thing relied on, and is enough—the subsequent words about work being carried on for the purpose of trade or gain being cut out and rendered unnecessary to be added to the definition, because these premises were in the occupation of the London County Council, and, therefore, are within sub-s. (9).”

The learned lord justice considers other matters and points out the great difficulty there would be if the kitchen was a factory and the apparent inapplicability of a number of the sections of the Factories Act, 1937, to a kitchen of this type in a hospital, and in particular he says (*ibid.*, 234):

" . . . I may point out that by s. 70, under the headings 'Hours and Holidays' and 'Employment of Women and Young Persons', it is provided that the period of employment shall not exceed eleven hours in any day, and shall not begin earlier than 7 a.m. nor end later than 8 p.m., or, on Saturday, 1 p.m. Those are provisions which I should think would be quite impossible to apply to the work being carried on in the kitchen of this asylum, particularly the provision that no work shall be done earlier than 7 a.m. or later than 8 p.m."

He continues (*ibid.*, 235):

"Those are some of the extraordinary results which would follow if this kitchen was a factory, quite apart from one's surprise, from the point of view of common sense, that an ordinary kitchen (a kitchen no doubt on a very considerable scale, because there are over two thousand people to cook for) could be within the definition of a factory at all. Counsel for the plaintiff was quite consistent in his argument, because he did not shrink from agreeing to my suggestion that, if this was an ordinary little cottage hospital run by some rural district council, with perhaps two people in its small kitchen, those premises would be a factory, because there would be persons employed in manual labour in a process incidental to one of the following purposes—namely, the washing of an article, that is to say, the ordinary washing up of a few plates and dishes which had been used in the other part. I fully recognise that, in construing an Act, one is not to be deflected from giving it its proper meaning by looking at and citing absurd lengths to which the definition may drive one, but I do not think that it is improper to take into account the whole nature of these premises and the nature of the work which is going on in them. In my view, a kitchen is not within this definition of a factory by reason of the fact that dishes are washed up in a kitchen, or by reason of the fact that articles are altered, finished or cleaned in a kitchen, or by reason of the fact that articles are ornamented, as, for instance, by providing icing sugar on a cake, or parsley for a garnish for dishes. A kitchen which is carried on in a large way by people running a restaurant for the purpose of trade or gain would not, by reason of those words, become a factory within that section."

I have to take into account the whole nature of this restaurant and the work done in it.

Counsel for the plaintiff relied on *Simmonds Aerocessories (Western), Ltd. v. Pontypridd Area Assessment Committee* (6), a decision of the Divisional Court in which the question was whether a canteen which was restricted to the use of the appellants' employees and comprised two large dining rooms in which hot and cold meals were served, with cloak-rooms and other accommodation, was a factory within the meaning of the Factory and Workshop Act, 1901. Electrical machinery was used in the kitchen of the canteen. The judgment of the court (*VISCOUNT CALDECOTE, C.J., MACNAGHTEN and ATKINSON, JJ.*) was read by *ATKINSON, J.*, who said ([1944] 1 All E.R. 266):

"Subject to certain exceptions specified in s. 3 (1) of the [Rating and Valuation (Apportionment) Act, 1928] an 'industrial hereditament' means a hereditament used and occupied as a factory or workshop, these expressions having the same meaning as in the Factory and Workshop Acts, 1901-1920. The first question, therefore, is whether this canteen is a factory or workshop. Both expressions include, *inter alia*, any premises

wherein manual labour is exercised by way of trade, or for purposes of sale for gain, in or incidental to any of certain purposes, including the making of any article or the adapting for sale of any article. It is plain that much manual labour is exercised in the canteen for the purpose of making articles of food and for the purpose of adapting articles of food for sale; and that such labour is exercised by way of trade. The canteen is, therefore, a factory or workshop."

A It does not appear that *Wood v. London County Council* (5) was cited in that case.

In *Hendon Corpn. v. Stanger* (7) there is a reference in the course of SOMERVELL, L.J.'s judgment to *Wood v. London County Council* (5). SOMERVELL, L.J., says, after dealing with the ratio decidendi in *Nash v. Hollinshead* (8) ([1948] 1 All E.R. 380):

B "That process of reasoning was employed in *Wood v. London County Council* (5) by MACKINNON, L.J. The question there was whether a kitchen was a factory. A kitchen is, no doubt, a place in which things are made and altered. MACKINNON, L.J., based his decision on a consideration of the Acts as a whole. He said that, for instance, if the kitchen were a C factory, no woman or young person could be employed later than 6 p.m. and no woman could be employed on Sunday. This and other provisions, in his opinion, made it clear that kitchens were outside the Factory Acts. That being so, there does not seem to me any case or principle laid down which is in favour of counsel's argument."

D Counsel for the plaintiff cited *Thorogood v. Van Den Berghs & Jurgens, Ltd.* (9), of the report of which the headnote is as follows:

E "The plaintiff was employed as an electrician by the defendants, the occupiers of a factory which they used for the manufacture of margarine. Within the curtilage of the factory was a separate building which was used for maintenance work in connection with the machinery and plant in the factory. While the plaintiff was testing in this maintenance shop an electric fan which was used to extract steam in a ventilator in a room in the factory where one of the processes of the manufacture of margarine was carried on and which had been removed to the maintenance shop for repair, his hand was caught in the rotating blades of the fan and he was injured."

F DEVLIN, J., dismissed the action, holding that the maintenance building was a separate factory, but the Court of Appeal reversed that, holding that it was not a separate factory, but was a part of the factory. My attention was called to the judgment of COHEN, L.J. ([1951] 1 All E.R. 685), where he said:

G "It is not disputed that the defendants' margarine factory is a factory within the first part of that definition [in s. 151 (1) of the Factories Act, 1937], but the defendants contend, first, that the separate building in which repairs to machinery are carried out—I shall refer to it henceforth as the 'engineering shop'—is to be deemed to be a separate factory by reason of s. 151 (6) . . ."

H Then he deals with the process by which the learned judge arrived at his conclusion (*ibid.*, 686):

"DEVLIN, J., recognised that, if the case cited [*London Co-operative Society, Ltd. v. Southern Essex Assessment Committee* (3)] had been a decision under the Factories Act, it would have been almost conclusive in favour of the plaintiff in the present case. He said: 'It is a decision under a Rating Act, and I do not think, paradoxical though it may sound, that a definition section which is common to two Acts is necessarily to be given the same meaning in both. The way in which sections taken from an

earlier Act should be construed in the later Act has been the subject of varying judicial comment'. He then proceeded to consider a number of authorities and came to the conclusion that he had a free hand. In none of the cases he cited, however, were any words so definite as 'shall have the same meaning' used."

I do not think I need deal with the passage which considered the question of construction on the principle that the Act imposed penalties.

On the authority of this case counsel for the plaintiff contends that the question I have got to consider is: Was this restaurant solely used for some purpose for, or incidental to, the process carried on in the factory? I think that this case is very much a borderline matter. The main difficulty arises from two elements, namely, that the apprentices had a games room there and that one of the dining rooms was occasionally used for the purposes of these joint conferences. However, applying the test which was applied, and looking, as I do, at this question as *MACKINNON, L.J.*, did, in *Wood v. London County Council* (5), regarding the complete whole and the purposes for which it was used, and also bearing in mind the test of the Divisional Court, whether it was essential for the welfare of the admittedly industrial workers, I have come to the conclusion that this is not a factory. It was, as I find, within the curtilage of the factory and comes within s. 151 (1), but I think it was solely used for some purpose other than the processes carried on in the factory. Therefore, the first part of sub-s. (6) takes it out of the statutory definition of a factory into which it was placed by sub-s. (1), and, in my view, it is not brought back by the latter part of sub-s. (6). I have followed the principles which have been enunciated by the cases, particularly *Wood v. London County Council* (5), and I have come to the conclusion that it cannot be said that this restaurant is a separate factory. In those circumstances, if I am correct, there is no statutory duty on the defendants under the Factories Act, 1937, towards the plaintiff.

[His LORDSHIP found on the evidence that, if he was wrong in holding that the restaurant was not a factory under the Factories Act, 1937, s. 151, the defendants had not been in breach of their statutory duty under s. 26 (1) and (2) of the Act or guilty of negligence, and that, therefore, the accident was not due to any such breach of duty or negligence. He held further that, if there was such negligence or breach of duty, there was no contributory negligence on the part of the plaintiff, and he assessed the damages (in case of a successful appeal) at £901 6s.]

Judgment for the defendants.

Solicitors: *Evill & Coleman* (for the plaintiff); *Stuart H. Lewis* (for the defendants).

[Reported by F. A. AMES, Esq., Barrister-at-Law.]

RITCHIE v. T. G. IRVING & CO., LTD.

[COURT OF APPEAL (Singleton, Birkett and Morris, L.J.J.), November 26, 27, 1952.]

Ship—Winch—Duty to fence—“So far as is practicable without impeding the safe working of the ship”—Docks Regulations, 1934 (S.R. & O., 1934, No. 279), reg. 26.

A While a vessel was discharging a cargo of coal at a port, a seaman employed in the ship was asked to raise the derrick to enable the stevedores to shift the coal. As he was re-winding the wire rope on to the drum of the winch, he was caught by the rope, was pulled over the guard towards the drum, and suffered injuries. The guard at the side of the drum was of the usual kind and height, and evidence was given that it would have been impossible to have put more fencing above the drum without impeding the use of the winch, while a further guard at the side of the winch would not have been practicable as it would have prevented access to that part of the ship. In an action for damages against the shipowners the seaman alleged, inter alia, a breach of the Docks Regulations, 1934, reg. 26.

B
C HELD: the working of the winch was part of the working of the ship; as further fencing would have made it impossible to work the winch properly, it was not practicable to fence the drum more securely “without impeding the safe working of the ship”, within the meaning of reg. 26 of the regulations of 1934; and, therefore, the shipowners were not in breach of the regulation.

D AS TO REGULATIONS RELATING TO DOCKS, see HALSBURY, 1952 Supplement, Factories and Shops, para. 1169.

APPEAL by the plaintiff from an order of STABLE, J., made at Durham Assizes on June 9, 1952, in an action for damages for personal injuries.

The plaintiff was a seaman employed by the defendants in their coastal vessel, the Ashdene, which was used for carrying coal from Sunderland to other places. In the ship was a small winch driven by a diesel engine. On E Nov. 23, 1949, while the vessel was discharging a cargo of coal at Macduff, Banfishire, the plaintiff and another seaman, named Dowell, were asked by the stevedores to raise the derrick so that they might shift the coal in another part of the hold. This involved using the winch, at the side of which was a guard three feet, two inches, high. Below this was the drum of the winch, around which ran the wire rope used for lifting cargo. After doing what was F required, the plaintiff wished to leave the wire rope straight and even, for the convenience of the next users of the winch, and, holding the wire rope in his left hand, he stooped to pick up a hammer with which he intended to keep the wire level round the drum. At the same time he told Dowell to start the winch. In some way, which was not explained, the plaintiff's left arm was drawn towards the winch, and, in trying to free himself, he fell, his right hand G and arm were caught, and he was pulled over the guard towards the drum and injured.

The plaintiff brought an action for damages against the defendants, his claim being based (a) on negligence at common law, and (b) on a breach of the Docks Regulations, 1934, reg. 26. At the hearing of the action evidence was given on behalf of the defendants that the guard at the side of the drum H was of the usual type and that it would have been impossible to put more fencing above or at the side of the drum without impeding the use of the winch or preventing access to it. STABLE, J., held that the defendants were not liable in damages and dismissed the action, and the plaintiff appealed against that part of the judgment whereby the learned judge held that there was no breach of reg. 26 of the regulations of 1934.

Fox-Andrews, Q.C., and J. H. Robson for the plaintiff.

Berryman, Q.C., and W. G. Wingate for the defendants.

SINGLETON, L.J., stated the facts and continued: The plaintiff's case is based entirely on reg. 26 of the Docks Regulations, 1934 (S.R. & O., 1934, No. 279) [which were made under s. 79 of the Factory and Workshop Act, 1901]. Regulation 26 reads:

"All . . . friction gearing . . . shall (unless it can be shown that by their position and construction they are equally safe to every person employed as they would be if securely fenced) be securely fenced so far as is practicable without impeding the safe working of the ship . . ."

It was pointed out by counsel for the plaintiff that the learned judge's finding, and, indeed, the accident itself, showed that the drum round which the wire rope went was not securely fenced. There is no question as to that, and it is common ground that the drum was "friction gearing" within reg. 26. Therefore, it is submitted on behalf of the plaintiff that, *prima facie*, there was a breach of the regulation in that the friction gearing was not securely fenced. It then becomes necessary to consider the further words of the regulation:

" . . . so far as is practicable without impeding the safe working of the ship . . ."

A good deal of the argument before us has been devoted to a discussion of what is meant by the "safe working of the ship". The plaintiff was the only witness called in support of his case. He described the working of the winch, and told how the accident happened. On the defendants' side two witnesses were called, the mate of the ship (whose evidence is not important from the point of view of the discussion before this court), and a Mr. Potts, who is a consulting engineer and marine surveyor.

[His LORDSHIP reviewed the evidence of Mr. Potts, who said that the winch in question was a popular make with this type of tonnage, that he had never known a winch to be more fenced than this one was, and that it could not function unless there was an open space above the drum where the wire rope went. The learned lord justice continued:] STABLE, J., had to consider whether or not a breach of reg. 26 of the regulations of 1934 was proved. The defendants had called evidence to show that this part of the ship was securely fenced "so far as is practicable without impeding the safe working of the ship", within the regulation. In his judgment, STABLE, J., having dealt with the facts, said:

"Mr. Potts said that he did not know of any winch, and had never seen any make of winch, that was more securely fenced than this was. He said that any additional protection was, in his view, not only impracticable, but would have added to the risk of anybody using the winch . . . These are, of course, practical matters, and in view of the testimony of Mr. Potts, which I accept (because it is the testimony of an expert and it seems to me to coincide with the real issue and the common-sense view of the matter), I have come to the conclusion that the defendants are protected by the words 'so far as is practicable without impeding the safe working of the ship'. In that event, the claim of the plaintiff fails and the action must be dismissed."

Regulation 26 of the regulations of 1934 is in quite different terms from some sections of the Factories Act, 1937. Section 14 (1) of the Act of 1937 provides:

"Every dangerous part of any machinery, other than prime movers and transmission machinery, shall be securely fenced unless it is in such a position or of such construction as to be as safe to every person employed or working on the premises as it would be if securely fenced . . ."

In reg. 26 of the regulations of 1934 there are brought in the words "so far as is practicable without impeding the safe working of the ship". I am impressed by the fact that in the years that these regulations have been in

operation there do not appear to have been any suggestions for dealing with a winch other than the way in which this winch was constructed and guarded, so far as the evidence shows. No evidence of an expert nature was called on behalf of the plaintiff, and the witness who gave evidence for the defendants said he had never seen any other form of guard adopted than was adopted in this case, and he was not cross-examined on that. It was suggested to him that there might be different means taken, and the learned judge thought his answers disposed of the very ingenious suggestions made by counsel for the plaintiff. One could cover up a part or the whole of the drum, but, if one did that, one could not work the winch and could not work that part of the ship, from which it follows that it is not practicable without impeding the safe working of the ship. The working of the winch is part of the working of the ship. The winch may be used as it was being used on the day of the accident, or it may be used when the ship is at sea. I do not think anyone would contend that, if a vessel is constructed for the carriage of coal, the working of the winch is not part of the working of the ship. On the evidence, you could not work the ship if the sides of this winch were raised to a greater height, and, as the witness said, if an alteration made it impossible to work the winch, it would have been equally impossible to work it safely. It seems to me to follow that the suggestions which counsel for the plaintiff made to the witness were not things which were practicable without impeding the safe working of the ship. That is the view which the judge formed on the evidence, and I think it was right. I cannot see that any breach of reg. 26 is shown, and I am satisfied that this appeal should be dismissed.

BIRKETT, L.J.: I am of the same opinion. [His LORDSHIP stated the facts and continued:] I agree that the working of the winch was the "working of the ship" in the proper interpretation of that term. In the working of the ship there might be many occasions on which it would be necessary to get at, or into, the winch. As Mr. Potts said, it would be possible to reconstruct the winch in the manner suggested by counsel for the plaintiff, but in that case one would not have a working winch, because it would be inaccessible. In other words, one could not add more fencing without impeding the safe working of the ship. I, therefore, agree that this appeal ought to be dismissed.

MORRIS, L.J.: I am in full agreement with the judgments which have been delivered.

Appeal dismissed.

Solicitors: *Isadore Goldman & Son*, agents for *Crute & Sons*, Sunderland (for the plaintiff); *Sinclair, Roche & Temperley*, agents for *Botterell, Roche & Spark*, Sunderland (for the defendants).

[Reported by C. N. BEATTIE, ESQ., Barrister-at-Law.]

WHITE v. BRISTOL AEROPLANE CO., LTD.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Denning and Romer, L.JJ.), December 11, 1952.]

Company—Alteration of members' rights—Proposal to increase capital—Issue of preference and ordinary shares to ordinary shareholders—Whether rights of preference stockholders "affected".

The capital of a company was £3,900,000, consisting of £600,000 preference stock and £3,300,000 ordinary stock, all of which was issued and fully paid. The articles of association of the company provided, by art. 68: "... all or any of the rights or privileges attached to any class of shares forming part of the capital for the time being of the company may be affected, modified, varied, dealt with, or abrogated in any manner with the sanction of an extraordinary resolution passed at a separate meeting of the members of that class ..." By art. 83 it was provided: "... preference shares or preference stock shall not confer on the holders thereof the right in respect thereof to receive notice of or to attend or vote at a general meeting unless the dividend thereon is in arrear or unless the meeting is convened to consider a resolution for winding-up or to reduce capital or to consider a resolution directly affecting their rights or privileges as a separate class ..." The company proposed to create (by way of capitalisation of undistributed profits) (a) 660,000 new cumulative preference shares of £1 each ranking *pari passu* with the existing preference stock, and (b) 2,640,000 ordinary shares of 10s. each ranking *pari passu* with the existing ordinary stock. Under the company's regulations both new issues would be distributed to existing ordinary stockholders. On the question of the rights of existing preference stockholders in relation to the proposal, no argument being advanced that their rights were modified, varied or abrogated, and no separate significance being attached to the term "dealt with",

HELD: the proposed transaction would, or might, affect the enjoyment of their rights by the preference stockholders, but their rights as such would not be affected, and, therefore, the proposed transaction could be carried out without the summoning of a separate meeting of the preference stockholders as provided for by art. 68, and without the summoning of the preference stockholders to attend and vote at a general meeting of the company in accordance with art. 83.

Re Mackenzie & Co., Ltd. ([1916] 2 Ch. 450), applied.

Dictum of LORD GREENE, M.R., in *Greenhalgh v. Arderne Cinemas, Ltd.* ([1946] 1 All E.R. 517), explained.

AS TO RIGHTS OF PREFERENCE SHAREHOLDERS, see HALSBURY, 1949 Edn., Vol. 5, p. 156, para. 282; and FOR CASES, see DIGEST, Vol. 10, pp. 1002-1009, Nos. 6961-6993.

Cases referred to:

- (1) *Re John Smith's Tadcaster Brewery Co., Ltd.*, [1952] 2 All E.R. 751.
- (2) *Re Mackenzie & Co., Ltd.*, [1916] 2 Ch. 450; 85 L.J.Ch. 804; 115 L.T. 440; 9 Digest 563, 3734.
- (3) *Greenhalgh v. Arderne Cinemas, Ltd.*, [1945] 2 All E.R. 719; *affd.* C.A., [1946] 1 All E.R. 512; 2nd Digest Supp.

APPEAL by the defendant, the Bristol Aeroplane Co., Ltd., from an order of DANCKWERTS, J., dated Nov. 28, 1952.

The plaintiff, a holder of preference stock in the defendant company, sought declarations that (i) on the true construction of the memorandum and articles of association of the company the holders of preference stock were entitled to receive notice of and to attend and vote at a general meeting of the company

convened to consider any resolution for increasing the capital of the company or for issuing shares of any class in such capital; and (ii) any resolution for increase of the capital of the company (save a resolution for the creation or issue of further preferential shares ranking *pari passu* with the existing preference stock up to the limit stated in art. 62 of the articles of association) required the sanction of an extraordinary resolution passed at a separate meeting of the holders of preference stock in accordance with art. 68 of the articles of association. The plaintiff further sought injunctions restraining the company by their servants and agents from increasing the capital in a manner inconsistent with the aforesaid rights of the preference stockholders. On motion DANCKWERTS, J., made an order restraining the company until after judgment in the action or until further order from (a) convening a general meeting to consider a resolution to increase the capital of the company by issuing £660,000 new five per cent. cumulative preference shares to rank *pari passu* in all respects with the existing £600,000 preference stock, and by issuing 2,640,000 new ordinary shares of 10s. each, without giving notice of such general meeting to the holders of the preference stock of the company; and (b) passing or acting on such resolution without the sanction of an extraordinary resolution passed at a separate meeting of the holders of the preference stock in accordance with art. 68 of the articles of association of the company. The company appealed against the said order.

J. G. Strangman, Q.C., and *K. L. Coghlan* for the company.

Gray, Q.C., and *D. S. Chetwood* for the preference stockholder.

SIR RAYMOND EVERSLED, M.R.: The question raised in this appeal

is whether, according to the proper construction of the memorandum and articles of association of the Bristol Aeroplane Co., Ltd., to which I will refer hereafter as "the company", the proposed distribution (by way of capitalisation of undistributed profits) of fully paid-up preference and ordinary shares requires (i) that a separate meeting of the existing preference stockholders should be summoned, and an extraordinary resolution in favour of the proposals passed thereat, and (ii) that the existing preference stockholders should be summoned to attend, and vote at, the general meeting of the company.

[HIS LORDSHIP stated the existing capital position of the company and the effect of the proposals to increase the capital from £3,900,000 to £5,880,000, and continued:] It is, therefore, manifest that the ordinary stockholders, by obtaining between them the 660,000 preference shares of £1 each, or the equivalent amount of stock, will, on a matter which has solely to be debated by preference stockholders, have a majority over the existing preference stockholders, and it is also manifest that on a matter on which all the stockholders, preference and ordinary, debate together the new ordinary stock to be issued will swell the total number of votes that can be cast by ordinary stockholders, although it is fair to add that the proportion of votes which ordinary stockholders will have as against preference stockholders will be reduced from the present ratio of about eleven to one to the smaller ratio of about $7\frac{1}{2}$ to one.

It has been the contention of the representative of the preference stockholders, who is the plaintiff in the action—a contention which was successful in the court below—that the proposal now made falls within the ambit of certain clauses in the articles which I will read, so as to give the preference stockholders the right to a separate meeting and to attendance at the general meeting of the company. I turn, therefore, at once to the articles, and I am bound to say that the draftsman has displayed a prolixity of expression, which has, I think, given rise to the difficulty with which the company, and the court, is faced. It will be sufficient if I go at once to art. 61, observing only that by a previous article, art. 50, the words "share" and "shareholders" are later used as comprehending "stock" and "stockholders". Article 61 sets out the present capital, and indicates the rights, or some of the rights—for it is not

in this respect exhaustive—which belong to the preference stockholders. After stating the figures of the original capital, the article proceeds:

“The said preference stock shall confer upon the holders thereof the right to a fixed cumulative preferential dividend at the rate of five per cent. per annum on the capital paid up or credited as paid up thereon, and the right in a winding-up to repayment of the capital paid up or credited as paid up thereon, together with all arrears and accruals of the said preferential dividend down to the date of such repayment, whether earned or declared or not, before any return of capital is made on the ordinary stock or shares, but shall not confer any further right to participate in profits or assets.”

There follows a number of clauses dealing with increase of capital, of which the most important is the next clause, art. 62, which I will read in full:

“The company may from time to time, in general meeting, whether all the shares for the time being authorised shall have been issued, or all the shares for the time being issued shall have been fully called up or not, increase its capital by the creation of new shares, such aggregate increase to be of such amount and to be divided into shares of such respective amounts as the general meeting resolving upon the creation thereof shall direct. Subject and without prejudice to any rights for the time being attached to the shares of any special class, any shares in such increased capital may have attached thereto such special rights or privileges as the general meeting resolving upon the creation thereof shall direct, or, failing such direction, as the directors shall by resolution determine, and in particular any such shares may be issued with a preferential, deferred or qualified right to dividends or in the distribution of assets and with a special or without any right of voting. No shares shall be issued so as to rank in priority to the preference stock referred to in art. 61 either as to dividend or capital, without the sanction of an extraordinary resolution passed at a separate meeting of the holders thereof in manner provided in art. 68; but preference shares may without any such sanction be created and issued so as to rank *pari passu* therewith, provided that the total nominal amount of the preference capital for the time being issued shall not exceed the total nominal amount of the ordinary capital for the time being issued and outstanding.”

Article 63 provides for shares being offered to the existing members in a particular manner. Article 64 provides:

“Subject to any directions that may be given in accordance with the powers contained in the memorandum of association or these articles, any capital raised by the creation of new shares shall be considered as part of the original capital, and as consisting of ordinary shares, and shall be subject to the same provisions with reference to the payment of calls, transfer, transmission, forfeiture, lien and otherwise as if it had been part of the original capital.”

Article 68 bears the familiar heading: “Modification of rights”, and is as follows:

“Subject to the provisions of s. 72 of the [Companies Act, 1948] all or any of the rights or privileges attached to any class of shares forming part of the capital for the time being of the company may be affected, modified, varied, dealt with, or abrogated in any manner with the sanction of an extraordinary resolution passed at a separate meeting of the members of that class. To any such separate meeting all the provisions of these articles as to general meetings shall . . . apply . . .”

The Companies Act, 1948, s. 72, relates to the right of holders of special classes of shares to apply to the court in certain circumstances where variation of their rights is proposed. That section does not apply in the present case.

Next I must refer to art. 83, and we now pass from the first point—whether there must be a separate meeting—to the second point—whether the preference stockholders are entitled to be present, and to vote, at the general meeting. Article 83 reads:

A “ Subject to any special rights or restrictions for the time being attached
to any special class of shares in the capital of the company, on a show of
hands every member personally present shall have one vote only, and
B in case of a poll every member present in person or by proxy shall (subject
as hereinafter provided) have one vote for every share held by him or
in the case of the said preference stock one vote for every £1 of preference
stock held by him or in the case of the said ordinary stock one vote for
every ten shillings of ordinary stock held by him: Provided that preference
C shares or preference stock shall not confer on the holders thereof the right
in respect thereof to receive notice of or to attend or vote at a general
meeting unless the dividend thereon is in arrear or unless the meeting is
convened to consider a resolution for winding-up or to reduce capital or to
consider a resolution directly affecting their rights or privileges as a
separate class . . . ”

The only other articles to which I need allude are art. 131 and art. 132. Article 131, under the heading of “ Dividends and reserve fund ”, provides:

D “ Subject to any rights or privileges for the time being attached to any
shares in the capital of the company having preferential, deferred or other
special rights in regard to dividends, the profits of the company which it
shall from time to time be determined to distribute by way of dividend
shall be applied in payment of dividends upon the shares of the company
in proportion to the amounts paid up thereon respectively ”

E as therein stated. Article 132 provides:

“ The directors may, with the sanction of a general meeting, from time
to time declare dividends . . . ”

Finally, it is under art. 139 that the proposed scheme of capitalisation is intended
to be carried through, but I need not read that article. From what I have read
it will be observed that the rights of the preference stockholders consist, first,
F of the right to priority of the dividend of five per cent. on the paid up capital—
i.e., in priority to any dividend paid to ordinary stockholders; secondly, of the
right to repayment, on a winding-up, of capital and unpaid dividends on their
shares before anything is distributed to the ordinary stockholders; thirdly, of
a qualified right to attend meetings and to vote. Their voting rights by reference
to the amount of capital paid up are half those of the ordinary stockholders,
G and they are only entitled to influence the transactions of the company at
meetings at which it is proposed to deal with subject-matters of the kind men-
tioned in art. 83. They have also certain special rights to be separately
summoned in case there is anything to be done affecting, modifying, varying,
dealing with or abrogating in any way their other rights or privileges.

H Those being the relevant articles, the question shortly is: Will the effect
of this proposed distribution, if carried out, be to “ affect ” the rights of the
preference stockholders? I can state it thus briefly, because counsel for the
preference stockholder, has not sought to make any distinction between
“ rights ” and “ privileges ”, and he has, in view of certain authorities which
I shall mention later, not contended that the proposals operate, or would
operate, to “ modify ” or “ vary ”, still less to “ abrogate ”, the existing
preference stockholders’ rights, and, finally, counsel for the preference stock-
holder does not attach any separate significance to the words “ dealt with ”.

The argument for the preference stockholder, in its briefest form, is that this word "affect", particularly when followed at the end of the collection of words which I have mentioned by the phrase "in any manner", is a word of the widest import, and, therefore, it must be taken to cover, and as having been intended to cover, a transaction which, though not in any way modifying or varying the rights, would in some way otherwise affect them, and, as junior counsel for the preference stockholder added in his few observations following those of his learned leader, if it has a meaning of that kind, the precise method whereby the result is arrived at cannot matter. On the other side it has been argued that this formula is one of some antiquity—or the substance of it is—that there is authority for the view that no such broad and significant meaning should be given to the word "affected", and, further, that to give so broad a meaning to that word is not consistent with the inevitable implications of other parts of these regulations, particularly art. 62 and art. 64. The learned judge came to the conclusion that the plaintiff's contentions were well-founded, and he granted injunctions to restrain the company from carrying out their proposed scheme of increase of capital and distribution of new shares without first having a separate extraordinary meeting of the preference stockholders and also summoning the preference stockholders to the general meeting of the company. In so holding he followed an earlier decision of his own in *Re John Smith's Tadcaster Brewery Co., Ltd.* (1), an appeal from his decision in which case is now pending in this court. The learned judge, in the latter case—as, indeed, I think, DANCKWERTS, J., did in the present case—expressed the view that the matter was not free from difficulty. Nor, indeed, is it, and that is as the result, I venture to repeat, of the use of a multiplicity of words without, perhaps, ever considering what their significance, singly or in conjunction, might be. But with all respect to the learned judge, I have come to a conclusion different from that which he entertained. I think, approaching this matter for the moment as a matter of construction of these articles, and without reference to these earlier authorities, that one cannot sensibly give to this word "affected" the wide meaning for which the plaintiff has contended.

It is necessary, first of all, to note—although on this matter counsel for the preference stockholder has not argued to the contrary—that what must be "affected" are the rights of the preference stockholders. The question then is: "Are the rights which I have summarised 'affected' by what is proposed?" It is said in answer—and, I think, rightly said—"No, they are not. They remain exactly as they were before. Each one of the manifestations of the preference stockholders' privileges may be repeated without any change whatever after, as before, the proposed distribution." It is, no doubt, true that the enjoyment of, and the capacity to make effective, those rights is, in a measure, affected, for, as I have already indicated, the existing preference stockholders will be in a less advantageous position on such occasions as entitle them to register their votes, whether at general meetings of the company or at separate meetings of their own class, but there is, to my mind, a sensible distinction between an affecting of the rights and an affecting of the enjoyment of the rights or the stockholders' capacity to turn them to account, and that view—again I am referring still to the construction of these regulations—seems to me to flow necessarily from certain other articles that I have read.

Let me take first of all art. 62. It is divided, so to speak, into three parts. The first indicates that the company may from time to time in general meeting increase the share capital by creating new shares. Up to that stage, no particular characteristics or rights are attached to the new shares created, and, should nothing else be done to give them special character, art. 64 automatically makes them ordinary shares. As a matter of construction, so far, of the article, I find it impossible to hold at that stage that increasing the capital by creating new shares involves an "affecting" of the preference stock—though, of course,

if you analyse the matter sufficiently, it is obvious that the result of so doing in some measure, for better or for worse, touches the way in which in the future preference stockholders may turn to account that which they have. The second part of art. 62 introduces for the first time the warning that what follows is without prejudice to the rights of "special classes", by which it is conceded that at least for present purposes the preference stockholders are meant. Without prejudice to them, shares in such increased capital may have attached to them special rights or privileges as to dividends, and in particular as to voting. There, again, that second part seems to me to indicate that it is only when one gives to these new shares special privileges of one kind or another, you may—it does not follow that you must—come into conflict with the rights attached to the existing special classes, so that this second step may only be capable of being taken after you have done what has to be done in the way of calling a separate meeting and so forth.

The matter is carried still further by the third, and perhaps most significant, part of the article:

"No shares shall be issued so as to rank in priority to the preference stock . . . without the sanction of an extraordinary resolution passed at a separate meeting of the holders thereof in manner provided in art. 68 . . ."

But the article goes on to provide:

"but preference shares may without any such sanction be created and issued so as to rank *pari passu* therewith,"

subject only to the limitation that one must not go on doing so if the result is that the total amount of paid up preference capital exceeds that of the ordinary capital, and so, I assume, leaves to the preference stockholders an insufficient basis, so to speak, of security in the ordinary issued capital.

Without going into too much detail, I cannot make those provisions consistent with the view that any variation which in any manner touches or affects the value of the preference stock or the character or enjoyment of any of the holders' privileges is within the contemplation of art. 68. I think counsel for the preference stockholder had to admit, going still further, that even a deliberate increase of new ordinary shares to rank *pari passu* with the existing ordinary shares would on this view of it mean separate meetings of the existing preference stockholders and also of the existing ordinary stockholders. I cannot think that such a result ought to be attributed to articles which are, after all, fairly well known as common form. Such a result seems to me to strike at the usual conception of the relations, in a company of this sort, of preference and ordinary stockholders, where the former take their rights subject always to the normal incidence of the company's right to increase its capital. I also obtain some assistance from art. 83, in two ways. First, with regard to the actual wording—though in documents of this sort I do not attach too much importance to the precise language. Instead of a repetition of the phrase "may be affected, modified, varied, dealt with, or abrogated", etc., one finds the single phrase "directly affecting", which leads me to the conclusion that "directly affecting" in this article and in this context cannot have so broad and general a meaning as the plaintiff contends. Secondly, I notice that a resolution to reduce capital is regarded as in itself such as to require the summoning of the preference stockholders to the meeting, and, therefore, as something distinct from a resolution "directly affecting" their rights. I do not also forget the point made by counsel for the company that, on the broadest view, even the payment of dividend might affect the rights of a preference stockholder. I quite agree that the court ought not, unless it is unavoidable, to reduce to mere futility a particular word which has apparently been deliberately introduced, but I do not think it is necessary to go so far.

Examples were put in the course of the argument, which I think might well answer the question: To what does this word "affecting", as distinct from

"variation", apply? For example, it might be, though I express no view on it, that a resolution aimed at increasing the voting power of the ordinary stockholders by doubling it, giving them twofold their present power, without otherwise altering any other of the privileges or rights attached to any class, might be said to be something so directly touching the position, and, therefore, the rights, of the preference stockholders, having regard to the statement of the voting rights in art. 83, as to be within the ambit of art. 68, albeit that there was no variation of their own individual rights. That case is not before us, and I mention it only to indicate that I am not persuaded that the conclusion which I have indicated involves the result that no meaning, as distinct from variation, can be given to the word "affected".

I must say a word now about the earlier cases. There was nothing in the *Tadcaster* case (1) to correspond with the second and third parts of art. 62 in the present case, and counsel for the company pointed out other differences to which I need not allude. I go to the case which may be said to have been the founding authority in cases of this sort, a case before ASTBURY, J., *Re Mackenzie & Co., Ltd.* (2) which was decided in 1916. In that case, there were, as here, preference shareholders or stockholders and ordinary shareholders or stockholders. The former had the right to a preferential dividend, but they had no right to priority as to capital in a winding-up. The company proposed to reduce its capital and to make the reduction a rateable reduction on all the shares, preference and ordinary alike. The objection was taken that the written consent of the preference shareholders as a special class was required. The relevant clause in the memorandum there was:

"Subject to any express provision to the contrary made upon the creation of any class of shares, all or any of the special rights, privileges and advantages attached to any class may, with the sanction in writing of the holders of two-thirds of the issued shares of the class (but shall not without such sanction), be altered, modified, dealt with or affected in any manner whatsoever . . ."

Article 64 followed in substantially the same form:

"All or any of the special rights, privileges and advantages attached to any class of shares may, with the sanction in writing of the holders of two-thirds of the issued shares of the class, but shall not without such sanction, be altered or modified, dealt with, or affected, in any manner whatsoever."

The argument, it is true, appears to have proceeded solely on the two words "altered" and "modified". I observe, however, having regard to the argument of the leading counsel who appeared for the opposing preference shareholders, that, so far as I can see, the learned judge was most careful in his judgment to avoid using any one of the four words used in the article, but, if the argument of the company here is correct, I should have thought it inevitable that the rights of the preference shareholders there were in a broad sense "affected". True, the rights as stated in the article remained, viz., the right to receive four per cent. on the nominal amount of the capital from time to time paid up or credited as paid up, but, in the business sense, in truth and in substance, the effect of what was done was to reduce by an amount corresponding to the amount of the reduction the total dividends of the preference shareholders. The learned judge rejected the argument (without, as I have said, referring to any one of the four words used in the article) that the preference shareholders were entitled to be required to sign the necessary consent.

The other case which has been referred to was decided in this court, viz., *Greenhalgh v. Arderne Cinemas, Ltd.* (3). In that case the plaintiff in the action had, as part of a transaction for advancing money to the defendants, obtained the issue to him of a number of what were called "1941 2s. shares", and it was one of the terms of the original arrangement that each of those shares

should, as regards voting, rank *pari passu* with the other issued ordinary shares of the company, which happened to be 10s. shares, so that, in effect, so long as that arrangement stood in relation to the actual paid-up capital, the plaintiff had five times as many votes as the other shareholders. The proposal on behalf of the other shareholders was to reverse the situation by sub-dividing the existing shares, so that at a stroke their voting power was made five times as great. Not unnaturally the plaintiff strongly objected, and among other points taken by him was the point that they could not do so without first calling a separate meeting of the 1941 2s. shareholders, treating them as a separate class, and the court proceeded to consider that matter on the footing that the 1941 2s. shares were a separate class. It is important to observe that the relevant modification of rights clause was the much less verbose clause taken from Table A (reg. 4). That provided:

"If at any time the share capital is divided into different classes of shares, the rights attached to any class . . . may . . . be varied with the consent in writing of the holders of three-fourths of the issued shares of that class, or with the sanction of an extraordinary resolution passed at a separate general meeting of the holders of the shares of the class."

So that all this court had to consider was whether this proposal of the other ordinary shareholders in the company involved a variation (the terms "altered", "modified", "affected", "disturbed", "dealt with", or "abrogated" were not employed) of Mr. Greenhalgh's rights (the article did not also refer to "privileges" or "advantages") as a substantial holder of 1941 2s. ordinary shares. This court said not, but counsel for the preference stockholder in the present case has laid emphasis on the circumstance that LORD GREENE, M.R., who delivered the leading judgment, apparently did not observe that the word "affected" appeared in the *Mackenzie* case (2).

I make two references to LORD GREENE's judgment where he said ([1946] 1 All E.R. 517):

"Several authorities have been cited, but the only one, I think, which throws any light on the matter is *Re Mackenzie & Co., Ltd.* (2), a decision of ASTBURY, J., which I do find, up to a point, helpful. It was a case of a petition for reduction of capital, and under the memorandum and articles the only right of the preference shareholders was to have a fixed cumulative preferential dividend of a certain amount. A rateable reduction of all the shares, preference and ordinary, was proposed to be carried out, subject to the sanction of the court. All the shares, preference and ordinary, suffered the rateable reduction, and the result of that was that the dividend rights of the preference shareholders were substantially affected because, by reducing their capital, as they were only entitled to a fixed cumulative preferential dividend on the nominal amount of their capital for the time being paid up, it reduced the dividend accordingly, although the dividend still remained at four per cent. That reduction operated in a certain way to the benefit of the ordinary shareholders, who were entitled to what is commonly called the equity . . . ASTBURY, J., pointed out that the only dividend right was a right to four per cent. per annum on the nominal amount of the capital from time to time paid up or credited as paid up, and that, under the articles, the company had power to reduce its capital. He then said ([1916] 2 Ch. 450, at p. 457): 'The result of the memorandum and articles shortly is this. Subject to the right of the company to reduce its capital by the votes of the ordinary shareholders in any manner sanctioned by statute these preference shares are to be of the denomination of £20 each, and the only special right, privilege, or advantage attached to those shares is a cumulative four per cent. preferential dividend on the nominal amount of capital from time to time paid up or credited as paid up thereon'."

Later, LORD GREENE, M.R., said (*ibid.*):

"As VAISEY, J., pointed out, and I agree, the effect of this resolution [in the *Greenhalgh* case (3)] is, of course, to alter the position of the 1941 2s. shareholders. Instead of *Greenhalgh* finding himself in a position of control, he finds himself in a position where the control has gone, and to that extent the rights of the 1941 2s. shareholders are affected, as a matter of business. As a matter of law, I am quite unable to hold that, as a result of the transaction, the rights are varied; they remain what they always were . . ."

I cannot attach such importance to the use by LORD GREENE, M.R., of the word "affected" as to lead me to conclude that the authority of the *Greenhalgh* case (3) depends entirely on the circumstance that in the relevant clause the only word which had to be construed was "varied". I agree that LORD GREENE, M.R., used the word "affected", but I draw attention to the fact that the distinction was not between "affected" and "varied", but between "affected as a matter of business" and "varied as a matter of law".

I have no doubt, as I have already indicated, that, on a sufficient analysis, what is suggested in the present case will "affect" the preference stockholders "as a matter of business", but we are concerned with the question whether the rights of the preference stockholders are "affected", not as a matter of business, but according to the meaning of the articles when construed according to the rules of construction and as a matter of law. I further think that, when regard is had to the fact that the word "affected" was in the article in the *Mackenzie* case (2), it would be wrong for this court now to say that its presence in this set of articles (and it may be, I dare say, that it has appeared in many others before and since *Mackenzie* (2)) has so restrictive an effect on the ordinary shareholders in the company that separate meetings of preference stockholders and shareholders would have to be held whenever it could be shown that as a matter of business, on a close analysis, that which was proposed would, or might, affect in some degree the value of the preference shares or the way in which the rights conferred on them by the regulations of the company were to be enjoyed. The result is that, with all respect to the learned judge, I have come to the conclusion that the preference stockholders' claim in this case is not well-founded, or, perhaps, I should say, as this is an appeal by way of a motion, that the plaintiff has not satisfied me that any such interlocutory relief as he asks for on the motion ought to be granted to him. In those circumstances the appeal will be allowed.

DENNING, L.J.: I agree.

ROMER, L.J.: I also agree. I only add a word or two, partly because we are differing from DANCKWERTS, J., and partly because I imagine that this case may have a certain importance in commercial circles and among practitioners in company law. The plaintiff's case is that the rights attached to the class of preference stockholders whom he represents are being "affected" within the meaning of art. 68 of the company's articles of association, and plainly, therefore, the first question one has to ask is: "Of what do those rights consist?" because until one knows what the rights are it is impossible to form a view whether they are being affected.

The rights attached to a class of shares within the meaning of such an article as this means attached by the resolutions creating such shares or by the articles of association of the company as amended from time to time by any relevant resolution, and, accordingly, one has to look to such resolutions and to the constitution of the company to find out what the rights of the preference stockholders are.

The rights which attach to the preference stockholders in the present case are those conferred by art. 61 and art. 83, and the only relevant article for

present purposes is art. 83. Under that article it is provided that on a poll every member present in person or by proxy shall have one vote for every share held by him, or, in the case of the preference stock, one vote for every £1 of preference stock held by him. It is suggested that, as a result of the proposed increase of capital, that right of the preference stockholders will in some way be "affected", but I cannot see that it will be affected in any way whatever. The position then will be precisely the same as the position now, viz., that the holder of every £1 of preference stock will have on a poll one vote for every £1 of preference stock held by him. It is quite true that the block vote, if one may so describe the total voting power of the class, will or may have less force behind it because it will pro tanto be watered down by reason of the increased total voting power of the members of the company, but by the constitution of the company no particular weight is attached to the vote as distinct from the right to exercise the vote, and certainly no right is conferred on the preference stockholders to preserve anything in the nature of an equilibrium between their class and the ordinary stockholders or any other class.

During the course of the discussion I asked counsel for the preference stockholder whether, if his argument were sound, it would not be true to say that the rights of ordinary shareholders would be affected by the issue of new ordinary capital on the ground that every one of the considerations on which he was relying would be present in such a case. The votes of the existing shareholders would be diminished in power, and they would have other people with whom to share the profits and, on a winding-up, the capital assets. In answer to that he was constrained, I think rightly, to say that was so, but, in my opinion, it cannot be said that the rights of ordinary shareholders would be affected by the issue of further ordinary capital. Their rights would remain just as they were before, and the only result would be that the class of persons entitled to exercise those rights would be enlarged. I cannot help thinking that a certain amount of confusion has crept into this case between rights, on the one hand, and the result of exercising those rights, on the other hand. The rights, as such, are conferred by resolution or by the articles, and they cannot be affected except with the sanction of the members on whom those rights are conferred, but the results of exercising those rights are not the subject of any assurance or guarantee under the constitution of the company and are not protected in any way. It is the rights, and those alone, which are protected, and for the reasons which my Lord has given, and, in view of what I have myself said, the rights of the stockholders will not, in my judgment, be affected by the proposed resolutions. Accordingly, I agree that this appeal should be allowed.

Appeal allowed.

Solicitors: *Stanley & Co.* (for the company; *E. F. Turner & Sons* (for the plaintiff).

[*Reported by F. GUTTMAN, Esq., Barrister-at-Law.*]



M. & F. FRAWLEY, LTD. v. VE-RI-BEST MANUFACTURING CO., LTD.

[COURT OF APPEAL (Somervell, Jenkins and Hodson, L.JJ.), December 17, 1952.]

Landlord and Tenant—Shop—Renewal of tenancy—Builders and decorators—“Retail trade or business”—Leasehold Property (Temporary Provisions) Act, 1951 (c. 38), s. 10 (1), s. 20 (1).

Premises were occupied wholly for business premises under a tenancy by the applicants, a firm the main part of whose business was that of builders and decorators. On an application by the firm under s. 10 (1) of the Leasehold Property (Temporary Provisions) Act, 1951, for a new tenancy,

HELD: as the applicants' business involved their doing the greater part of their work on their customer's property and not on their own premises, they could not be said to occupy their premises "mainly for the purposes of a retail trade or business" within the meaning of s. 20 (1) of the Act, and, therefore, the premises were not a "shop" within that sub-section, and the applicants were not entitled to apply for a new tenancy under s. 10 (1).

FOR THE LEASEHOLD PROPERTY (TEMPORARY PROVISIONS) ACT, 1951, s. 10 (1), s. 20 (1), see HALSBURY'S STATUTES, Second Edn., Vol. 30, pp. 206, 216.

Cases referred to:

- (1) *Ritz Cleaners, Ltd. v. West Middlesex Assessment Committee*, [1937] 2 All E.R. 368; [1937] 2 K.B. 642; 106 L.J.K.B. 398; 157 L.T. 423; 101 J.P. 307; Digest Supp.
- (2) *Toogood & Sons, Ltd. v. Green*, [1932] A.C. 663; 101 L.J.K.B. 453; 147 L.T. 201; 96 J.P. 249; Digest Supp.
- (3) *Turpin v. Middlesbrough Assessment Committee & Bailey*, [1931] A.C. 451; 100 L.J.K.B. 271; 145 L.T. 73; 95 J.P. 115; Digest Supp.

APPEAL by the landlords, the Ve-Ri-Best Manufacturing Co., Ltd., against an order of His Honour JUDGE BLAGDEN at Westminster County Court, dated Oct. 8, 1952, granting the tenants, M. & F. Frawley, Ltd., a new tenancy under the Leasehold Property (Temporary Provisions) Act, 1951, s. 10 (1).

The judge held that the tenants' business, carried on in the premises in question, of a builder and decorator was wholly or mainly a "retail trade or business" within the meaning of s. 20 (1) of the Act of 1951, and, therefore, the premises were a "shop" within that sub-section. He further held that the tenants were entitled to a new tenancy of the premises under s. 10 of the Act.

I. S. Warren for the landlords.

Asher for the tenants.

SOMERVELL, L.J.: This is an appeal from a decision of His Honour JUDGE BLAGDEN. An application was made by the tenants, under the Leasehold Property (Temporary Provisions) Act, 1951, s. 10 (1), which provides:

"The provisions of this Part of this Act shall have effect for enabling the occupier of a shop under a tenancy to which this section applies (hereinafter referred to as 'the expiring tenancy') to apply to the court for, and subject to the provisions of this Act to obtain, the grant of a new tenancy . . ."

The tenants, whose business is that of builders and decorators, maintain that they were within that provision. The only question with which we are concerned is whether the premises were a shop within the meaning of the Act. Under s. 20 (1) of the Act

“ ‘shop’ means premises occupied wholly for business purposes, and so occupied wholly or mainly for the purposes of a retail trade or business.”

By the same section,

A “ ‘retail trade or business’ has the same meaning as in the Shops Act, 1950, except that it does not include the sale of intoxicating liquor for consumption on the premises or the sale of meals or refreshments in premises which are licensed for the sale of intoxicating liquor for consumption on the premises . . . ”

The definition in the Shops Act, 1950, s. 74 (1), reads as follows:

B “ ‘retail trade or business’ includes the business of a barber or hair-dresser, the sale of refreshments or intoxicating liquors, the business of lending books or periodicals when carried on for purposes of gain, and retail sales by auction, but does not include the sale of programmes and catalogues and other similar sales at theatres and places of amusement.”

C The learned judge had a “view”, which we have not had the advantage of having, but he sets out very clearly the nature of the premises and the business of the tenants. They have at all material times had a notice up: “Builders’ materials supplied by retail”. Over the door there is a key and the words: “Keys cut”. Entering the premises, one finds a small room where there are pots of paint, packets of cement, and paint brushes, which are available for sale to the general public. There is no counter, but the goods are displayed on a table and in a cupboard under the table. The rest of the premises is not open to the public and is very much greater in area. Those non-public rooms D could fairly be described as offices, though a certain amount of material is kept there and work is done in one of them in cutting keys. In the basement bulkier materials are stored. The tenants are described on their notepaper as builders and decorators. Apart from cutting keys, they also do plumbing and electrician’s work and some sign writing. They have been there for some E seventeen years.

It is not suggested on the part of the tenants that this business of selling building materials to the public is a substantial or appreciable part of the business done by them, and, if the issue whether this was a shop or not depended on this activity, it could not be said that these premises were used wholly or mainly for the purposes of that trade. The learned judge has decided that F the business carried on by the tenants as builders and decorators was the carrying on of a “retail trade or business” within the meaning of the definition, and so the case turns on the construction of those words. It was argued that the word “includes” as it appears in s. 74 (1) of the Shops Act, 1950, is normally used when something is to be included which manifestly would be outside the words to be defined but for the definition. I do not accept that, nor do I wish G to lay down any general observation as to what the word “includes” may mean in every context. But in the present context I think it is plain that what follows “includes” are activities about which, at any rate, there might have been disputes whether they came within the words “retail trade or business”. Undoubtedly, the word “retail”, which governs the two words which follow, does primarily suggest the selling of goods rather than the selling of services.

H In the course of the argument a very wide construction of this phrase was put forward on these lines. It was said, rightly, that the word “business” is a word of very wide import, possibly covering every activity for profit or gain. Then it was said, though I do not agree with this, that the word “retail” means any business activity in which the person carrying it on comes in contact with and supplies services or other facilities to members of the public as distinct from persons in trade. Then it was said that those two matters ought to be read into this tripartite expression “retail trade or business”. The

learned judge pointed out that that appeared to cover things which would seem to be a long way from the word with which one starts, which is "shop". The general character of the word to be defined must colour the definition. So far as I can see, the wide construction put forward would include bankers, though one need not pause to consider how far it would go because it is, to me, plain that, if in their context the words "retail trade or business" were to be given a construction of that kind, the definition in the Shops Act, 1950, was wholly unnecessary. A

We were referred to the history of the matter and how the expression "retail trade or business" came to appear in the statutes which have dealt with shops and are now consolidated in the Act of 1950. I do not find it necessary to refer in detail to that, but I think the history supports the argument that these words are not capable of the wide construction suggested. It seems to me that, if the word "business" is to be regarded as extending the meaning beyond the buying and selling of goods, the extension (and we have examples of them in the definition) is of this kind. There are cases, and the barber is a good example, where, although no chattel may be sold, services are sought and received at premises which are normally and naturally described as a shop. The same would apply, properly, to the business of lending books, but a builder and decorator seems to me to be in a different category altogether. His services are rendered normally outside his own premises. The learned judge at the conclusion of his judgment gave as an example a waterpipe bursting in somebody's house and someone being sent to the builder's premises in order that workmen might come to the house and repair the pipe. In my view, one is there in a different area from a "shop", whether according to the narrow definition of the word or according to the extended purview conferred by the definition in the Shops Act, 1950. It is unnecessary in the present case to decide whether the word "business" in the Act of 1951 would bring in other activities than those which are brought in by the express words after "includes" in the Act of 1950. I am clear that they ought not to be construed as bringing in a business such as that carried on by the tenants here, and I would allow the appeal. B C D E

JENKINS, L.J.: I agree. It is worth noting that in s. 10 (2) of the Act of 1951 there is this provision:

"This section applies to a tenancy the subject of which—(a) consists of a shop, or (b) consists of a shop and of living accommodation occupied wholly or mainly by the tenant or by a person who is employed by the tenant for the purposes of the retail trade or business carried on in the shop . . ."

That provision is, perhaps, indirectly relevant as showing that the Act contemplates that the retail trade or business by virtue of which the shop qualifies as such under the definition will be carried on in the shop. My Lord has already referred to the facts found by the learned judge, which come shortly to this. The tenants' business is that of builders and decorators. In the premises in question there is an outer room where pots of paint or size, packets of cement, paint brushes, and the like, are available for sale to the general public. They also advertise themselves as key cutters and locksmiths. So far as the sale to the public of pots of paint and so forth is concerned, the learned judge found—and this was clearly in accordance with the evidence—that that part of the tenants' activities formed an insignificant proportion of the business carried on on the premises and that the main part of the business consisted in conducting from those premises the business of builders and decorators, receiving orders for building work, giving estimates for building work, or tendering to undertake building work, to be carried out on the site, wherever it might be, where such work was required. Accordingly, in view of the insignificant character of the trade done in the way of the sale of paint F G H

and other materials the issue in this appeal resolves itself into the short question whether, on the true construction of the Act of 1951, the carrying on in the way I have indicated of a builder's and decorator's business, which consists of doing building and decorating work on sites or in houses wherever the services of the tenants are required, is the carrying on of a "retail trade or business" within the meaning of the definition.

A The expression "retail trade" clearly connotes in its primary sense a business consisting of selling goods to members of the public (as distinct from members of the trade) who resort to the shop or premises where the business is carried on to make purchases. The expression "business" may, I think, have a wider connotation than the expression "trade", the latter expression being more closely linked with transactions of purchase and sale than the expression "business". In my view, the learned judge erred in holding, as he did, that B the builder's and decorator's business here in question was a retail business because it involved doing work for the actual customer, but on the customer's property, as distinct, I suppose, from doing work for some middleman other than the individual who actually required the services for himself. So to hold, in my view, involves placing a wider meaning on the expression "retail trade C or business" than it will reasonably bear. I think that conclusion is borne out by the definition in s. 74 (1) of the Shops Act, 1950, for, if the expression "retail trade or business" had the wide significance sought to be placed on it by the tenants, it would not have been necessary to treat as doubtful cases requiring inclusion by definition the business of a barber or hairdresser, the sale of refreshments, the business of lending books, and retail sales by auction, D for all these would be included in the phrase itself without any express extension of the definition. The terms of the definition do, no doubt, suggest, and for my part I would not deny, that a business may be a retail business although it is concerned with matters other than the sale of goods, but, while I have no intention of attempting to lay down any general or exhaustive definition, it does seem to me that the adjective "retail", which is primarily applicable E to the sale of goods in the way I have mentioned, demands in its application, as it were by analogy, to businesses which consist in the sale of services rather than goods that the services rendered should be performed in circumstances comparable with those in which the ordinary retail trade in the sale of goods is normally carried on in a retail shop. For example, the business carried on in a shop where services, such as repairing shoes, or cleaning clothes, or mending watches, are rendered for customers resorting to the premises in circumstances F comparable with those in which the business of selling goods by retail to similar customers might be carried on could, I think, reasonably be held to answer the description of a "retail business". But the designation "retail" seems to me to be wholly alien to the builder's and decorator's business here in question.

G We have been referred to a number of authorities on other Acts, but I do not find it necessary to take up time by reading them. There is nothing in any of them, so far as I am aware, in any way inconsistent with the conclusion at which I have arrived on the construction of the language of this particular Act and its application to the learned judge's findings of fact. Accordingly, I agree that the appeal should be allowed.

H HODSON, L.J.: I agree. The word "retail" primarily suggests the sale of goods rather than services, and when one seeks to apply the word "retail" to the sale of services one is, I think, bound to consider whether the services are rendered on the premises as, for example, in the case of a barber, or away from the premises as is the case here. The learned judge seems to have thought that that was a distinction without a difference. At the conclusion of his judgment, when discussing *Ritz Cleaners, Ltd. v. West Middlesex Assessment Committee* (1), he noted that counsel had sought to distinguish that case

on the ground that there business was carried on wholly at the dealer's premises and in this case it was carried on mainly at the customer's premises. That, I think, is a valid distinction in considering the word "retail" and it was supported in *Toogood & Sons, Ltd. v. Green* (2), by LORD THANKERTON when he quoted ([1932] A.C. 674) a speech of VISCOUNT DUNEDIN ([1931] A.C. 474) in *Turpin v. Middlesborough Assessment Committee & Bailey* (3). Those cases were under the Rating and Valuation (Apportionment) Act, 1928, with regard to a retail shop. Speaking of garage premises, LORD DUNEDIN said:

"Now if we compare the hereditament here in question with a retail shop, do we find any common characteristics? My Lords, I think we do; for they are both buildings to which the public can resort for the purpose of having particular wants supplied and services rendered therein."

I think that supports the distinction which counsel has sought to draw and which is, I think, a valid distinction. For these reasons, and the reasons which my Lords have given, I agree that the appeal should be allowed.

Appeal allowed.

Solicitors: *Warren & Warren* (for the landlords); *Crawley & de Reya* (for the tenants).

[Reported by J. D. PENNINGTON, ESQ., Barrister-at-Law.]

EAST MIDLANDS GAS BOARD *v.* DONCASTER CORPORATION.

[QUEEN'S BENCH DIVISION (Hallett, J.), December 11, 12, 1952.]

Gas—Nationalisation—Undertaking formerly maintained by local authority—Recovery of sums transferred from gas undertaking accounts to other accounts—Amounts "debited . . . in the accounts of the gas undertaking . . . and credited . . . in . . . other account"—Expenses and receipts of undertaking to be paid out of and into general rate fund—Authority directed to "show under a separate heading or division" accounts of gas undertaking—Transfers from gas undertaking section to general rate fund—Liability of authority to account to gas board for sums transferred—Finality of determination by Minister of Health—Doncaster Corporation Act, 1926 (c. xxvii), s. 71, s. 72—Gas Act, 1948 (c. 67), s. 37 (1), (2).

By the Doncaster Corporation Act, 1926, s. 71, "all money received by the corporation on account of the revenue of the [gas undertaking] shall be carried to and shall form part of the borough fund and all payments . . . made and incurred in respect of [the undertakings] shall be paid out of that fund". By the Local Government Act, 1933, s. 185, "(1) All receipts of the council of a borough . . . shall be carried to the general rate fund of the borough, and all liabilities falling to be discharged by the council shall be discharged out of that fund. (2) An account, called the 'general rate fund account', shall be kept of all receipts carried to, and payments made out of, the general rate fund." By s. 72 of the Act of 1926 the corporation were required to keep their accounts so as, "as regards the revenue account to show under a separate heading or division in respect of" their gas undertaking all receipts and payments and expenses of the undertaking. One section of the corporation's abstract of accounts for 1947-48 was described as "Gas works account" and was headed "General rate fund (gasworks section)" and it contained a revenue account. There were also a gas section ledger and gas section cash book. On Mar. 31, 1948, the defendant corporation transferred: (i) £8,487 2s. 9d., the balance of profit then appearing in the net revenue account of the gas undertaking, to their general rate fund account; and (ii) £2,144 0s. 3d., a refund of excess profits tax, then standing in the "E.P.T. post-war

refund suspense account" of the gas undertaking, from that account to the corresponding account of the defendant corporation's water undertaking. On May 1, 1949, under the Gas Act, 1948, s. 17 (1), the gas undertaking was vested in the plaintiff gas board, who, on Aug. 23, 1949, claimed the payment of the two sums to them by the defendant corporation under s. 37 (1) of the Act. On July 6, 1950, the Minister of Health, after submission of the cases for the two parties under s. 37 (2), upheld the claim. In an action by the gas board to recover the sums in question,

HELD: (i) the claim of the gas board against the corporation, having been made within twelve months of the vesting date under the Act of 1948 within s. 37 (2) of that Act and not having been settled by agreement, was required by s. 37 (2) to be determined by the Minister of Health, and had been so determined, and the court had no jurisdiction to decide that it was not a valid claim.

Crisp v. Bunbury (1832) (8 Bing. 394) and dictum of VAUGHAN WILLIAMS, L.J., in *Joseph Crosfield & Sons, Ltd. v. Manchester Ship Canal Co.* ([1904] 2 Ch. 135), applied.

(ii) in any event, notwithstanding the provisions relating to payments into and out of the general rate fund, the revenue account of the gas undertaking, the general rate fund account, and the two suspense accounts were not merely sections of the general rate fund, but were separate accounts, and after Feb. 10, 1947, the two sums had, without the approval of the Minister, been debited in the accounts of the gas undertaking and credited in other accounts of the corporation within the meaning of s. 37 (1) of the Act of 1948, and, therefore, were payable to the gas board under that sub-section.

FOR THE GAS ACT, 1948, s. 37 (1) (2), see HALSBURY'S STATUTES, Second Edn., Vol. 10, p. 914.

Cases referred to:

- (1) *Crisp v. Bunbury*, (1832), 8 Bing. 394; 1 L.J.C.P. 112; 131 E.R. 445; 3 Digest 135, 98.
- (2) *Crosfield (Joseph) & Sons, Ltd. v. Manchester Ship Canal Co.*, [1904] 2 Ch. 123; 73 L.J.Ch. 345; 90 L.T. 557; 68 J.P. 421; *on appeal*, H.L., [1905] A.C. 421; 74 L.J.Ch. 637; 93 L.T. 141; 69 J.P. 441; 16 Digest 114, 145.
- (3) *Allchin v. Coulthard*, [1942] 2 All E.R. 39; [1942] 2 K.B. 228; *affd.* H.L., [1943] 2 All E.R. 352; [1943] A.C. 607; 112 L.J.K.B. 539; 107 J.P. 191; *sub nom.* *Allchin v. South Shields County Borough*, 169 L.T. 238; 25 Tax Cas. 445; 2nd Digest Supp.
- (4) *North-Eastern Gas Board v. Leeds Corpn.*, [1952] 2 All E.R. 326; 116 J.P. 483.

ACTION for the payment of two sums alleged to be due to the plaintiffs, the East Midlands Gas Board, by the defendants, Doncaster Corporation, under s. 37 (1) and (2) of the Gas Act, 1948.

The defendant corporation were the owners of a gas undertaking, which, by virtue of the Gas Act, 1948, s. 17 (1), was, on May 1, 1949 (see Gas (Vesting Date) Order, 1949 (S.I., 1949, No. 392)), vested in the plaintiff gas board. On Aug. 23, 1949, i.e., within twelve months of the vesting date as required by s. 37 (2) of the Act, the board submitted a claim for two sums, alleged to be due to them under that sub-section, to the corporation, who replied to it on Sept. 2. After correspondence had passed between the parties the case for the board was put before the Minister of Health in a document of Mar. 15, 1950, the case for the corporation being put before the Minister in a document forwarded with a letter of June 6, 1950. On July 6, 1950, the Minister upheld the claim of the board who now sought to recover from the corporation the sums in question on the ground that the liability of the corporation had been

finally established by the Minister's determination. The corporation contended that the Minister's determination was not conclusive as to their liability and that the claim ought to have been disallowed.

The claim related to the following transfers in the accounts of the corporation: (i) On Mar. 31, 1948, the credit balance of net profit of £8,487 2s. 9d. in the net revenue account of the corporation's gas undertaking on that date was transferred to the general rate fund account by a debit in the gas account and a credit in the general rate fund account of a larger amount which included the £8,487; (ii) Two refunds of excess profits tax in respect of revenue-producing undertakings of the corporation, one an actual cash payment and the other a deduction from a liability of the corporation to the Inland Revenue, were received by the corporation and apportioned among the revenue-producing undertakings, the sum of £2,144 0s. 3d. being apportioned to the gas undertaking and being credited in an account in the gas accounts called "E.P.T. post-war refund suspense account". On Mar. 31, 1948, that sum was transferred to the water account by a debit in the suspense account of the gas accounts and a credit in the "E.P.T. post-war refund suspense account" of the general rate fund (waterworks section) of the accounts of a larger sum which included the £2,144. No approval for these transfers had been obtained from the Minister of Health.

The board contended that the transfers represented amounts "without the approval of the Minister of Health debited . . . in the accounts of the gas undertaking" after Feb. 10, 1948, and "credited . . . in any other account of the authority", within the meaning of the Gas Act, 1948, s. 37 (1), and that the corporation were liable to pay the two amounts to the board in accordance with that sub-section. The corporation contended that under s. 71 of the Doncaster Corporation Act, 1926, and similar provisions in s. 185 (1) of the Local Government Act, 1933, the revenue of the gas undertaking was required to be transferred to and to form part of the borough fund and all payments and expenses made and incurred in respect of the undertaking were required to be paid out of that fund; that, apart from the reserve fund, there was only one fund of the corporation, the general rate fund; that the accounts related to various provisions and sections of that one fund; and that, therefore, there had been no such debiting and crediting of separate accounts as alleged.

Sir Frank Soskice, Q.C., and J. P. Ashworth for the plaintiff gas board.

Capewell, Q.C., F. N. Keen and W. Sugden for the defendant corporation.

HALLETT, J.: This is a claim by the East Midlands Gas Board against the Doncaster Corporation for two sums, £8,487 2s. 9d. and £2,144 0s. 3d. respectively. The claim is made under and by virtue of s. 37 of the Gas Act, 1948. That Act was passed by Parliament for the purpose of compulsorily acquiring the gas undertakings of the country, whether owned by private companies or by local authorities, and vesting them in certain gas boards, of which the plaintiffs are one. At the time when the Act was introduced the vesting date remained to be fixed, and it was ultimately fixed as May 1, 1949, by the Gas (Vesting Date) Order, 1949 (S.I. 1949, No. 392). The Bill had its first reading on Jan. 23, 1948, and that is, no doubt, the reason why that date appears in s. 36 of the Act, to which I shall presently refer. When the Bill was first introduced it did not contain s. 37, but on the second reading, which took place on Feb. 10, 1948, the Minister of Fuel and Power intimated that he intended to introduce certain further provisions with respect to the transfer of assets before the vesting date, and that was the reason why the date, Feb. 10, 1948, ultimately appeared in s. 37.

It is reasonably clear that, if the new area gas boards were going to be possessed on the vesting date of the assets of the former gas undertakings, those who were interested in the former gas undertakings might seek before the vesting date to put some of their assets out of the reach of the gas boards, and one can conceive

that that would be the more likely in the case of local authorities, because, whereas companies owning gas undertakings were to receive compensation, local authorities were to have no compensation for losing what, in many cases, may have been very valuable assets, except that there was a lump sum made available for compensation in respect of severance. The danger that, before the assets vested under s. 37, some of them might have been put out of the reach of the gas boards was appreciated by Parliament, and s. 33 to s. 38 of the Act are printed under the heading:

“Control of dividends and interest and safeguarding of assets pending transfer.”

The heading has no statutory authority, but it does usefully summarise the objects obviously sought to be attained by s. 33 to s. 38. Section 37 has two sub-sections, and there arise, therefore, in this action two points to be determined. Section 37 (1) lays down that in certain events the local authority shall be liable to pay certain amounts to the appropriate board with an exception which is immaterial for the purposes of the present case. The first point taken by counsel for the gas board is that, on a true construction of s. 37 (1), and on the true view of the facts here, there has arisen on the part of the defendant corporation a liability to pay to the gas board the two sums claimed in this action.

Section 37 (2) reads:

“Any claim under this section by the appropriate board against the local authority shall be made before the expiration of a period of twelve months beginning with the vesting date, and if so made and not settled by agreement, shall be determined by the Minister of Health.”

The second point taken by counsel for the gas board is that, whether the claim was or was not a valid claim under the provisions of s. 37 (1) having regard to the facts of this case, by s. 37 (2) the validity of the claim is expressly referred by the legislature to the Minister of Health for determination, and, accordingly, on well-known principles and in the light of abundant authority, this court has no jurisdiction to decide whether or not the claim is valid, because its validity was considered by the Minister of Health who determined the question adversely to the defendant corporation.

I do not think that the law is in any doubt: see *Crisp v. Bunbury* (1), decided in 1832 and referred to with approval by VAUGHAN WILLIAMS, L.J. ([1904] 2 Ch. 135), in *Joseph Crosfield & Sons, Ltd. v. Manchester Ship Canal Co.* (2).

The decision in those cases can be summarised as follows. If two persons agree that any dispute which may arise between them in respect of any matter shall be referred to the determination of a third person, that agreement will not oust the jurisdiction of the court, but, since the court attaches importance to the sanctity of contract, the court will, generally speaking, in the exercise of its discretion and in aid of that sanctity of contract, stay an action which is brought in contravention of or non-compliance with what has been agreed. That is what happens in the usual case where there is what is commonly called an arbitration clause and one party, notwithstanding the arbitration clause, seeks to resort to the courts. On the other hand, where the legislature has thought it proper to lay down that the determination of a certain question should be made by some authority other than the courts, the courts have no jurisdiction to override Parliament and no jurisdiction to determine that which Parliament has said shall be determined by some other person or body. If the other person or body, being in the nature of an inferior tribunal, proceeds to exceed its authority or not to exercise it properly, then, in certain appropriate cases, the Queen's Bench Division of the High Court of Justice, acting through the Divisional Court, can restrain the person or body so acting by processes which are well-known, but, apart from that authority which can be exercised over inferior tribunals, the court cannot proceed as an appellate authority to review,

and, if it thinks right, overrule, the determination of a person or body to whom Parliament has entrusted the determination of the particular problem.

In regard to the two points raised by counsel for the gas board, I think that the logical order in which to deal with them is the inverse of that in which I have stated how they arise, and I shall deal first with the second point, viz., that, whether or not the claim made by the gas board be a valid claim, its validity has been determined in favour of the board by the Minister of Health, and this court has no jurisdiction to investigate its validity. [Dealing with the requirements of s. 37 (2) of the Act of 1948, HIS LORDSHIP reviewed the facts in regard to the claim and found that it was made by the appropriate board against the local authority, within the period required by s. 37 (2), and that, not having been settled by agreement, it was determined by the Minister of Health, and he continued:] It seems to me, therefore, that the only point which remains, as regards the position under s. 37 (2), is whether it was a claim under the section. It seems to me that it clearly was. According to the defendant corporation, it was a claim which, having regard to the terms of s. 37 and to the facts of the case, ought to have been disallowed. To put it in another way, it was not a valid claim. But that it was a claim under s. 37 by the appropriate board against the local authority and made before the expiration of twelve months beginning with the vesting date seems to me to be beyond doubt, and that it was not settled by agreement is also beyond doubt. In those circumstances it was a claim which fell to be determined by the Minister of Health, and, since Parliament has said that it "shall be determined by the Minister of Health", in my judgment, on well settled principles, it is not a claim which this court has any jurisdiction to determine. The Minister of Health having determined that it was a good claim, this court has no authority to say that, in its opinion, it is a bad claim and to give judgment for the defendant corporation accordingly.

If I am right about that, it seems to be an end of this action, but, as the question whether this was a valid claim has been argued by counsel and in case it should be held elsewhere that I am wrong on the first point, I shall deal also with the other point. Before the Doncaster Corporation Act, 1926, certain enactments dealt with the application of the revenue from the corporation's revenue-producing undertakings, and, in particular, from the water, gas, light railways, and electricity undertakings. The application of the revenue of the gas undertaking was dealt with in the Doncaster Corporation Act, 1904, by s. 177 of which the defendant corporation were bound to

" . . . apply all money received by them on account of revenue in respect of their gas undertaking in manner and in the order following (that is to say) . . ."

The section concluded:

"And the corporation shall carry to the borough fund so much of any balance remaining in any year of the income of the undertaking (including the interest on the reserve fund . . .) as may in the opinion of the corporation not be required for carrying on the undertaking and paying the current expenses connected therewith."

Thus, under s. 177 of the Act of 1904 the defendant corporation were under an obligation to carry to the borough fund, which was what would now be called the general rate fund, any balance remaining in any year of the income of the undertaking which was not required by the corporation for carrying on the undertaking and paying the current expenses connected therewith. By the Doncaster Corporation Act, 1926, s. 79, the enactments dealing with the application of revenue from the revenue-producing undertakings, including s. 177 of the Act of 1904, were repealed, and by s. 71 of the Act of 1926 it was laid down that as from a certain date

" . . . all money received by the corporation on account of the revenue of the following undertakings (namely) [the section then names six revenue-producing undertakings of which the third is the gas undertaking] shall be carried to and shall form part of the borough fund and all payments and expenses made and incurred in respect of those undertakings shall be paid out of that fund."

A The Local Government Act, 1933, contains substantially similar provisions, in s. 185 as regards borough councils, and in s. 188 as regards urban district councils. By s. 185 (1):

B "All receipts of the council of a borough . . . shall be carried to the general rate fund of the borough, and all liabilities falling to be discharged by the council shall be discharged out of that fund. (2) An account, called the 'general rate fund account,' shall be kept of all receipts carried to, and payments made out of, the general rate fund."

Section 72 of the Doncaster Corporation Act, 1926, however, provides:

C "*Separate accounts in respect of certain undertakings* . . . the corporation shall keep their accounts so as . . . as regards the revenue account to show under a separate heading or division in respect of each of the following undertakings "

D all the receipts and payments and expenses in respect of the undertakings, being the light railways, water, gas, electricity, market, and baths undertakings. The section also lays down what those accounts shall contain. The object of keeping such separate accounts is, I think, apparent, and so appeared to me before examination of the recent cases. The object of such sections was considered by LORD GREENE, M.R. ([1942] 2 All E.R. 43), in *Allchin v. Coulthard* (3) and by WYNN-PARRY, J., in *North-Eastern Gas Board v. Leeds Corpn.* (4), where he quoted ([1952] 2 All E.R. 330) the passage from LORD GREENE's judgment to which I have referred. Section 73 of the Doncaster Corporation Act, 1926, deals with the disposal of surplus revenue of the electricity undertaking in reduction of electricity charges, but apart from that provision there is no provision limiting the way in which the corporation deal with the revenue from their revenue-producing undertakings. Separate accounts of these undertakings, I think, had to be kept, even apart from s. 72 of the Act, in order to satisfy other obligations of the corporation. For instance, as regards gas, accounts had to be furnished by the corporation to the Board of Trade as to undertakings under the Gas Regulation Act, 1920, s. 15 (1), and, as regards the light railways undertaking, accounts had to be furnished to the Minister of Transport under s. 78 of the Doncaster Corporation Act, 1926. That, then, is the position as to their obligation to keep separate accounts.

E The corporation did keep separate accounts of their various revenue-producing undertakings and also of other departments of their activities. The table of contents of the abstract of the treasurer's account for the year ended Mar. 31, 1948, vol. 1, starts off with "Gas works account", and goes on with water works account, electricity account, and so forth. The first section of the book is described as dealing with the "General rate fund (gas works section)". Then there are the revenue account and certain other accounts dealing with the gas works undertaking. I think the heading, "General rate fund (gas works section)", is used because of s. 71 of the Act of 1926, and it would probably have been necessary because of s. 185 (1) of the Local Government Act, 1933. But there is certainly a separate section dealing with the accounts of the gas works undertaking, and it appears that originally the section was physically separate for the purpose of its submission to the appropriate committee of the corporation for approval. So all through this volume there are these different sections dealing with different undertakings, some of them revenue-producing and some not revenue-producing, and at p. 258 there is the aggregate

balance sheet as at Mar. 31, 1948. On p. 258 on the liabilities side of the account, and on p. 259, the property, assets and outlay side, the heading in the left-hand column is "Account or fund. Gas, water, electricity, trackless trolley", and so forth. To my mind, it is unarguable that there was not a separate gas account and also a separate general rate fund account. Counsel for the corporation has urged on me strongly, with the authority of *Allchin v. Coulthard* (3) and on the strength of s. 71 of the special Act of 1926 (and, as he would have submitted, on the strength of s. 185 of the general Act of 1933), that, apart from the reserve fund, which, I think, he would concede was in a special position, there is only one fund, viz., the general rate fund, and I would assume, without deciding it, that in that submission he is correct. But, whether there be only one fund or not, I am satisfied on the evidence that there was more than one account, and, in particular, that there was a gas account, as there was a water account and the general rate fund account. Among the defendant corporation's books of account there were also a gas section ledger and a gas section cash book, a waterworks ledger and a waterworks cash book, and a general rate fund ledger and a general rate fund cash book.

With regard to what happened to the amounts with which I am concerned, in the net revenue account of the gas account for the year ending Mar. 31, 1948, there was a balance of net profit of £8,487 2s. 9d. That net profit was transferred to the general rate fund as shown by a cash book entry and forms part of the figure of £79,099 2s. 0d., trading surpluses account, in the abstract in the general rate fund summary revenue account as a contribution in aid of rates. The same thing appears also from the ledger and cash book entries relating to the gas undertaking and to the general rate fund. In other words, the £8,487 2s. 9d. is debited in the gas account and the same amount, though concealed in a larger amount, is credited in the general rate fund revenue account. The other item in dispute is somewhat more difficult to deal with, although I have come to the conclusion that there is no difference in principle which affects the matter. At some time before 1946 the defendant corporation had been compelled to pay excess profits tax in respect of their revenue-producing undertakings, and at the time with which I am concerned a refund of the tax had become payable. It seems to be agreed that the undertakings of the corporation, for the purpose both of the payment of excess profits tax and also of any refund becoming due, are considered together. Under the Finance (No. 2) Act, 1945, s. 39 (1) and s. 40 (1), no post-war refund was to be made to any person unless an undertaking was given that the net amount of the refund would be used in developing or re-equipping the trade or business and, until so used, would be so dealt with as to remain available for use, when required, in so developing or re-equipping the trade or business. The corporation received two amounts by way of refund of excess profits tax. The first was an actual cash payment. The second was recovered by way of deduction from a liability of the corporation to the inland revenue authorities. Those two different ways of receiving the refund have complicated the facts a little by splitting up the amount claimed by the gas board under the second head into two items, £1,012 4s. 5d. and £1,131 15s. 10d. The refunds were apportioned by the borough treasurer among the revenue-producing undertakings in the accounts of those undertakings. Without deciding it, as at present advised I am disposed to agree with the borough treasurer that he was bound to apportion those refunds by virtue of s. 75 of the Doncaster Corporation Act, 1926, though he said he would have done it in any event as the right thing to do, though Mr. Hill, a financial expert witness, disagreed. It is sufficient, however, that £2,144 0s. 3d. was in fact apportioned to the gas account and appears in the accounts of the gas section under the heading "E.P.T. post-war refund suspense account". For, perhaps, obvious reasons, since it had either to be spent on development, etc., or to be kept available for that purpose,

and since that is, I imagine, the normal way of keeping a sum available for a future purpose, the total was put into a suspense account. On Mar. 31, 1948, that account was debited with £2,144 0s. 3d. in respect of a cash transfer to the water account. In the waterworks ledger and in the waterworks cash book it appears as: "To various accounts excess profits tax, post-war refunds, gas, £2,144 0s. 3d." So there is a debit in the gas account of that sum in respect of a transfer to the water account, and a credit in the water account in respect of that sum received from gas. The item is to be found under the general rate fund (waterworks section) of the accounts under "E.P.T. post-war refund suspense account" as: "Transferred from other trading undertakings, £11,837 10s. 3d." How that £11,837 10s. 3d. is made up is disclosed in the waterworks cash book and the water ledger, where it is shown that into that £11,837 10s. 3d. there enters £2,144 0s. 3d. from the gas account. The authority for that method of dealing with the items in the gas account is to be found recorded as I understand it, on the correspondence.

I have not found any case which directly assists me on this point. In *North-Eastern Gas Board v. Leeds Corpn.* (4), the transfer or dealing by the local authority with the sums there in question had taken place long before Feb. 10, 1948. As I understand it, the corporation there transferred the sums in question to their general rate fund in 1947. Accordingly, s. 37 of the Gas Act, 1948, had no relevance, but the gas board had to demonstrate, in the words of WYNN-PARRY, J. ([1952] 2 All E.R. 328),

"that the corporation had no power to perform these operations at the time when they did so."

For reasons given in his judgment, he came to the conclusion that in 1947 they had power to perform those operations and that, the moneys having as a result been merged in the general rate fund—"lost" was the word used by LORD GREENE, M.R., in *Allechin v. Coulthard* (3) ([1942] 2 All E.R. 43)—the gas board could not disentangle them and claim them as assets of the gas undertaking vested in them under the vesting sections of the Act of 1948. If I have rightly summarised the substance of that case, it clearly is no help to me here. I assume, without deciding it, that, but for the passing of the Gas Act, 1948, and, in particular, but for the results of s. 37, the defendant corporation could have merged the two amounts now in question in the general rate fund, or, if so desired, as it actually did, have merged one of them in the general rate fund and the other in the accounts of the water undertaking. But I have to decide what is the effect on the liability of the corporation of s. 37 of the Act.

As I find no help in the cases I have mentioned, I must take the words of the section and see if there is any doubt about their meaning or their application to the present facts. Section 37 (1) provides:

"Where at any time after Feb. 10, 1948, a local authority have, without the approval of the Minister of Health, debited any amount in the accounts of the gas undertaking of the authority . . ."

There has been no dispute here that what the defendant corporation did with regard to the two sums in question, which has given rise to the present claim, was done after Feb. 10, 1948, and without the approval of the Minister of Health. In spite of the argument of counsel to the contrary I should have said it was obvious on the documents and books before me that the corporation debited both the amounts in question in the accounts of the gas undertaking of the authority on Mar. 31, 1948, one being in respect of a cash transfer to the general rate fund and the other in respect of a transfer to the water undertaking. I cannot see how there could be a clearer debiting of the two amounts in the accounts of the gas undertaking. Section 37 (1) provides that where a local authority have

“debited any amount in the accounts of the gas undertaking of the authority and credited that amount in any other account of the authority, the local authority shall be liable to pay that amount to the appropriate board”,

with an exception which, as I have said, is immaterial. Here, again, in my view, there could not be a clearer crediting in other accounts of the defendant corporation.

When I look at the words of the section, it seems to me plain that in upholding the claim of the gas board against the corporation the Minister of Health was correct. It seems to me idle to discuss what might have been the result if the words of the section had been different from what they are. For instance, if there had been words referring to a transfer from one fund to another, the argument of counsel for the defendant corporation might well have prevailed that, having regard to the provisions of s. 71 of the private Act of 1926, and, maybe, also to the provisions of the Local Government Act, 1933, there is only one fund apart from a reserve fund, that that fund is the general rate fund, and that these accounts relate to various provisions and sections of that one fund. But Parliament chose to use very plain language, and the facts of this case seem to fall within the scope of that language without any doubt. For those reasons, I think that the plaintiff gas board should succeed on both grounds. First, I think there has been a determination by the Minister of Health in their favour on their disputed claim, and such determination has by statute been left to the Minister of Health and this court has no right to differ from his decision or to review it. Secondly, even if it were open to me to review the decision of the Minister of Health contrary to the view which I take, I have no doubt that the determination of the Minister of Health was in fact correct. There will be judgment for the plaintiffs for the amount claimed.

Judgment for the plaintiff gas board.

Solicitors: *Sherwood & Co.*, agents for *A. Gwynne Davies*, secretary and solicitor, East Midlands Gas Board, Leicester (for the plaintiff gas board); *Sharpe, Pritchard & Co.*, agents for *H. R. Wormald*, town clerk, Doncaster (for the defendant corporation).

[Reported by F. A. AMIES, ESQ., Barrister-at-Law.]

BADDELEY AND OTHERS v. INLAND REVENUE COMMISSIONERS.

[CHANCERY DIVISION (Harman, J.), December 2, 3, 18, 1952.]

Stamp Duty—Charity—Moral, social, and physical training and recreation—Whether object charitable—Finance Act, 1947 (c. 35), s. 54 (1).

A Property was conveyed to trustees on trust, *inter alia*, for the moral, social, and physical training and recreation of persons resident in certain districts who were members of the Methodist Church or were likely to become members of that church and lacked the means otherwise to enjoy the advantages provided by the trusts, and for the promotion and encouragement of all forms of such activities as were calculated to contribute to the health and well-being of such persons. On the question whether, under s. 54 (1) of the Finance Act, 1947, the conveyances were exempt from the doubled stamp duty imposed by s. 52 (1) of that Act, on the ground that the conveyances were made to the trustees of a trust established for charitable purposes only,

B HELD: (i) the trusts were not for the relief of poverty, since “relief” connoted the need of the means to provide for some necessity or quasi-necessity, and not for a mere amusement, however healthy;

C (ii) a trust for the promotion of recreation was not a trust for a “purpose beneficial to the community”: *Londonderry Presbyterian Church House Trustees v. Inland Revenue Comrs.* (1946) (27 Tax Cas. 431), followed;

D (iii) and, therefore, the purposes of the trusts were not exclusively charitable and the conveyances did not fall within s. 54 (1).

AS TO THE MEANING OF CHARITY FOR INCOME TAX PURPOSES, see HALSBURY, *Hailsham Edn.*, Vol. 17, pp. 310-314, paras. 617-621; and FOR CASES, see DIGEST, Vol. 28, pp. 10, 11, Nos. 51-54.

FOR THE FINANCE ACT, 1947, s. 54 (1), see HALSBURY'S STATUTES, *Second Edn.*, Vol. 21, p. 1345.

E Cases referred to:

(1) *Londonderry Presbyterian Church House Trustees v. Inland Revenue Comrs.*, [1946] N.I. 178; 27 Tax Cas. 431; 2nd Digest Supp.

(2) *Income Tax Special Purposes Comrs. v. Pemsel*, [1891] A.C. 531; 61 L.J.Q.B. 265; 65 L.T. 621; 55 J.P. 805; 3 Tax Cas. 53; 28 Digest 10, 51.

F (3) *Spiller v. Maude*, (1881), 32 Ch.D. 158, n.; 8 Digest 348, 1412.

(4) *Re De Carteret*, [1933] Ch. 103; 102 L.J.Ch. 52; 148 L.T. 188; Digest Supp.

(5) *Williams' Trustees v. Inland Revenue Comrs.*, [1947] 1 All E.R. 513; [1947] A.C. 447; [1948] L.J.R. 644; 176 L.T. 462; 27 Tax Cas. 409; 2nd Digest Supp.

G (6) *Re Macduff*, [1896] 2 Ch. 451; 65 L.J.Ch. 700; 74 L.T. 706; 8 Digest 296, 731.

(7) *A.-G. v. National Provincial & Union Bank of England*, [1924] A.C. 262; *sub nom. Re Tetley*, 93 L.J.Ch. 231; 131 L.T. 34; Digest Supp.

(8) *Shillington v. Portadown Urban Council*, [1911] 1 I.R. 247; 8 Digest 260, a.

H (9) *Re Hadden*, [1932] 1 Ch. 133; 101 L.J.Ch. 52; 146 L.T. 190; Digest Supp.

(10) *Re Nottage*, [1895] 2 Ch. 649; 64 L.J.Ch. 695; 73 L.T. 269; 8 Digest 265, 266.

(11) *Re Grove-Grady*, [1929] 1 Ch. 557; 98 L.J.Ch. 261; 140 L.T. 659; Digest Supp.

(12) *Verge v. Somerville*, [1924] A.C. 496; 93 L.J.P.C. 173; 131 L.T. 107; Digest Supp.

- (13) *Oppenheim v. Tobacco Securities Trust Co., Ltd.*, [1951] 1 All E.R. 31; [1951] A.C. 297; 2nd Digest Supp.
- (14) *Re Compton*, [1945] 1 All E.R. 198; [1945] Ch. 123; 114 L.J.Ch. 99; 172 L.T. 158; 2nd Digest Supp.
- (15) *Re Hobourn Aero Components, Ltd.'s Air Raid Distress Fund*, [1946] 1 All E.R. 501; [1946] Ch. 194; 174 L.T. 428; 2nd Digest Supp.
- (16) *Goodman v. Saltash Corpn.*, (1882), 7 App. Cas. 633; 52 L.J.Q.B. 193; 48 L.T. 239; 47 J.P. 276; 8 Digest 327, 1099.

CASE STATED by the Commissioners of Inland Revenue under s. 13 of the Stamp Act, 1891.

The commissioners refused the taxpayers' claim, under s. 54 (1) of the Finance Act, 1947, to be exempt from the doubling of stamp duty imposed by s. 52 (1) of the Act, the contention of the taxpayers being that the conveyances subject to stamp duty were made to trustees of a trust established for charitable purposes only.

S. Pascoe Hayward, Q.C., and *W. F. Waite* for the taxpayers.
Cross, Q.C., and *J. H. Stamp* for the Crown.

Cur. adv. vult.

Dec. 18. **HARMAN, J.**, read the following judgment. These are appeals by Case Stated from two decisions of the Commissioners of Inland Revenue under the Stamp Act, 1891, holding that two conveyances both dated Aug. 21, 1951, and made in favour of the taxpayers fell to be stamped under sched. I to the Act as either conveyances on sale or voluntary conveyances to be treated as such under s. 74 of the Finance (1909-10) Act, 1910, and, accordingly, were liable to ad valorem duty at the rate of £1 for every £50 under s. 52 of the Finance Act, 1947. The taxpayers' contention in each case is that the stamp duty ought to be at one-half that rate on the ground that the conveyances were made to "a body of persons established for charitable purposes only or to the trustees of a trust so established" within the meaning of s. 54 (1) of the Finance Act, 1947. The question in each case is, therefore, the same, namely, whether the taxpayers are trustees of a trust established for charitable purposes only.

Of the two deeds the first transfers to the trustees a piece of land on which were already erected a mission church, a lecture room, and a store, and the second transfers to them four pieces of land. The second also deals with a sum of £10,000 as an endowment fund. The conveyances both bear the same date and are intimately connected though the trusts are not stated in the same terms. The taxpayers, who are throughout called the trustees, are directed to allow the property in each case

"to be appropriated and used by the leaders for the time being of the Stratford Newtown Methodist Mission under the name of 'The Newtown Trust' "

which in the deeds is referred to as "the foundation". From this point the words of the two deeds diverge and I must, I think, deal with them separately. The first deed, which is the conveyance of the mission church, lecture room, and store, uses these words in cl. 2 (a) and (b):

"The trustees shall permit the said property to be appropriated and used by the leaders for the time being of the Stratford Newtown Methodist Mission under the name of 'the Newtown Trust' (hereinafter called 'the foundation') for the promotion of the religious social and physical well-being of persons resident in the county boroughs of West Ham and Leyton in the county of Essex by the provision of facilities for religious services and instruction and for the social and physical training and recreation of such aforementioned persons who for the time being are in the opinion of such leaders members or likely to become members of the Methodist

Church and of insufficient means otherwise to enjoy the advantages provided by these presents and by the provision of facilities for religious social and physical training and recreation and by promoting and encouraging all forms of such activities as are calculated to contribute to the health and well-being of such persons . . . (b) The trustees may from time to time: (i) Maintain the said property or any part thereof as a centre for religious services and instruction and for social and physical training and recreation."

The second deed, which deals with the four pieces of land adjacent to the mission hall comprised in the first deed and described as being

"laid out as a playing field and upon parts of which a pavilion and a groundsman's bungalow have been erected",

is in these terms: Clause 2 (a) provides:

"The trustees shall permit the said property to be appropriated and used . . . for the promotion of the moral social and physical well-being of persons resident in the county boroughs of West Ham and Leyton in the county of Essex who for the time being are in the opinion of such leaders members or likely to become members of the Methodist Church and of insufficient means otherwise to enjoy the advantages provided by these presents by the provision of facilities for moral social and physical training and recreation and by promoting and encouraging all forms of such activities as are calculated to contribute to the health and well-being of such persons . . . (b) The trustees may from time to time: (i) Maintain the said property or any part thereof as a ground for moral social and physical training and recreation."

The £10,000 is to be held on trust as though it were capital money arising from the sale of land settled by the second deed. There are in both deeds limitations over on the failure of the primary trust, but, in my judgment, these do not affect the present question.

Charity, we are taught, covers a multitude of sins, but whether that doctrine ought to extend to the draftsman of these documents may, I think, well be doubted. It was conceded by the Crown during the argument before me that the first deed contained words to which no meaning could be attached and which must have been inserted by mistake. The words are these: "and by the provision of facilities for religious social and physical training and recreation and". If these words are treated as cut out of the clause the trusts may be paraphrased as follows:—(a) The promotion of the religious, social, and physical well-being of persons resident in the county boroughs of West Ham and Leyton by the provision of facilities for religious services and instruction. (b) The social and physical training and recreation of such persons so resident as are (i) in the opinion of the leaders, members, or likely to become members, of the Methodist Church, and (ii) of insufficient means otherwise to enjoy the advantages provided by the trust. (c) The promotion and encouragement of all forms of such activities as are calculated to contribute to the health and well-being of such persons. The trusts of the second deed are more shortly stated and may be thus paraphrased:—(a) The promotion of the moral, social, and physical well-being of persons resident in the same boroughs and with the same qualifications as to religious belief and means as in the first deed (i) by the provision of facilities for moral, social, and physical training and recreation, and (ii) by permitting and encouraging all forms of such activities as are calculated to contribute to the health and well-being of such persons.

For the purposes of what follows I may exclude trust (a) in the first deed which would seem to be a charitable object as being for the advancement of religion. What, then, remains? In my judgment, the two deeds in other respects

are in terms so alike that they can be dealt with together. Are the objects stated exclusively charitable—that is to say, are there objects for which the trustees could allow the property to be used which are not charitable objects? They could, in my judgment, without a breach of trust, allow the property to be used either for the physical training or for the recreation of persons resident within the named boroughs, provided those persons either are of the Methodist belief, in the leaders' opinion, or, in that opinion, likely to become so, and are also of insufficient means to enjoy the advantages provided. These advantages may, in my judgment, include, so far as the hall is concerned, social activities such as tea parties or dances, or recreations, such as whist drives, table tennis, or billiards, and, so far as the playing field is concerned (which I note in passing was formerly the property of a body called the Gaiety Lawn Tennis Club, Ltd.), lawn tennis or any other open-air game. It was not argued before me that by reason of the connection of the foundation with the Methodist Church these trusts could be said to be for the advancement of religion, an argument advanced without success in the North Irish case of *Londonderry Presbyterian Church House Trustees v. Inland Revenue Comrs.* (1) to which I shall have to refer again, but it was sought to uphold them on two grounds—(i) that they were for the relief of poverty, and (ii) that they came within the fourth category of LORD MACNAGHTEN'S classification in *Income Tax Special Purposes Comrs. v. Pemsel* (2) as being "for other purposes beneficial to the community".

I will deal first with the poverty qualification. This is based on the words in 43 Eliz. c. 4 "the relief of aged, impotent and poor people". I must ask myself whether these words cover the provision of facilities for playing, for instance, billiards or lawn tennis for people who could not otherwise afford to do so. If there were no authority, I should at once answer that this was not relief of the poor. "Relief" seems to connote need of some sort, either need of a home or of the means to provide for some necessity or quasi-necessity and not merely for an amusement, however healthy it is. The definition of poverty for the present purpose is not without authority. It does not mean absolute want or grinding need. For instance, SIR GEORGE JESSEL, M.R., appears to have held in *Spiller v. Maude* (3) that a fund was charitable although recipients of bounty under it might have an income up to £50 a year. The authorities on the subject are collected in MAUGHAM, J.'s decision in *Re De Carteret* (4), where he came to the conclusion that there might be a good charity for the relief of poverty though the persons to be benefited are by no means destitute. It is, however, to be observed that the class of persons whom the learned judge there declared to be the objects of charity were widows with young children whose income was not more than £120 a year and who were thus very much in need of an allowance to help them bring up their children. In my judgment, counsel for the Crown was justified in his submission that this is not a poverty case at all because no question of need is involved.

There remains the question whether the trust is charitable on the other ground alleged. As to this the House of Lords has recently pointed out in *Williams' Trustees v. Inland Revenue Comrs.* (5) that an object may be of great public utility but still not be a charity. The headnote reads as follows:

"Every object of public general utility is not necessarily a charity, for in order to be charitable a trust must be within the spirit and intendment of the statute 43 Eliz. c. 4. Accordingly, no trust can be charitable unless it is beneficial to the community in a way which the law regards as charitable."

LORD SIMONDS says ([1947] 1 All E.R. 518):

"My Lords, there are, I think, two propositions which must ever be borne in mind in any case in which the question is whether a trust is charitable. The first is that it is still the general law that a trust is not

A charitable and entitled to the privileges which charity confers unless it is within the spirit and intendment of the preamble to 43 Eliz. c. 4, which is expressly preserved by s. 13 (2) of the Mortmain and Charitable Uses Act, 1888. The second is that the classification of charity in its legal sense into four principal divisions by LORD MACNAGHTEN in *Pemsel's case* (2) ([1891] A.C. 583) must always be read subject to the qualification appearing in the judgment of LINDLEY, L.J., in *Re Macduff* (6) ([1896] 2 Ch. 466): 'Now SIR SAMUEL ROMILLY did not mean, and I am certain that LORD MACNAGHTEN did not mean to say, that every object of public general utility must necessarily be a charity. Some may be and some may not be.' This observation has been expanded by VISCOUNT CAVE, L.C., in this House in *A.-G. v. National Provincial & Union Bank of England* (7) ([1924] A.C. 265) in these words: 'LORD MACNAGHTEN did not mean that all trusts beneficial to the community are charitable, but that there were certain beneficial trusts which fall within that category: and accordingly to argue that because a trust is for a purpose beneficial to the community it is therefore a charitable trust is to turn round his sentence and to give it a different meaning. So here it is not enough to say that the trust in question is for public purposes beneficial to the community or is for the public welfare; you must also show it to be a charitable trust.' But it is just because the purpose of the trust deed in this case is said to be beneficial to the community or a section of the community and for no other reason that its charitable character is asserted. It is not alleged that the trust is (a) for the benefit of the community and (b) beneficial in a way which the law regards as charitable. Therefore, as it seems to me, in its mere statement the claim is imperfect and must fail."

If I were free to do so, I should hold that recreation is not a charitable object. It was argued before me that this is not so having regard to the views of the legislature on this subject, and I was referred to two Acts, first, the Physical Training and Recreation Act, 1937, which set up a national council for physical training and recreation and empowered the Board of Education and local authorities to spend money on playing fields for the use of organisations having athletic objects, and, secondly, to the Education Act, 1944, by s. 53 of which the education authorities are enjoined in connection with schools to provide adequate facilities for recreation and to provide playing fields for persons enjoying State education. I do not feel impressed by these statutes which provide, no doubt, admirable activities in connection with education and for the benefit of the public, but the State nowadays spends a deal of money on objects which no one could consider charitable in the legal sense. I was also referred to *Shillington v. Portadown Urban Council* (8) in which BARTON, J., held that the application of money for providing the means of healthy recreation was a good public charitable purpose in the context in which it appeared in that will. The learned judge, after reciting the words of the will which were ([1911] 1 I.R. 256):

"for the purpose of fostering, encouraging, and providing the means of obtaining healthy recreation, including the teaching of singing in classes or choruses, for the residents of the town of Portadown and the surrounding districts, and for the purpose of providing music and instruments (in so far as my trustees think advisable) for the town band",

said:

"This direction to the trustees as to the application of the balance or residue of the income of the trust estate constitutes, in my opinion, a valid charitable devise and bequest. The testator's purpose was a charitable or public purpose. He wished to benefit the residents of his native town and of its immediate neighbourhood. The benefits which he intended to confer on them were such as he believed to be of public advantage. That

belief was rational and not contrary to the laws of the land or the principles of morality."

I was referred further to *Re Hadden* (9) where CLAUSON, J., held that the provision of means for public recreation is a charitable object within 43 Eliz. c. 4. After referring to *Shillington v. Portadown Urban Council* (8), and to certain Acts of Parliament, and, in particular, to the Mortmain and Charitable Uses Act, 1888, he said this ([1932] 1 Ch. 141):

"That section [s. 6] enacts that Part II of the Act, which relates to assurances to charitable uses, shall not apply to an assurance of a limited amount of land for the purposes of a park, garden, or other land dedicated or to be dedicated to the recreation of the public. That enactment seems to me necessarily to involve that in the view of the legislature dedication of land to the recreation of the public is dedication to a charitable use; and in face of that enactment I am, I conceive, bound to hold (nor am I at all reluctant so to do) that the provision of means for public recreation is a charitable object within 'the meaning, purview and interpretation' of the preamble to the Act of 43 Eliz. c. 4."

Against these authorities must be set the decision in *Re Nottage* (10), distinguished by CLAUSON, J., on the ground that "mere" sport was, no doubt, not charitable. I find it difficult to see why the addition of the word "mere" constitutes a distinction, and why public recreation is not tantamount to "mere" sport. Watching a football match on Saturday afternoon may claim to be the most popular public recreation in this country, but I feel that a fund devoted to providing gate money could not be held to be a charitable activity without passing that bursting point referred to by RUSSELL, L.J., in *Re Grove-Grady* (11). However this may be, I am not without guidance in the form of *Londonderry Presbyterian Church House Trustees v. Inland Revenue Comrs.* (1) already referred to, where the Court of Appeal of Northern Ireland held that property conveyed subject to trusts very similar to the present, was not exempt from tax under a statute similar to the English statute. The trusts are stated as follows in the headnote (27 Tax Cas. 431):

"The appellant trustees held certain properties 'upon trust to permit the same or any part thereof to be used as a hall for meetings or for social or recreation purposes in connection with the various Presbyterian churches in the city of Londonderry and the surrounding district or as a hostel or boarding house or as a library or for such other . . . purposes as the board of governors . . . shall . . . think fit, it being the true intention and meaning of these presents that the said premises shall be used for the purposes of assisting and helping in the religious moral social and recreative life of those connected with the Presbyterian church in the city of Londonderry and surrounding district in such manner as the said board of governors . . . shall . . . think right'."

MACDERMOTT, J., held these to be charitable trusts as falling within LORD MACNAGHTEN's fourth category, but he was reversed in the Court of Appeal of Northern Ireland. I find the following passage in the judgment of ANDREWS, C.J. (*ibid.*, 446):

"The authorities, whose number is legion, upon whether particular trusts fall within or without LORD MACNAGHTEN's fourth category, baffle all efforts on my part to reconcile them with one another, and no useful purpose would be served in the circumstances by reviewing them. Judicial minds have operated not always consistently on facts admittedly different; and the result can only be described as in a measure chaotic. I shall simply content myself with saying that I find nothing in the statutes referred to which would assist me in holding that the trusts in the present case for religious, moral, social and recreative purposes, excluded as I have

held them to be from LORD MACNAGHTEN's third class, fall within the fourth class as a valid charitable trust. The test is not whether the objects or purposes aimed at are beneficial to or receive the general acceptance of the community. It is simply whether they conform or not to the requirements and essentials of a legal charity."

A This is a tax case which I find to be of high persuasive authority, and I think I ought to follow it and to hold that the trusts in the present case are not charitable.

B Had I favoured the taxpayers on this point as to recreation, there would still remain a difficult question whether the purpose was "public recreation". *Williams' Trustees v. Inland Revenue Comrs.* (5), above cited, shows that one of the qualifications is that the object must be public, that is to say, it must benefit the community or a class of the community. This is, perhaps, best stated in *Verge v. Somerville* (12) ([1924] A.C. 499). Applying the opinion there expressed to the present facts, this trust is confined to the inhabitants of two boroughs—so far, good—but not all the inhabitants—only to persons of insufficient means and either Methodists or likely to become Methodists. Now these three qualifications must all rest on the decision of the leaders. C Whether a man is of insufficient means and a Methodist can, I suppose, be satisfactorily ascertained as a fact. Whether he is likely to become a Methodist is not ascertainable with any certainty, and it is argued that a body of persons so qualified cannot claim to constitute a class of the community, but are a mere shifting body of individuals. It has recently been held in *Oppenheim v. Tobacco Securities Trust Co., Ltd.* (13) that the nexus of employment is not sufficient, and it is said that this is far more definite than the nexus of being likely to become a Methodist. This question has been much canvassed recently, beginning with the judgment of LORD GREENE, M.R., in *Re Compton* (14) and going on with *Re Hobourn Aero Components Ltd.'s Air Raid Distress Fund* (15) and I do not pretend to be a master of all its niceties. Nor is it necessary that I should decide it having regard to the view already expressed. It was, however, E fully argued before me, and it may be right, that I should state my conclusion. On the whole, it seems to me that this is a section of the community. Its members are united by adherence to or inclination towards a form of Christianity. They must have a territorial qualification, as was held in *Goodman v. Saltash Corpn.* (16), and they must pass a means test. The nexus is not a personal one. I cannot subscribe to the view expressed by BABINGTON, L.J., in the *Londonderry Presbyterian Church* case (1) that adherence to the Presbyterian faith in the F town of Derry would not do. I prefer the contrary views of MACDERMOTT, J., and ANDREWS, C.J. If Presbyterians in Derry are not a class for this purpose, then Jews in Whitechapel are not, nor Christians in Hoxton, and it seems to me that this kind of reasoning leads to absurdity. Accordingly, if I had held that recreation was a charitable object, I should have held that the purpose G here was public recreation. As it is, I dismiss the appeal.

Appeal dismissed.

Solicitors: *Kenneth Brown, Baker, Baker* (for the taxpayers); *Solicitor of Inland Revenue* (for the Crown).

[Reported by C. N. BEATTIE, Esq., *Barrister-at-Law.*]

EVANS v. EVANS.

[COURT OF APPEAL (Singleton and Morris, L.JJ.), December 11, 12, 1952.]

Divorce—Costs—Security for wife's costs—Husband an "assisted person"—Matrimonial Causes Rules, 1950 (S.I., 1950, No. 1940), r. 65 (3).

Legal Aid—Costs—Security for costs—Application by wife in divorce proceedings—Husband an "assisted person"—Legal Aid and Advice Act, 1949 (c. 51), s. 12 (2) (b) (ii).

A

A wife, whether she is an assisted person or not, is entitled to apply for security for her costs under the Matrimonial Causes Rules, 1950, r. 65 (1), although the husband is an assisted person, but, where the wife is also an assisted person, an application should seldom be made.

B

On Jan. 3, 1952, the husband filed a petition for divorce on the ground of the wife's cruelty. On Feb. 9, 1952, the wife obtained a civil aid certificate to defend the suit. On Sept. 18, 1952, the husband was granted a civil aid certificate in which it was stated that his disposable income was £296 and his capital was nil. The National Assistance Board determined his maximum contribution as £70, and the local committee assessed his contribution at that sum. On Nov. 3, 1952, the wife applied, under r. 65 (1) of the Matrimonial Causes Rules, 1950, for security for her costs. After referring to the husband's civil aid certificate for particulars of his means and without any further evidence on the matter, the registrar ordered that he should provide security to the extent of £20 for the wife's costs. On appeal,

C

HELD: under r. 65 (3) of the rules of 1950 the Divorce Division had jurisdiction to make an order for security for the wife's costs even though the parties were assisted persons, but on the facts of the present case the order should not have been made.

D

Vincent v. Vincent ([1952] 2 All E.R. 978), approved.

Conway v. George Wimpey & Co., Ltd. ([1951] 1 All E.R. 56), distinguished.

AS TO A WIFE'S SECURITY FOR COSTS, see HALSBURY, Hailsham Edn., Vol. 10, pp. 724-727, paras. 1107-1115; and FOR CASES, see DIGEST, Replacement Vol. 27, pp. 505, 506, Nos. 4482-4492.

E

FOR THE LEGAL AID AND ADVICE ACT, 1949, see HALSBURY'S STATUTES, Second Edn., Vol. 18, p. 532.

FOR THE MATRIMONIAL CAUSES RULES, 1950, r. 65 (3), see HALSBURY'S STATUTORY INSTRUMENTS, Vol. 10, p. 228.

F

Cases referred to:

(1) *Vincent v. Vincent*, [1952] 2 All E.R. 978.

(2) *Conway v. George Wimpey & Co., Ltd.*, [1951] 1 All E.R. 56; [1951] 2 K.B. 266; 2nd Digest Supp.

(3) *Re A.B.'s Petition*, [1928] P. 25; *sub nom. S. v. S. & P.*, 97 L.J.P. 37; 138 L.T. 302; 27 Digest, Replacement, 505, 4487.

(4) *Williams v. Williams*, [1929] P. 114; 98 L.J.P. 40; 140 L.T. 383; 27 Digest, Replacement, 505, 4484.

(5) *Wigley v. Wigley*, [1950] 2 All E.R. 1218; [1951] P. 156; 2nd Digest Supp.

(6) *Jackson v. John Dickinson & Co. (Bolton), Ltd.*, [1952] 1 All E.R. 104.

G

INTERLOCUTORY APPEAL by the husband from an order of COLLINGWOOD, J., made in chambers on Nov. 18, 1952, whereby he affirmed an order of the Brighton district registrar that the husband, who had filed a petition for divorce, should give security for the wife's costs. Both parties were "assisted persons", within the Legal Aid and Advice Act, 1949, and it was contended by the husband (a) that, as an assisted person, he could not be ordered to give security, and (b) that, if an order for security for the wife's costs could be made against an assisted person, it should not have been made in the circumstances.

H

Ranking for the husband.

K. G. I. Jones for the wife.

SINGLETON, L.J.: By a petition filed on Jan. 3, 1952, the husband, William Harold Evans, sought a decree of dissolution of his marriage with Clara Ethel Evans on the ground of cruelty. The wife applied for legal aid under the Legal Aid and Advice Act, 1949, and on Feb. 9, 1952, she was granted a civil aid certificate to defend the suit. Her disposable income was stated to be £156, her disposable capital to be £8, and her maximum contribution to the legal aid fund to be nil. Her answer was filed on July 21, 1952. The husband applied for legal aid and on Sept. 18, 1952, he was granted a civil aid certificate. Under s. 4 (6) of the Act of 1949 the National Assistance Board determined his disposable income at £296, his disposable capital as nil, and his maximum contribution as £70. The local committee assessed his contribution at the same sum, £70, payable by a first instalment of £4 and eleven subsequent monthly payments of £6 each.

The Legal Aid and Advice Act, 1949, s. 12, provides:

“(1) The Lord Chancellor may make such regulations as appear to him necessary or desirable for giving effect to this Part of this Act or for preventing abuses thereof. (2) Without prejudice to the foregoing subsection or any other provision of this Act authorising the making of regulations, regulations may . . . (b) regulate the procedure of any court or tribunal in relation to legal aid, and in particular make provision . . . (ii) as to the cases in which and extent to which a person receiving legal aid may be required to give security for costs, and the manner in which it may be given.”

No such regulations have been made as yet.

The Matrimonial Causes Rules, 1950, r. 65 (3), provides:

“Where an application for security has been made under this rule, a registrar shall ascertain what is a sufficient sum of money to cover the costs of the wife, and if, after taking all the circumstances into account, including the means of the husband and the wife, he considers that the husband should provide security for all or some of the wife’s costs, he may order the husband to pay the sum so ascertained, or some portion of it, into court or to give security therefor within such time as he may fix, and may direct a stay of the proceedings until the order is complied with.”

This rule in regard to security for the wife’s costs is not in quite the same form as it was of old: see the Matrimonial Causes Rules, 1937, r. 74 (2) and (3). An alteration made in the Matrimonial Causes Rules, 1947, r. 74 (3), is preserved in r. 65 (3) of the rules of 1950, which expressly provides that one of the matters to be taken into account on such an application is the means of the husband.

In the present case an application under r. 65 (1) for security was made by the wife to the registrar on Nov. 3, 1952, and he ordered that the husband should provide security to the extent of £20 for the wife’s costs of the hearing. The husband appealed to COLLINGWOOD, J., against that order. COLLINGWOOD, J., we are told, felt that he was bound by a decision of BARNARD, J., in *Vincent v. Vincent* (1), and upheld the judgment of the registrar. From that order of COLLINGWOOD, J., the husband appeals to this court. Both parties are assisted persons for the purposes of this appeal. Counsel for the husband put forward two submissions to this court. The first was that, where both parties are legally aided, there is no power to make an order for security for costs. His second point was that, even if there was power, the making of the order for £20 security in this case was a wrong exercise of the discretion conferred on a registrar and that the order ought to be set aside.

In December, 1950, *Conway v. George Wimpey & Co., Ltd.* (2) was before this court. In that case security for the costs of an appeal by the plaintiff had been ordered under R.S.C., Ord. 58, r. 15 (2). Immediately thereafter the plaintiff became an assisted person and an application was made that the order for security should be discharged. The judgment of the court was that, until the regulations envisaged by s. 12 (2) (b) (ii) of the Act of 1949 were made, in the absence of special circumstances an order for security for costs should not be made against an assisted person, and, therefore, the order which had been made would be discharged. COHEN, L.J., who gave the judgment of the court, used these words ([1951] 1 All E.R. 57):

"None the less, until we get the guidance of the regulations which are indicated by the provisions in s. 12 . . . I think we must proceed on the basis that, generally speaking, and in the absence of special circumstances, it would be inappropriate to make an order for security for costs at a time when an emergency certificate is in force."

It is submitted by counsel for the wife in this case that the position is different when the application which is before the court is for security for the wife's costs under r. 65 of the Matrimonial Causes Rules, 1950, and it is as well to notice that these rules were made after the Legal Aid and Advice Act, 1949, was enacted. I do not think that, in the absence of regulations, it can be said that the power of the Divorce Division to order security for a wife's costs has ceased. I think that it remains, and that a wife, whether she is an assisted person or not, is entitled to make an application under r. 65 (1) even though the husband be an assisted person. On the hearing of the application, the question whether or not an order for security should be made, under r. 65 (3), has then to be considered. At the same time, I think that such an application should seldom be made.

When the decision of this court in *Conway v. George Wimpey & Co., Ltd.* (2) was given, it seems to have been thought that it should be taken to cover divorce practice as well. I am inclined to think that it would have been a good thing if it had been so treated, though the court was not then dealing with a matrimonial suit. A practice direction was issued by the Senior Registrar which I should describe as extremely useful, though in *Vincent v. Vincent* (1) BARNARD, J., seems to have thought the wording of it was not satisfactory. We were given to understand that the registrar at Brighton, from whose decision this is an appeal, did not have it before him. The direction is this:

"Legal Aid. Costs, security for. In the absence of any regulations under s. 12 of the Legal Aid and Advice Act, 1949, the decision in *Conway v. George Wimpey & Co., Ltd.* (2), must be taken to prevent the making of any order for security for costs against an assisted person unless there are special circumstances. The fact that a legally aided husband has been directed by a local committee to pay a contribution less than the maximum contribution may be regarded as a special circumstance, and an order to secure for the wife's costs a sum not greater than the difference between the actual and maximum contributions may be made in a proper case."

In *Vincent v. Vincent* (1), which was before BARNARD, J., in November, 1952, the husband, on Apr. 23, 1951, filed a petition for divorce on the ground of the wife's desertion. On Jan. 14, 1952, he obtained a civil aid certificate to enable him to carry on the proceedings. On July 22, 1952, the wife obtained a civil aid certificate limited to obtaining an order for security against the husband. On Aug. 28, 1952, the wife's application to the registrar for an order for security was dismissed on the ground that no order for security could be made against an "assisted person." On appeal, BARNARD, J., held that it was a well-established practice in the Divorce Division that a wife had a right

to apply for security for her costs and this was not affected by the husband being an "assisted person", and, therefore, the registrar was bound to comply with r. 65 (3) of the Matrimonial Causes Rules, 1950, and the case would be referred to him for that purpose. In giving his decision BARNARD, J., pointed out that in *Conway v. George Wimpey & Co., Ltd.* (2) COHEN, L.J., was careful to make it clear that he was not seeking to lay down a general rule covering all classes of case and all circumstances. BARNARD, J., continued ([1952] 2 All E.R. 979):

A "The registry, by their direction, have interpreted the decision in *Conway's* case (2) as applying to a wife's application for security for costs in the Divorce Division. I have come to the conclusion that this direction is a misinterpretation of the decision in *Conway's* case (2). It is a well-established practice of this Division that a wife has a right to apply for security for her costs, and LORD MERRIVALE, P., once said, in *Re A.B.'s Petition* (3) ([1928] P. 27): '... there is something in the nature of a prescriptive right upon cause shown to secure to the wife the means for defence'."

B BARNARD, J., then referred (*ibid.*, 980) to *Williams v. Williams* (4), where HILL, J., said ([1929] P. 118):

C "The main object of security, in recent years at any rate, is that justice may be done by the wife being enabled to procure the assistance of solicitor and counsel and come to court. That is the main object in modern times. The old basis for the rule, namely, that all the wife's property on marriage passes to the husband, and therefore the husband alone can foot the bill, has gone altogether, and now you must consider whether in the circumstances the wife can foot the bill, and it is a very important matter to consider whether the solicitor can conduct the business without something in court to pay him up to setting down and without security."

D After citing this passage BARNARD, J., continued ([1952] 2 All E.R. 980):

E "I think that the present case is a different class of case from *Conway v. George Wimpey & Co., Ltd.* (2), by reason of the peculiar nature of a wife's security for costs in the Divorce Division, which I have already indicated and is not covered by *Conway's* case (2). I, therefore, allow this appeal and refer the matter back to the Leeds registrar to comply with r. 65 (3) of the Matrimonial Causes Rules, 1950. The registrar will, of course, take into account the fact that the husband is an assisted person and will also have regard to the facts stated in the civil aid certificate and it may well be that he will come to the conclusion that this is a case in which no security should be ordered."

F BARNARD, J., upheld the power of the Divorce Division to make an order for security, even though the person against whom it is made is an assisted person. I have said that I think that power remains. The learned judge pointed out that, if the case went back to the registrar, he might well order nothing by way of security.

G In the case now under appeal the wife is an assisted person, and there is no difficulty about her coming to court with solicitor and counsel. In my view, it would have been better if she had not applied for security for her costs. If the registrar had properly found himself able to make an order for security, it could only have been for a trifling sum, and the cost of getting it is at the expense of the legal aid fund on both sides. Moreover, when an application of this kind is made, the customary practice is that there should be an affidavit as to means and the like, and that costs a good deal of money. There was, however, nothing like that before the court in this case. The registrar had the husband's civil aid certificate before him and he indorsed the summons:

"I have referred to the petitioner's legal aid certificate for particulars of the petitioner's means and consider he is able to give security for £20."

The civil aid certificate states that the petitioner has no disposable capital, but counsel for the wife pointed out to us that he might have some capital which was not disposable capital. The legal aid committee and the National Assistance Board decided what the husband should provide by way of contribution. The wife having applied, under r. 65 (1) of the Matrimonial Causes Rules, 1950, for security for her costs, under r. 65 (3) it was the duty of the registrar, after taking all the circumstances into account, including the means of the husband and the wife, to consider whether or not the husband should provide security and how much he should provide, if anything. It looks as though he considered that the husband was in a position to do something which the National Assistance Board thought they ought not to ask him to do. I recognise that the test is not precisely the same, but it is the duty of the National Assistance Board, in a case such as this, to find out, having regard to the terms of the Legal Aid and Advice Act, 1949, and the rules thereunder, what it is reasonable for the husband to pay when he is granted legal aid. In this case, the registrar, who considered the matter very soon afterwards, thought that, notwithstanding the facts stated in the husband's civil aid certificate, the husband was able to give security for £20. It is almost akin to a registrar sitting on appeal from the National Assistance Board, and it is undesirable that such a position should arise.

Moreover, the object of the Legal Aid and Advice Act, 1949, is to enable a party who has a proper case, one worthy of assistance, to put before the court and has not the means to do so, to put it forward with the help of the legal aid fund. As a result of the wife's application for security for her costs, the husband might be prevented from bringing his petition forward, or it might be held up for months, although the legal aid committee have decided that he has a proper case to bring forward. Where a wife is an assisted person and there is no reason to think that the husband has any means other than those which the National Assistance Board has found, I do not see what good an application for security can do when it follows immediately on the assessment of the husband's financial position by the National Assistance Board. It is a waste of time and money. If there is any reason to think there has been a change of circumstances or that something has been overlooked, the position is quite different, but that there should be an application of this kind without any material put before the registrar except the civil aid certificate is difficult to understand. I do not question the power to make an order under r. 65 of the Matrimonial Causes Rules, 1950, but I draw attention to the fact that in *Vincent v. Vincent* (1) BARNARD, J., said ([1952] 2 All E.R. 980) that the matter must go back to the registrar and that

"... it may well be that he will come to the conclusion that this is a case in which no security should be ordered."

That is the conclusion to which I think the registrar ought to have come in the present case. It is for that reason that I think the application was a mistake. I do not think it is desirable, in view of the circumstances which are before this court, that there should be an order of this kind made against the husband on no information other than that which was before the National Assistance Board. For these reasons I have reached the conclusion that this appeal should be allowed and that the order for security made by the registrar should be set aside.

MORRIS, L.J.: I am entirely of the same opinion. When considering the circumstances in this case, it is of interest to note some remarks made by my Lord, SINGLETON, L.J., when delivering judgment in *Wigley v. Wigley* (5).

In that case the wife was an assisted person, but the husband was not. SINGLETON, L.J., said ([1951] P. 160):

“ But, if that assisted person is a husband, and the suit is a matrimonial suit, it may be that thereafter an application comes for security for the wife’s costs. It is with that sort of case in mind that I think it might be as well if regulations under s. 12 (2) (b) (ii) were made. Otherwise, some-one will be faced with the task of deciding what is to be done in regard to the wife’s application for security for costs when, with the help of the National Assistance Board, the local committee have already decided that the husband shall make the maximum payment which he can make to the legal aid fund. There may be an overlapping and it will be extraordinarily difficult for anyone to say what shall be done unless further guidance be given on that matter.”

It is to be observed that s. 1 (7) of the Legal Aid and Advice Act, 1949, provides:

“ Save as expressly provided by this Part of this Act or by regulations made thereunder . . . (b) the rights conferred by this Part of this Act on a person receiving legal aid shall not affect the rights or liabilities of other parties to the proceedings or the principles on which the discretion of any court or tribunal is normally exercised.”

The Matrimonial Causes Rules, 1950, were dated Dec. 4, 1950, and were amended by the Matrimonial Causes (Amendment) Rules, 1951 (S.I., 1951, No. 840), dated May 9, 1951. The provisions of r. 65, therefore, have been in force after the passing of the Legal Aid and Advice Act, 1949. I can find nothing which supersedes or in any way nullifies the effect and validity of r. 65 of the rules of 1950. I, therefore, find myself in agreement with the judgment of BARNARD, J., in *Vincent v. Vincent* (1), to which my Lord has referred. BARNARD, J., there pointed out that in *Conway v. George Wimpey & Co., Ltd.* (2) this court was dealing with a situation to which R.S.C., Ord. 58, r. 15 (2), applied and it was from that rule that the expression “ special circumstances ” came. It follows, therefore, that r. 65 of the rules of 1950, is operative and that the power to make an order for security under r. 65 (3) remains, even though the parties are assisted persons. But it is of great consequence to have in mind the concluding words of BARNARD, J., in *Vincent v. Vincent* (1), to which my Lord has drawn special attention. They form a guide and are a pointer to the view which, I think, must have been held by the learned judge as to what is likely to happen in cases of this kind.

In *Jackson v. John Dickinson & Co. (Bolton), Ltd.* (6), which was before this court, the plaintiff, who was ordinarily resident abroad, claimed, as an assisted person, damages for personal injuries. The defendants applied for an order for security for costs. It was held that the fact that the plaintiff was an assisted person did not disentitle the defendants to an order for security.

Counsel for the wife in the present case referred to s. 2 (2) (e) of the Legal Aid and Advice Act, 1949. Section 2 (2) provides:

“ Where a person receives legal aid in connection with any proceedings . . . (e) his liability by virtue of an order for costs made against him with respect to the proceedings shall not exceed the amount (if any) which is a reasonable one for him to pay having regard to all the circumstances, including the means of all the parties and their conduct in connection with the dispute.”

Counsel correctly pointed out that that shows that, though a party is an assisted person, if due regard is had to that fact and to all the circumstances, an order for costs may be made against him. In the present case, we have been definitely told that the only material before the learned registrar was the civil aid certificate. Counsel for the wife submitted that, in spite of the

terms of that certificate, the husband might have some resources. He pointed, for example, to the Legal Aid (Assessment of Resources) Regulations, 1950 (S.I., 1950, No. 1358), sched. II, para. 6, which reads:

"No account shall be taken of any loose cash in the possession of the person concerned reasonably necessary to meet his current requirements so far as it does not exceed £20."

He contended that the husband might have had up to £20, and he pointed to other possibilities. It seems to me, however, that all that is pure speculation and that, as the only material before the registrar in this case was what is contained in the civil aid certificate, there was no material on which he could make the order that he made. The order might have the effect of preventing the husband from proceeding with his petition, as, unless he could find the £20, he would not be able to proceed. I agree fully with all that my Lord has said, and I concur with the order proposed by him.

Appeal allowed.

Solicitors: *Haslewood, Hare & Co.*, agents for *Bosley & Co.*, Brighton (for the husband); *Gates & Co.*, Brighton (for the wife).

[Reported by C. N. BEATTIE, ESQ., Barrister-at-Law.]

Re GOETZE (deceased). NATIONAL PROVINCIAL BANK, LTD. AND ANOTHER *v.* MOND AND ANOTHER.

[COURT OF APPEAL (Somervell, Jenkins and Romer, L.JJ.), November 18, 19, 20, December 15, 1952.]

Estate Duty—Allowance—Double taxation—Canadian succession duty—Legacies given "free of legacy duty and all other death duties"—Allowance of amount of Canadian succession duty against estate duty—Benefit of allowance—Double Taxation Relief (Estate Duty) (Canada) Order, 1946 (S.R. & O., 1946, No. 1884), art. V.

By cl. 2 of her will, dated Mar. 2, 1949, a testatrix provided: ". . . all legacies and annuities bequeathed by this my will or any codicil thereto are to be paid free of legacy duty and all other death duties". By cl. 8 to cl. 47 inclusive the testatrix bequeathed a number of pecuniary legacies and annuities, and by cl. 50 she devised and bequeathed to her trustees her residuary real and personal estate on the usual trusts for sale and conversion, and provided: "And my trustees shall out of the moneys to arise from the sale . . . and out of my ready money pay my funeral and testamentary expenses (including all payments to be deemed testamentary expenses under the provisions of this my will) and debts and shall pay or provide for all legacies and annuities bequeathed by this my will or any codicil hereto and the duty on all such legacies and annuities And subject as aforesaid my trustees shall hold the residue of my estate in trust" for C. On Feb. 12, 1951, the testatrix died domiciled in England. Her estate included shares in a Canadian limited company which amounted in value to more than one-half of her estate and were liable both to estate duty in the United Kingdom (by virtue of the domicile of the testatrix) and also to succession duty in Canada (by virtue of their situation). According to Canadian law, the succession duty was assessed on the beneficial interests and would fall ultimately to be borne by the beneficiaries concerned. Under art. V of the agreement between the governments of the United Kingdom and Canada set out in the schedule to the Double Taxation Relief (Estate Duty) (Canada) Order, 1946, the government of the United Kingdom bound itself to allow against so much of its duty as was attributable to property situated in Canada a credit equal to so much of the duty imposed in Canada as was attributable to such property. On the question

as to the incidence of the Canadian succession duty so far as attributable to the pecuniary legacies and annuities, it being conceded that that duty was not a testamentary expense, and that, therefore, the legatees and annuitants would, apart from express provision in the will or the effect of the order of 1946, be bound to bear their due proportion of the duty,

A HELD: the effect of art. V of the order of 1946 was that the Canadian succession duty was to be allowed as a payment operating to discharge a like amount of United Kingdom estate duty, and, if the Canadian duty attributable to the pecuniary legacies and annuities were thrown on those benefits, they would not have been paid free of United Kingdom estate duty, for the amount paid in respect of the Canadian duty was none the less for the present purpose a payment of United Kingdom estate duty because under the terms of the order it served to discharge both the B Canadian duty and also a like amount of United Kingdom duty, but the will directed that they should be so free, and, therefore, the whole of the United Kingdom estate duty should be borne by C., the residuary legatee, including the proportion thereof satisfied by the payment of the Canadian duty.

C Per JENKINS and ROMER, L.JJ.: the directions in the will with regard to death duties related prima facie to United Kingdom death duties only, and the circumstances that the testatrix held more than half her estate in the form of shares situated in Canada and that she was a good business woman who had caused to be prepared a statement showing the value of her residuary estate calculated without any reference to Canadian succession duty as payable out of the pecuniary legacies and annuities and D producing a credit of like amount for the benefit of residue against the full amount of United Kingdom estate duty it would otherwise bear were insufficient to displace that construction.

Rule as stated by WYNN-PARRY, J., in *Re Cunliffe-Owen* ([1951] 2 All E.R. 223), approved and applied.

E Quaere, whether the Finance Act, 1949, s. 27, affects the construction of testamentary directions relating to freedom from duty.

Cases referred to:

- (1) *Re Cunliffe-Owen*, [1951] 2 All E.R. 220; [1951] Ch. 964; 2nd Digest Supp.
- (2) *Peter v. Stirling*, (1878), 10 Ch.D. 279; 21 Digest 64, 419.
- (3) *Re Maurice*, (1896), 75 L.T. 415; 21 Digest 130, 956.
- F (4) *Re Brewster*, [1908] 2 Ch. 365; 77 L.J.Ch. 605; 99 L.T. 517; 21 Digest 130, 957.
- (5) *Re Scott*, [1914] 1 Ch. 847; 83 L.J.Ch. 694; 110 L.T. 809; *affd.*, C.A., [1915] 1 Ch. 592; 84 L.J.Ch. 366; 112 L.T. 1057; 21 Digest 130, 959.
- (6) *Re Norbury*, [1939] 2 All E.R. 625; [1939] Ch. 528; 108 L.J.Ch. 219; 160 L.T. 572; Digest Supp.

G APPEAL by a pecuniary legatee under the will of Constance Goetze, deceased, from an order of UPJOHN, J., dated May 14, 1952.

UPJOHN, J., held, inter alia, that, on the true construction of the will of the testatrix, (i) Canadian succession duty paid in connection with her death ought, in so far as it was attributable to the legatee's legacy, to be borne by her, and H (ii) that the credit of the amount of such Canadian succession duty allowed against the United Kingdom estate duty under the Double Taxation Relief (Estate Duty) (Canada) Order, 1946, enured for the benefit of the residuary estate.

J. A. Wolfe for the first defendant, a pecuniary legatee.

Edwards, Q.C., for the second defendant, the residuary legatee.

F. B. Marsh for the plaintiffs, two of the executors and trustees.

Cur. adv. vult.

Dec. 15. **SOMERVELL, L.J.:** I will ask **JENKINS, L.J.**, to read his own judgment and then the judgment of **ROMER, L.J.**

JENKINS, L.J.: This is an appeal from an order made by **UPJOHN, J.**, on May 14, 1952, concerning the incidence as between the pecuniary legatees and annuitants under the will of the testatrix, **Constance Goetze** (represented by the appellant, **Elizabeth Mond**), and the residuary estate of the testatrix (to which the respondent, **Countess Cippico**, is solely entitled under such will) of the United Kingdom estate duty and Canadian succession duty attributable to the personal estate of the testatrix situated in the Dominion of Canada. The learned judge declared that the United Kingdom estate duty so attributable and the interest thereon ought to be borne by the residuary estate of the testatrix, and that declaration is not appealed from by the respondent residuary legatee. But he also declared that the Canadian succession duty so attributable ought to be borne by the legatees or annuitants concerned, and that the credit of the amount of such Canadian succession duty allowed against the United Kingdom estate duty under the Double Taxation Relief (Estate Duty) (Canada) Order, 1946, enured for the benefit of the residuary estate of the testatrix, and from this part of the learned judge's order the appellant, as representative of all the pecuniary legatees and annuitants, now appeals to this court.

The testatrix died domiciled in England on Feb. 12, 1951. By her will dated Mar. 2, 1949, and (with one codicil thereto not material for the present purpose) proved on Apr. 4, 1951, the testatrix appointed the respondents, **National Provincial Bank, Ltd.**, **Hyman Stone**, and **Countess Cippico**, to be executors and trustees thereof, and (so far as relevant to the present appeal) made the following dispositions: By cl. 2 she declared that

"all legacies and annuities bequeathed by this my will or any codicil thereto are to be paid free of legacy duty and all other death duties."

By cl. 3 she declared that

"In case any death duties shall become payable on my death in respect of the money or property comprised in any gifts made or covenants entered into by me in my lifetime such death duties (and any duty thereon payable by reason of the provisions of this clause) shall be paid by my trustees out of my estate in exoneration of any other person accountable for such duty [and, further, that] all payments made hereunder shall be deemed to be testamentary expenses of my estate."

By cl. 8 to cl. 47, inclusive, the testatrix bequeathed forty-three pecuniary legacies and annuities to persons who, with two exceptions, all survived the testatrix, including (by cl. 9) a legacy of £1,000 to the appellant. By cl. 50, the testatrix devised and bequeathed to her trustees her residuary real and personal estate on usual trusts for sale and conversion, and directed as follows:

"And my trustees shall out of the moneys to arise from the sale calling in and conversion of or forming part of my residuary estate and out of my ready money pay my funeral and testamentary expenses (including all payments to be deemed testamentary expenses under the provisions of this my will) and debts and shall pay or provide for all legacies and annuities bequeathed by this my will or any codicil hereto and the duty on all such legacies and annuities And subject as aforesaid my trustees shall hold the residue of my estate in trust for "

the respondent, **Countess Cippico**.

The net value of the testatrix's estate, for the purposes of United Kingdom estate duty, was £431,501 4s. 3d. and, in addition to other assets all of which were situated in England, it comprised 26,150 preferred and 10,976 common shares in the **International Nickel Co. of Canada, Ltd.**, valued for duty purposes at £230,243 15s. 1d., which were situated in Canada. As the testatrix was

domiciled in England, these shares, notwithstanding their Canadian situation, attracted United Kingdom estate duty on her death, and, accordingly, fell to be included in the above-mentioned total net estate of £431,501 4s. 3d. on which United Kingdom estate duty at the appropriate rate (viz., sixty-five per cent.) amounting to £280,475 13s. 2d., was assessed. But, notwithstanding the testatrix's English domicile, the last-mentioned shares (which I will call "the Canadian estate") also attracted, by reason of their Canadian situation, the succession duty exigible under the law of Canada on the beneficial interests in the Canadian estate created by her will. In these circumstances, the Double Taxation Relief (Estate Duty) (Canada) Order, 1946 (which I will call the "Double Taxation Order"), applied to the case. The Double Taxation Order is an Order in Council made under the Finance (No. 2) Act, 1945, s. 54, which provides as follows:

"(1) If His Majesty by Order in Council declares that arrangements specified in the order have been made with the government of any territory outside the United Kingdom with a view to affording relief from double taxation in relation to estate duty payable under the laws of the United Kingdom and any duty of a similar character imposed under the laws of that territory, and that it is expedient that those arrangements should have effect, the arrangements shall, notwithstanding anything in any enactment, have effect so far as they provide for relief from estate duty, or for determining the place where any property is to be treated as being situated for the purposes of estate duty."

After declaring (by cl. 2)

"(a) that the arrangements specified in the agreement set out in the schedule to this order have been made with the government of Canada with a view to affording relief from double taxation in relation to estate duty payable under the laws of the United Kingdom and duty of a similar character imposed under the laws of Canada; and (b) that it is expedient that those arrangements should have effect",

the Double Taxation Order sets out in the schedule thereto the agreement between the two governments, which includes the following provisions:

"Art I. (1) The duties which are the subject of the present agreement are:—(a) In the United Kingdom, the estate duty imposed in Great Britain, and (b) In Canada, the succession duty imposed by Canada. (2) The present agreement shall also apply to any other duties of a substantially similar character imposed by either contracting government subsequent to the date of signature of the present agreement . . ."

Article IV provides:

"(1) In determining the amount on which duty is to be computed, permitted deductions shall be allowed in accordance with the law in force in the territory in which the duty is imposed. (2) Where duty is imposed by one contracting government on the death of a person who was not domiciled at the time of his death in any part of the territory of that contracting government . . . no account shall be taken, in determining the amount or rate of the duty so imposed, of property situated outside the former territory."

Article V provides:

"(1) Where one contracting government imposes duty by reason of a deceased person being domiciled in some part of its territory at the time of his death, that contracting government shall allow against so much of its duty (as otherwise computed) as is attributable to property situated in the territory of the other contracting government a credit (not exceeding the amount of the duty so attributable) equal to so much of the duty

imposed in the territory of the other contracting government as is attributable to such property . . . (4) For the purposes of this article, the amount of the duty of a contracting government attributable to any property shall be ascertained after taking into account any credit, allowance or relief, or any remission or reduction of duty, otherwise than in respect of duty payable in the territory of the other contracting government."

From the affidavit of a Canadian lawyer filed in the present proceedings, it appears: (i) That Canadian succession duty is assessed and chargeable on all successions on death to Canadian property. (ii) That for this purpose (so far as now material) "succession" means every disposition of property whereby any person becomes entitled to any property or the income thereof on the death of any person. (iii) That where the deceased was at the time of his death domiciled outside Canada, the duty is exigible on or in respect of the succession to all property situated in Canada. (iv) That the duty in respect of any succession under the will of a testator is assessed at rates varying with the aggregate net value of the Canadian property passing on the death and the relationship of the successor to the testator, and that there are certain exemptions one of which frees successions of less than \$1,000 from the duty. (v) That the successor is liable for the duty assessed in respect of any succession under the will of a testator, but that such duty is nevertheless payable by and recoverable from the executors to the extent of the property administered by them, with a right for executors who are required to pay the duty to deduct it in paying over the amount of the succession or to recover it from the successor personally in the event of the succession being satisfied otherwise than in money.

The notice of assessment which is in evidence shows how the Canadian succession duty was assessed in the present case. To put it shortly, the net Canadian estate was ascertained by deducting from the gross value of the Canadian estate a proportion of the total debts of the testatrix corresponding to the proportion borne by the gross value of the Canadian estate to the gross value of the total estate, and the pecuniary legatees and annuitants and the residuary legatee were respectively treated as entitled to beneficial interests (or "successions") in the net Canadian estate bearing the same proportions to their respective interests in the total net estate as the proportion borne by the net Canadian estate to the total net estate, and (apart from exemptions) each proportionate beneficial interest so ascertained was assessed, as a "succession", to duty at the appropriate rate, consisting of the basic rate of 11.7 per cent. appropriate to the aggregate net value of the Canadian estate plus an additional percentage varying with the relationship of the particular successor to the testatrix. The total amount of the Canadian succession duty thus assessed was \$245,087.16 or £82,034 10s. 9d. This Canadian duty was duly paid by the executors, who under art. V of the Double Taxation Order were accordingly allowed a credit of £82,034 10s. 9d. against the United Kingdom estate duty attributable to the Canadian estate, leaving a balance payable, and in fact paid, of £198,441 2s. 5d. in respect of the last-mentioned duty, out of the total assessment of £280,475 13s. 2d.

The questions which, in the circumstances I have stated, arise for determination in the present appeal are, in effect: (i) whether on the true construction of the testatrix's will the Canadian succession duty attributable to the pecuniary legacies and annuities ought (apart from the provisions of the Double Taxation Order) to be borne by the respective legatees and annuitants or by the residuary estate; and (ii) if that question should be answered in the former sense, whether the provisions of the Double Taxation Order have the effect of throwing the liability for such Canadian succession duty on to the residuary estate in exoneration of the pecuniary legacies and annuities. Counsel for the pecuniary legatee conceded that the Canadian succession duty was not a testamentary expense, and, accordingly, that, unless he could show the pecuniary legacies

and annuities to have been exonerated from this duty by some express provision in the will, they must (apart from the effect of the Double Taxation Order) bear their due proportions of it ascertained in accordance with the Canadian assessment on the footing that they were payable rateably out of the English and Canadian estates. He argued, however, that the will, on its true construction, when read in the light of the attendant circumstances, did expressly exonerate the pecuniary legacies and annuities from Canadian succession duty as well as United Kingdom estate duty, so far as the latter was not automatically payable out of residue as a testamentary expense.

The passages in the will on which he relied were the direction in cl. 2 that all legacies and annuities were to be paid "free of legacy duty and all other death duties", and the direction in cl. 50 to "pay or provide for all legacies and annuities . . . and the duty on all such legacies and annuities". He contended that these words were in themselves wide enough to include Canadian succession duty, and should be construed as including that duty, especially when read in the light of the attendant circumstances. Now the words relied on by counsel for the pecuniary legatee are no more than ordinary directions as to duty such as might be found in any English will, and the only duty specifically described is (or was) an English one, viz., legacy duty. The attendant circumstances on which counsel for the pecuniary legatee relies come to no more than this, that the testatrix held more than half her estate in the form of shares situated in Canada, that she was a good business woman who took an interest in her affairs and had caused to be prepared annually a statement showing the value of her residuary estate as it would be, having regard to the terms of her will, and that the latest of such statements dated May 10, 1950 (which is one of the exhibits in the case) allows for the payment out of residue of United Kingdom estate duty at sixty-five per cent., without any reference to Canadian succession duty as payable out of the pecuniary legacies and annuities and producing a credit of like amount for the benefit of residue against the full amount of United Kingdom estate duty it would otherwise bear.

The fact that the testatrix held more than half her estate in the form of shares situated in Canada is, no doubt, a circumstance proper to be taken into consideration in construing the directions as to duty contained in her will, but with this qualification I cannot regard the so-called attendant circumstances to which I have referred as throwing any light on the meaning of the relevant passages in the will, and I think the use sought to be made of the statement of May 10, 1950 (which was relied on by counsel for the residuary legatee, as pointing, if anything, the other way), came perilously near to its introduction as direct evidence of the testatrix's intention, which would plainly be inadmissible. UPJOHN, J., held that the directions as to duty contained in the testatrix's will did not, on their true construction, extend to Canadian succession duty, and in so holding he followed the decision of WYNN-PARRY, J., in *Re Cunliffe-Owen* (1). In that case WYNN-PARRY, J., reviewed the authorities and held them to establish a rule of construction that prima facie directions such as those in the present will by which duties are thrown on the residuary estate in exoneration of legacies are to be construed as referring only to United Kingdom death duties, with the qualification that directions of this nature ([1951] 2 All E.R. 223)

" . . . may in appropriate circumstances be given a wider scope if the surrounding circumstances are sufficiently compelling, and that that is so even in the absence of express words in the will referring to duties imposed by the law of foreign countries."

I need not repeat the review of the authorities made by WYNN-PARRY, J. They leave the question open in this court, but, in my view, the rule, and the qualification on it, deduced from them by WYNN-PARRY, J., are right in

principle, and the scope of the directions as to duty contained in the present will should be judged accordingly. So judged, those directions must, in accordance with the rule, be held confined to United Kingdom duties, unless the attendant circumstances are sufficiently compelling to warrant the extension of their primary meaning so as to include Canadian succession duty. As appears from what I have said above, the attendant circumstances relied on, in my view, really provide no assistance beyond the bare fact that more than half the testatrix's estate consisted of assets situated in Canada in the form of her holdings of shares in the International Nickel Co. of Canada, Ltd. Is that fact in itself enough to displace the rule? In my view, it is not. The directions in question are well satisfied if construed in accordance with the rule as referring only to United Kingdom duties, and, therefore, the case is not one in which directions as to duty in the ordinary form must be taken to refer to foreign duty because no United Kingdom duty is payable. The mere fact that the testatrix had important assets in Canada as well as in this country falls far short of raising a necessary implication that she used the expression "death duties" as meaning Canadian as well as United Kingdom duties. She or her advisers may well have omitted to take Canadian duties into account at all, or may have thought that such duties would automatically fall on residue without any express direction to that effect, or may not have appreciated that the Canadian shares were technically situated in Canada for duty purposes and would, therefore, attract Canadian duty notwithstanding the testatrix's English domicile. One might add that the question commonly arises by reason of the fact that a testator or testatrix dies possessed of assets situated abroad, and that it would be curious if the circumstance giving rise to the question in itself sufficed to displace the general rule. Accordingly, I am not prepared to hold that the directions as to duty in the present case extend to the Canadian succession duty.

It follows that, apart from the effect of the Double Taxation Order, the pecuniary legatees and annuitants must, on the basis of the concession made by counsel for the pecuniary legatee, bear their due proportion of the Canadian succession duty. But, in considering the effect of the Double Taxation Order, it must be borne in mind that (to relate the relevant directions to the particular United Kingdom duty actually in question) the testatrix did, undoubtedly, give the pecuniary legacies and annuities free of United Kingdom estate duty and direct that the United Kingdom estate duty on such legacies and annuities (so far as not automatically payable out of residue as a testamentary expense) should be paid or provided for out of her residuary estate. This means that residue had to bear all payments necessary to make the pecuniary legacies and annuities free of United Kingdom estate duty before the residuary legatee could take anything. It also means, so far as the Canadian estate was concerned, that the Canadian estate had to provide its due proportion of the pecuniary legacies and annuities and the United Kingdom estate duty thereon before any part of that estate could go to the residuary legatee.

The effect of art. V of the Double Taxation Order appears to have been that the United Kingdom estate duty was to be assessed in full on the Canadian estate without regard to Canadian succession duty, that the Canadian succession duty was to be similarly assessed thereon without regard to the United Kingdom estate duty, and that the Canadian succession duty was then to be allowed as a credit of like amount against the United Kingdom estate duty, or, in other words, as a payment operating to discharge a like amount of United Kingdom estate duty. It seems to me, therefore, that, if the Canadian succession duty attributable to the Canadian proportion of the pecuniary legacies and annuities was thrown on those benefits, they would not have been paid free of United Kingdom estate duty. They would have been paid free of United Kingdom estate duty save in so far as that duty was satisfied by the payment of Canadian succession duty out of the pecuniary legacies and annuities.

The amount paid in respect of Canadian succession duty was, to my mind, none the less for the present purpose a payment of United Kingdom estate duty because under the terms of the order it served the double purpose of discharging both the Canadian succession duty and also a like amount of United Kingdom estate duty.

A The matter can, I think, be put in another way which leads to substantially the same conclusion. By virtue of the directions in the will the liability for the whole of the United Kingdom estate duty attributable to the Canadian estate was thrown on the residue of that estate in exoneration of the proportion so attributable of the pecuniary legacies and annuities. The directions in the will did not, however, extend to Canadian succession duty, and, therefore, on the basis of the concession of counsel for the pecuniary legatee, so much of that duty as was attributable to the pecuniary legacies and annuities had to be paid out of those legacies and annuities. But by virtue of the Double Taxation Order the effect of such payment was to discharge at the expense of the pecuniary legatees and annuitants a like amount of the United Kingdom estate duty which, according to the terms of the will, the residuary legatee was to bear. Therefore, the credit against United Kingdom estate duty secured under art. V of the Double Taxation Order by the payment of Canadian succession duty out of the pecuniary legacies and annuities should enure for the benefit of the pecuniary legatees and annuitants in order to give full effect to the direction in the will whereunder the whole of the United Kingdom estate duty on the Canadian estate fell to be borne by the residuary legatee. It was not, I think, disputed that, if there had been no special directions at all in the will concerning death duties, so that each of the pecuniary legacies and annuities had to bear its due proportion of the United Kingdom estate duty attributable to the Canadian estate, the credit against such United Kingdom estate duty secured under art. V of the Double Taxation Order by payment out of each pecuniary legacy or annuity of its due proportion of the Canadian succession duty would have enured for the benefit of the pecuniary legatee or annuitant concerned (which appears to have been the effect of the decision in the second judgment in *Re Cunliffe-Owen* (1)). I do not see why the result should be any different because the pecuniary legacies and annuities were given free of United Kingdom estate duty, for the effect of this quoad the Canadian estate was to give to each pecuniary legatee or annuitant an additional benefit out of the Canadian estate in the shape of the proportion of the United Kingdom estate duty on the Canadian estate which his or her legacy or annuity would otherwise have had to bear, and inasmuch as payment of the Canadian succession duty on such legacy or annuity operated to discharge a like amount of United Kingdom estate duty, payment of the former duty out of such legacy or annuity would have the effect of depriving the legatee or annuitant of a corresponding part of the additional benefit to which he or she was entitled under the terms of the will, if such payment was not counterbalanced by giving to him or her the benefit of the credit against the United Kingdom estate duty which it had secured by virtue of the provisions of the Double Taxation Order. Perhaps the simplest way of putting the point—I trust it is not an oversimplification—is to describe the effect of the Double Taxation Order as being in substance to preserve the liability of the Canadian estate to assessment to United Kingdom estate duty at the full appropriate rate of sixty-five per cent., but to make the Canadian succession duty payable out of the amount of the United Kingdom estate duty as so assessed.

I conclude, therefore, that the whole of the United Kingdom estate duty at the appropriate rate of sixty-five per cent. on the Canadian estate should be borne by the residuary legatee and that she is not entitled to throw on the pecuniary legatees and annuitants the proportion of it which was satisfied by the payment of, or, in other words, was applied in payment of, the Canadian succession duty on the pecuniary legacies and annuities. The argument for

the residuary legatee proceeds on the footing that the effect of the Double Taxation Order is to make the Canadian estate liable to (i) United Kingdom estate duty reduced by the amount of the Canadian succession duty, and (ii) Canadian succession duty; that by the terms of the will the pecuniary legatees and annuitants are relieved of the reduced United Kingdom estate duty, but not of the Canadian succession duty; and, accordingly, that, while the residuary legatee must bear the former, the pecuniary legatees and annuitants must bear their due proportions of the latter. I reject this argument as involving a departure from the actual terms of the Double Taxation Order, which does not reduce the amount of the United Kingdom estate duty, but allows the payment of Canadian succession duty as a credit against, or, in other words, treats it as discharging a like amount of, the full United Kingdom estate duty. For the reasons I have endeavoured to state, I would allow the appeal and vary the declarations made by the learned judge as regards Canadian succession duty so as to give effect to the conclusion above expressed.

I feel I should add that in the course of the argument a suggestion which counsel for the pecuniary legatee felt unable to support was made to the effect that, irrespective of any special direction in the will and independently of the provisions of the Double Taxation Order, the Canadian succession duty might, perhaps, properly be regarded simply as part of the cost of getting in the Canadian estate, and as such falling on residue generally. This is not a case of a specific gift of property situated in a foreign country and attracting duty by virtue of the laws of that country, or a gift to a legatee domiciled or resident abroad which attracts duty in the hands of the legatee under the law of his or her domicile or place of residence. It is simply a case in which property situated in Canada has passed under a general residuary devise and bequest in the English will of a testatrix domiciled and resident here, and in which this country is the appropriate forum of administration. The residue, including the Canadian estate, is given on the usual trusts for sale and conversion and payment of funeral and testamentary expenses and debts and pecuniary legacies and annuities and the United Kingdom duties thereon, and subject to these payments in trust for the respondent residuary legatee. To get in the Canadian estate and make it available for application as above, the executors had to pay the Canadian succession duty. It is true that under the law of Canada the duty in question was assessed on the beneficial interests, and according to that law would fall ultimately to be borne by the beneficiaries concerned, the extent of their beneficial interests in the Canadian estate being ascertained by treating them as provided rateably out of the net Canadian and English estates, and the rates of duty varying with the relationship of the beneficiaries to the testatrix. But it does not necessarily follow that these features of the Canadian fiscal law, involving as they do a wholly artificial apportionment of debts and benefits as between the Canadian and English estates should be imported into an English administration, and the alternative course of treating the amount of the Canadian duty simply as part of the cost of getting in the Canadian estate, without regard to the peculiarities of the local law as to mode of assessment and incidence, would certainly have the merit of simplicity.

The possible view to which I am now calling attention is supported by *Peter v. Stirling* (2) and *Re Maurice* (3), and, particularly, the latter case, where an Australian duty assessed by reference to the ages of the beneficiaries was held payable out of the estate as a whole and not out of the respective interests of the beneficiaries in accordance with the amounts assessed on them in Australia. Those two cases were distinguished by SWINFEN EADY, J., in *Re Brewster* (4), which was a case of a specific devise, on trusts separate from those of the residuary estate, of land in Melbourne, Victoria, Australia, in which it was held that the local death duties and other costs of realising the Melbourne property fell on that property and not on residue. *Peter v. Stirling* (2) was also distinguished by WARRINGTON, J., in *Re Scott* (5), where it was held

that the French mutation duty on chattels situated in France should be borne by the specific legatees thereof and not by residue, and the decision of WARRINGTON, J., was upheld in the Court of Appeal. But there is nothing in the judgment of SWINFEN EADY, J., in *Re Brewster* (4) or of WARRINGTON, J., or the Court of Appeal in *Re Scott* (5) to suggest that *Peter v. Stirling* (2) and *Re Maurice* (3) were wrongly decided. On the contrary, the explanation given by WARRINGTON, J., in *Re Scott* (5) ([1914] 1 Ch. 854, 855) of the ratio decidendi in *Peter v. Stirling* (2) seems to me to bring it fairly close to the present case, and his judgment was affirmed without qualification in the Court of Appeal. As the point has not been argued in the present case, and if made good would lead to the same conclusion as I have reached on other grounds, I express no opinion about it one way or the other, but merely refer to it lest this judgment, which is framed in accordance with the arguments presented, should be regarded as implicitly concluding it if raised in any future case.

In conclusion, I would associate myself with the reservation made by ROMER, L.J., at the end of his judgment in regard to possible arguments as to the effect on the construction and operation of testamentary directions as to death duties of the abolition of legacy and succession duties brought about by the Finance Act, 1949, s. 27. So far as the present will is concerned, I find nothing in the Act of 1949 to affect the conclusion expressed above on this aspect of the case, and no argument founded on it was presented to us on the appellant's behalf.

ROMER, L.J. (read by JENKINS, L.J.): I am in full agreement with the reasons on which JENKINS, L.J., has founded his conclusion that this appeal should be allowed. It is as well, however, that I should shortly state my opinion on the question whether a gift of a legacy "free of death duties" or even "free of all death duties" suffices, without more, to exonerate the bequest not only from United Kingdom duties, but also from those imposed in respect of the gift under the laws of a foreign state. In my judgment, an exonerating provision in either of the above terms, if found in a will, executed in Great Britain and in accordance with the testamentary formalities required by our law, of a domiciled British subject is prima facie confined in its operation to death duties exigible by the laws of this country, but if, in any given case, there are attendant circumstances of a quality and degree sufficient to show beyond reasonable doubt that the testator must have intended to include freedom from foreign duties also, then effect will be given to the intention so disclosed.

This view is in substance that which commended itself to WYNN-PARRY, J., in *Re Cunliffe-Owen* (1). I agree with the observations of BENNETT, J., in *Re Norbury* (6)—though it is true, I think, that what he said went further than that case required—as to the probable ignorance of British testators of duties payable on death under foreign systems of taxation. The fiscal legislation of this country is a matter of which a testator can from time to time inform himself, and he can, accordingly, by codicil, remove or alleviate such burden as he may have imposed by his will on his residuary estate in favour of the pecuniary legatees if he considers that, by reason of changes in the law, that burden will prove too heavy at his death. I doubt, however, whether the average testator knows (nor can he easily ascertain) much about the death duty legislation in the foreign country or countries where some of his assets may be situate, or where the legatees reside, and much less will he know what changes may occur in such legislation between the dates of his will and of his death. Nor, indeed, can he know, when he makes his will, where the legatees will be living when his death brings it into operation. In these circumstances it would be difficult for him to keep the same balance as between the pecuniary and residuary legatees which changes in foreign fiscal legislation might render desirable as he could keep in relation to similar legislative changes at home. Accordingly, I cannot but think that in the absence of some clear direction

to the contrary in the will, or of sufficiently compelling attendant circumstances, it is a safe and right assumption that British duties, and those alone, are within the ambit of words of exoneration such as those to which I have referred. In the present case, this assumption is, in my opinion, fortified by the express reference which the testatrix made to what was then a British duty ("free of legacy duty and all other duties"), and as I agree with JENKINS, L.J., that the surrounding or attendant circumstances are quite insufficient to show that the testatrix had Canadian succession duty also in mind the *prima facie* rule must, in my judgment, be applied.

I would add, in conclusion, that what I have said is quite without prejudice to any arguments that may be addressed to the court in any future case based on the change in death duties which was effected by the Finance Act, 1949. That statute was not discussed or even referred to by either side on the present appeal.

SOMERVELL, L.J.: I agree with JENKINS, L.J., that this appeal should be allowed for the reasons which he gives on the assumption that the words of cl. 3 of the will do not apply to Canadian succession duty. I would, however, myself like to reserve this latter question, and, in particular, whether there is a rule as laid down by WYNN-PARRY, J., and accepted by my brethren. In the first decision relied on BENNETT, J., said he supposed not many English testators knew much about death duties imposed by the laws of foreign countries. I think such knowledge would be a good deal more widespread now. It may be that the express reference to a specific English duty in the present formula might limit the general words. If, however, one takes a bequest of £5,000 to "X" free of "all death duties" or "death duties", I would like to be free to construe those or similar words unassisted by any rule. Having regard to the fairly common incidence of "double" death duties I would myself have been inclined to construe the words as meaning all death duties which, but for this provision, would diminish the £5,000. To say that it would have been easy for a testator to make clear that he meant foreign duties, assumes that he knows the rule that, for example, "all" may mean "British". If he did not know the rule, he might well think that "death duties" meant any death duties that might otherwise diminish his legacies. The question may well depend on whether the testator is presumed to be calculating what will remain in residue or expressing sufficiently clearly an intention that the legatee shall get the sum stated. In the present case, it is not necessary to decide the question, but on the grounds suggested I would regard it as open for this court. I agree that the appeal should be allowed in the sense indicated by JENKINS, L.J.

Appeal allowed.

Solicitors: *Jacobson, Ridley & Co.* (for all parties).

[*Reported by F. GUTTMAN, Esq., Barrister-at-Law.*]

HOLE v. CUZEN.

[COURT OF APPEAL (Somervell, Jenkins and Hodson, L.JJ.), December 17, 18, 1952.]

Bankruptcy—Tenancy—Premises subject to Rent Acts—Rent paid in excess of recoverable rent—Bankruptcy of landlord—Right of tenant to deduct amount of rent overpaid from rent payable to trustee—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (c. 17), s. 14 (1).

A Premises to which the Rent Acts applied were let to a tenant at a rent in excess of that lawfully recoverable under the Acts. A receiving order having been made against the landlord, a trustee in bankruptcy was appointed who claimed from the tenant arrears of rent. The tenant claimed the right under s. 14 (1) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, to deduct the overpayments of rent from the rent payable to the trustee.

B HELD: the reversion expectant on the determination of the tenant's interest vested in the trustee subject to all the rights of the tenant, including his rights under s. 14 (1) of the Act of 1920, and, therefore, the tenant was entitled to deduct the rent overpaid from rent payable by him to the trustee after the bankruptcy.

C *Bendall v. McWhirter* ([1952] 1 All E.R. 1307), applied.

Kitchen's Trustee v. Madders ([1949] 2 All E.R. 1079), explained.

AS TO PROPERTY OF BANKRUPT PASSING TO TRUSTEE, see HALSBURY, Hailsham Edn., Vol. 2, p. 209, para. 278; and FOR CASES, see DIGEST, Vol. 5, pp. 630-638, Nos. 5676-5738.

D Cases referred to:

(1) *Murray v. Webb*, (1925), 59 I.L.T. 41; 31 Digest, Replacement, 692, 2574.

(2) *Kitchen's Trustee v. Madders*, [1949] 2 All E.R. 1079; [1950] Ch. 134; 2nd Digest Supp.

(3) *Bendall v. McWhirter*, [1952] 1 All E.R. 1307; [1952] 2 Q.B. 466.

E (4) *Titterton v. Cooper*, (1882), 9 Q.B.D. 473; 51 L.J.Q.B. 472; 46 L.T. 870; 5 Digest 937, 7657.

(5) *Alloway v. Steere*, (1882), 10 Q.B.D. 22; 52 L.J.Q.B. 38; 47 L.T. 333; 47 J.P. 55; 4 Digest 394, 3609.

(6) *Re Sneezum. Ex p. Davis*, (1876), 3 Ch.D. 463; 45 L.J.Bey. 137; 35 L.T. 389; 5 Digest 937, 7661.

F (7) *Re Wilson. Ex p. Lord Hastings*, (1893), 62 L.J.Q.B. 628; 10 Morr. 219; 4 Digest 394, 3610.

APPEAL by the tenant from an order of His Honour JUDGE ARCHER made at Hastings County Court on Oct. 7, 1952, in an action for arrears of rent.

G The claim was made by the landlord's trustee in bankruptcy, and the tenant sought to deduct, under s. 14 (1) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, rent previously paid to the landlord in excess of the rent recoverable under that Act. The trustee contended that he was not liable in respect of any overpayment of rent made to the landlord before the trustee's appointment. The county court judge, considering himself bound by a dictum of COHEN, L.J., in *Kitchen's Trustee v. Madders* (2) ([1949] 2 All E.R. 1087), gave judgment for the trustee for the full amount of recoverable rent accrued since the bankruptcy.

H *L. A. Blundell and Plume* for the tenant.

Muir Hunter for the trustee in bankruptcy.

SOMERVELL, L.J.: I will ask JENKINS, L.J., to deliver the first judgment.

JENKINS, L.J.: This is an appeal from a judgment of His Honour JUDGE ARCHER concerning the right claimed by the tenant to deduct in respect

of his tenancy of 27, Magdalen Road, St. Leonards, rent overpaid by him to the landlord in excess of the rent lawfully recoverable under the provisions of the Rent Restrictions Acts. It appears that, whereas the standard rent of the premises under the Acts was 15s. 6d. and there were permitted increases which brought the rent up to a maximum of 19s. 5½d., in fact a substantially larger weekly rent was reserved and paid. In the ordinary way there would be no difficulty in the matter as the provisions of s. 14 (1) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, would enable the tenant, having made these overpayments, to recover them from the landlord to whom they were made, or, alternatively, to deduct them from subsequent rent payable, at all events, to that landlord. The difficulty in the present case is that on Aug. 23, 1951, a receiving order was made against the landlord, and on Sept. 21, 1951, the plaintiff was appointed the landlord's trustee in bankruptcy. The question thus arises whether the right of deduction given by s. 14 (1) of the Act of 1920 is exercisable against the trustee in bankruptcy of the landlord?

Section 14 (1) provides:

"Where any sum has, whether before or after the passing of this Act, been paid on account of any rent or mortgage interest, being a sum which is by virtue of this Act, or any Act repealed by this Act, irrecoverable by the landlord or mortgagee, the sum so paid shall be recoverable from the landlord or mortgagee who received the payment or his legal personal representative by the tenant or mortgagor by whom it was paid, and any such sum, and any other sum which under this Act is recoverable by a tenant from a landlord or payable or repayable by a landlord to a tenant, may, without prejudice to any other method of recovery, be deducted by the tenant or mortgagor from any rent or interest payable by him to the landlord or mortgagee."

In conjunction with those provisions it is necessary to look at s. 12 (1) (f) of the Act, which provides:

"The expressions 'landlord', 'tenant', 'mortgagee', and 'mortgagor' include any person from time to time deriving title under the original landlord, tenant, mortgagee, or mortgagor."

If the expressions "the landlord" where it occurs at the end of s. 14 (1) in the passage "may, without prejudice . . . be deducted by the tenant or mortgagor from any rent or interest payable by him to the landlord or mortgagee" means, in accordance with the definition, the landlord or any person from time to time deriving title under him, it would seem that the claim of the trustee in bankruptcy would be fraught with great difficulty for, on that construction, the statute would have provided a statutory right of deduction in terms exercisable against the landlord for the time being which would, so far as I can see, include the trustee in bankruptcy as one of the possible successors in title of a landlord. There is, however, some authority to the effect that the expression "the landlord" in that passage is limited by the context to the landlord who receives the excess payment. That authority is provided by the Irish case of *Murray v. Webb* (1) where it was held that on its true construction the expression "the landlord" in that passage was confined to the landlord who had been overpaid. Speaking for myself, I desire to keep that question of construction open for determination if and when it becomes necessary to decide it in some other case. For the purposes of the present case, I am prepared to assume that the construction placed on it by the Irish court was the right one so that the only right of deduction given by s. 14 (1) is a right of deduction against the overpaid landlord as distinct from a successor in title to the overpaid landlord. Counsel for the tenant invited us, in effect, to deal with the matter on that footing, and that is how I propose to deal with it.

The learned judge came to the conclusion that the right of deduction claimed

to be exercisable by the tenant was not, as contended by the tenant, available against the trustee in respect of rent accrued to the trustee from the time of the bankruptcy. The note of his reasons is in these terms:

“Although there is no reference to or argument on s. 14, it appears that what COHEN, L.J., held in *Kitchen's Trustee v. Madders* (2) involves the point in his judgment at the end where he deals with the sum recoverable.”

A Accordingly, the learned judge rejected the tenant's contention and gave judgment in favour of the trustee for the full amount of recoverable rent accrued since the bankruptcy claimed by the tenant.

In *Kitchen's Trustee v. Madders* (2) there was a claim in respect of rent over-paid of a similar nature to the claim in the present case. The trustee in bankruptcy of a landlord sued the defendants for five quarters' rent due under a tenancy granted to them by the landlord. Two of those quarters' rent had accrued due before the bankruptcy, and three had accrued due after the bankruptcy. In the court below the case had been argued with reference to a set-off claimed in respect of an entirely different matter into which I need not now enter, but in this court the defendants were allowed to introduce by amendment a claim to the effect that the premises comprised in the tenancy were subject to the protection of the Rent Acts and that the rent claimed by the trustee was in excess of the recoverable rent, and, moreover, that the defendants had paid rent in excess of the recoverable rent, and were, therefore, entitled to deduct or set-off the excess payments they had made against the rent claimed by the trustee. The effect of the deduction or set-off they claimed to make, as I understand it, was to exhaust the two quarters' rent claimed in respect of periods prior to the bankruptcy and to leave a balance of overpaid rent amounting to £20 which they sought to set off against the rent accrued due after the bankruptcy. There seems to have been no argument addressed to the court on the point which has been debated before us. COHEN, L.J., after referring to the amendment raising the defence based on the Rent Acts, and discussing and deciding in favour of the defendants the question whether the premises were a dwelling-house to which the Act applied, continued ([1949] 2 All E.R. 1087):

“It seems to me that those facts reinforce the conclusion that SIR RAYMOND EVERSHED, M.R., came to and that there is nothing in the terms of the lease which can prevent us holding that at the material time this house was a dwelling-house within the meaning of the Rent Restrictions Acts, 1920 to 1939. The result is that the rent was payable only at the rate of £140 per annum instead of at the rate of £500 per annum. On that basis counsel for the defendants claims that the sum recoverable, instead of being £625, should be £85. In making that calculation, however, he went too far, because he tried to set off the £90 which his clients had overpaid for the quarter's rent which they had paid in advance, not only against the first two quarters' rent, as to which it was clearly a proper subject-matter of set off, but also to the extent of £20 against the rental accrued due after the commencement of this action.”

The words “after the commencement of this action” should, I think, have been “after the commencement of the bankruptcy”. The learned lord justice continued (*ibid.*):

“For the reasons I have already given I do not think the set off can be applied as regards the last three quarters' rent. In my view, therefore, the proper sum for which judgment should be entered for the plaintiff is £105.”

As I understand it, “the reasons already given”, as the learned lord justice called them, were, in effect, these. He said (*ibid.*, 1084):

"As to the last three quarters' rent which accrued due after the commencement of the bankruptcy, there was, I think, no mutuality, and, therefore, there could be no set off."

The learned lord justice was referring there to a claim to set-off an amount entirely different from the excess rent, namely, a judgment debt which would, apart from the bankruptcy, have been recoverable against the debtor. The ground for refusing a set-off was that there was no mutuality because the judgment debt had become due from the debtor before the bankruptcy whereas the rent against which it was sought to set it off was rent accrued after the bankruptcy. Again (*ibid.*, 1085), the learned lord justice said:

"Here we are considering instalments of rent which accrued due for the first time after the commencement of the bankruptcy. We are considering, therefore, debts which were never due to the bankrupt but which become due to the trustee. It seems to me in those circumstances impossible to say that there is such mutuality between the claim for rent due to the trustee and the claim for fraudulent misrepresentation against the bankrupt as to found a right to set off within s. 31 of the Bankruptcy Act, 1914. For these reasons I think HARMAN, J., was right when he rejected the defence based on set off."

Accordingly, if I am not mistaken, all that was decided in *Kitchen's Trustee v. Madders* (2), which has any bearing on the present case, was that where rent had been overpaid in respect of premises subject to the Rent Acts, the resulting claim was not a proper matter for set-off under s. 31 of the Bankruptcy Act, 1914, against rent accruing due to the trustee subsequent to the commencement of the bankruptcy. The argument which has been addressed to us, based on the language of s. 14 (1) of the Act of 1920 and the statutory right of deduction for which it provides, does not appear to have been raised at all, and, therefore, notwithstanding the decision in *Kitchen's Trustee v. Madders* (2), I conceive that the point is open in this court.

Counsel's argument for the tenant, which I summarise on the assumption that the narrow construction of the expression "the landlord" where it last appears in s. 14 (1), is the right one, is, in effect, of this nature. All the property of the bankrupt vested in the trustee. That included, among other things, the reversion expectant on the determination of the tenant's interest in 27, Magdalen Road, St. Leonards. The trustee thus became entitled to receive whatever rent was payable by the tenant in respect of the premises, but the reversion passed to the trustee, not only with that right, but also subject to the statutory obligation which the landlord was under to submit to the deduction from the rent currently payable of rent previously paid in excess of the lawfully recoverable rent.

In his submission, that argument was supported by the reasoning which underlies the decision of this court in *Bendall v. McWhirter* (3). In that case a deserted wife was living in the matrimonial home which was the property of the husband. The husband was adjudicated bankrupt, and the freehold of the house vested in his trustee in bankruptcy. The trustee brought an action to recover possession and mesne profits against the wife as a trespasser from the date of the adjudication in bankruptcy. The learned county court judge made an order for possession. On appeal it was held in this court, first, that a deserted wife in occupation of the matrimonial home had a personal licence, revocable by her husband only by obtaining an order of the court under s. 17 of the Married Women's Property Act, 1882, and, secondly, that where the matrimonial home was a freehold house which vested in the husband's trustee in bankruptcy under the provisions of the Bankruptcy Act, 1914, the trustee took the house subject to the wife's licence and could not obtain possession of it without an order of the court made on an application for possession under

s. 105 (1) of the Bankruptcy Act, 1914. ROMER, L.J., with whom SOMERVELL, L.J., agreed, said ([1952] 1 All E.R. 1317):

“ . . . a trustee takes no better title to property than the bankrupt had . . . [he] is no more entitled than was the debtor prior to his bankruptcy to revoke the wife's licence on his own authority and to sue her for possession of the property.”

- A That case deals with an entirely different set of circumstances, but, to my mind, it is of great assistance in the present case for this reason. The right of the wife and the obligation of the husband there under consideration were a personal right and a personal obligation depending on the relationship of husband and wife which subsisted between those two parties. Yet, it was held that the trustee in bankruptcy could not disregard the wife's interest.
- B That shows, I think, that, although it has been said in some cases that the trustee in bankruptcy is simply the assignee, like any other assignee, of all the property of a bankrupt divisible among the creditors, that unqualified statement does not provide a universally adequate definition of the trustee's position, for, if it was an exhaustive and accurate definition of his position, the decision in *Bendall v. McWhirter* (3) must, as it seems to me, have gone the other way. The wife there was in a position comparable with that of the tenant, and the husband was in a position comparable with that of the landlord, in the present case. The husband was under a personal obligation to his wife, based on their relationship, to permit her to remain in the matrimonial home. If the trustee was simply in the position of an ordinary assignee of the house, I should have thought there would be grave difficulty in seeing how there was any interest in the wife which could override his interest as assignee, for the husband's obligation to the wife was, as I have said, purely personal.
- D Accordingly, it matters not in the present case that, according to the construction of s. 14 (1) on which I am basing this judgment, the right of deduction claimed by the tenant here would not have been exercisable against an ordinary assignee of the landlord. As *Bendall v. McWhirter* (3) shows, the trustee in bankruptcy steps into the shoes of the debtor and takes the debtor's property subject to all clogs or fetters or liabilities affecting it in the hands of the debtor himself. The position is well stated in the passage from HALSBURY'S LAWS OF ENGLAND, Hailsham ed., vol. 2, p. 209, referred to by ROMER, L.J., in *Bendall v. McWhirter* (3):

- E “ The property of the bankrupt passes to the trustee in the same plight and condition in which it was in the bankrupt's hands, and is subject to all the equities and liabilities which affected it in the bankrupt's hands, and to all dispositions which have been validly made by the bankrupt, and to all rights which have been validly acquired by third persons at the commencement of the bankruptcy, unless the property which the trustee takes is released by some express provision of the bankruptcy law.”

- F “ The property of the bankrupt passes to the trustee in the same plight and condition in which it was in the bankrupt's hands, and is subject to all the equities and liabilities which affected it in the bankrupt's hands, and to all dispositions which have been validly made by the bankrupt, and to all rights which have been validly acquired by third persons at the commencement of the bankruptcy, unless the property which the trustee takes is released by some express provision of the bankruptcy law.”
- G Counsel for the trustee in his argument to the contrary, referred us to a number of well known cases on the question of the right of set-off, beginning with *Titterton v. Cooper* (4) which he cited to illustrate the position of the trustee in bankruptcy in regard to leasehold property of the debtor. He used it, in effect, to support the proposition that the trustee in bankruptcy comes in like any other assignee by a new title which, in the absence of disclaimer, may make him personally liable for the rent under the lease, but he is not liable for any breach of covenant happening before his appointment. It is suggested that, similarly, in the present case the trustee, coming in on his appointment as assignee of the reversion subject to the tenant's tenancy, was not liable for or concerned with any matter such as the overpayment of rent to the bankrupt landlord which had happened before his appointment. Nearer the actual question is *Alloway v. Steere* (5) where the tenant was a tenant
- H

from year to year of a farm on the terms that, at the expiration of the tenancy, he should be paid by the landlord allowances for tillages and cultivation according to the custom of the country. The tenant went bankrupt, and a trustee was appointed, who did not disclaim the tenancy, but carried on the business of the farm for the benefit of the creditors until the tenancy was determined by notice to quit. The tenant's estate was sufficient to indemnify the trustee against any personal liability in respect of the tenancy. In an action to recover the value of tillages and cultivation by the trustee during his tenancy, according to the custom, it was held that the landlord was not entitled to set off against the trustee's claim rent accrued due from the debtor before the liquidation proceedings. The matter was very fully argued on behalf of the landlord by Mr. Vaughan Williams and I should, perhaps, read some of the passages in the judgments which are relied on by counsel for the trustee in the present case. In his judgment DENMAN, J., referred to *Re Sneezum. Ex p. Davis* (6) and said (10 Q.B.D. 27):

"In that case the question was not as to the right of set-off, but as to the right of proof—a wholly different thing. There may be a right here on the part of the landlord to prove for his rent, but that fact creates no analogy between the cases. No case has gone the length of deciding that where the trustee takes to a lease or tenancy, and carries on the business of the farm, and becomes entitled to get from the landlord a return of monies which have been expended for the benefit of the farm, the landlord shall have, not only his right of proof against the debtor's estate, but shall also be entitled to set-off against monies actually expended by the trustee in tillage and cultivation, of which the landlord gains the benefit, sums due from the debtor for rent accruing before the commencement of the trustee's interest."

MANISTY, J., said (*ibid.*, 29):

"The relative rights and liabilities of the landlord and the trustee appear clearly from the case of *Titterton v. Cooper* (4), where the whole question was fully considered, and the conclusion arrived at by the Court of Appeal was that a trustee in bankruptcy, not disclaiming, was in the position of an ordinary assignee of the lease, and as such liable for the rent, and for the performance of the covenants during the time the lease was vested in him . . . Supposing it had been the case of an ordinary assignment; the assignee of the tenancy is bound under his contract to go on spending money on the farm, of which the landlord obtains the benefit; on what principle could it be said that when the tenancy comes to an end the landlord has a right of equitable set-off in respect of rent accrued due before the assignment, or in respect of damages for breach of covenant or contract accruing before the assignment? The statute has made no provision that there should be any such right of set-off in the case of bankruptcy, and I cannot see upon any principle or authority how the defendant's claim to a set-off can be supported; the plaintiff being, as I have said, in the same position as any other assignee."

As I have already observed, I think that last statement—that the plaintiff is in the same position as any other assignee—as a general proposition is too widely expressed, and is not entirely accurate to describe the position of a trustee in bankruptcy in all circumstances.

We were also referred by counsel for the trustee to *Re Wilson. Ex p. Lord Hastings* (7). That was another case of an agricultural tenancy where the tenant went bankrupt, and the question again arose as to setting off rent against the outgoing valuation. The interesting point about that case was that the result was the opposite of *Alloway v. Steere* (5) on account of a custom in the county of Norfolk. I think the effect of the decision is sufficiently stated in the headnote (10 Morr. 219):

A “Held:—That under s. 38 of the Bankruptcy Act, 1883, the landlord had no right to set off the one sum against the other. But that the court was of opinion on the evidence that as a matter of fact, according to the custom of the county of Norfolk, the amount payable by the landlord in respect of valuation to the outgoing tenant was not the absolute value put by the valuers on the subject-matter of the valuation, but was the balance of that sum after deducting any arrears of rent; and that that being so, the landlord in the present case was not liable to pay any part of the £271 to the trustee.”

So that there, by custom, the tenant's right was to receive only the balance represented by the amount of the valuation less the arrears of rent, and that custom was held binding on the trustee in bankruptcy.

B Counsel for the trustee claimed, in effect, that the present case does not differ from cases concerned with set-off such as those to which I have referred. He said that, on the principle of *Alloway v. Steere* (5), there can be no right of set-off in the present case, that the claim in respect of overpaid rent had been converted simply into a right of proof, and that any other method of recovering it was barred by s. 7 (1) of the Bankruptcy Act, 1914. He claimed C that it would be contrary to the principles of the bankruptcy legislation to give the tenant the right of deduction claimed, which would, in effect, give him an undue preference over the general body of creditors.

In my view, the argument of counsel for the tenant should prevail in this case. I accept all that counsel for the trustee says so far as ordinary cases of set-off are concerned, but this is not an ordinary case of set-off. Here there is a statutory right given to the tenant to deduct the overpayment of rent from the rent D currently payable until overpayments are satisfied. The effect of that is that, as against the landlord who was overpaid, namely, the bankrupt landlord in the present case, the tenant was entitled, by virtue of s. 14 (1) of the Act of 1920, to remain in the premises rent free until such time as the amount of the lawfully recoverable rent accruing due under the tenancy should have sufficed to recoup to the tenant the amount of the overpaid rent. Applying the principle stated E in *Bendall v. McWhirter* (3), I see no reason why a right of that sort should not be binding on the trustee in bankruptcy of the landlord or why the trustee in bankruptcy should, in regard to such a right, be in any better position than the bankrupt personally would have been. In my view, the reversion expectant on the determination of the tenant's interest vested in the trustee in bankruptcy subject to all the rights of the tenant, including, in particular, the F tenant's right under s. 14 (1) of the Act of 1920 to be considered, in effect, as between himself and the bankrupt landlord as having paid rent in advance up to the amount of the rent in fact paid in excess of the rent lawfully recoverable under the Act. For these reasons, as, in my view, the point cannot be regarded as having been concluded in *Kitchen's Trustee v. Madders* (2) against the contention now advanced by counsel for the tenant, I would allow G this appeal.

SOMERVELL, L.J.: I agree with the conclusion to which JENKINS, L.J., has come and with the reasons he has given for it. I only want to add that I can quite understand that the learned county court judge should feel he ought to follow the statement in *Kitchen's Trustee v. Madders* (2). But in this H court, for the reasons JENKINS, L.J., has given, the point is, in my opinion, open for us to consider.

HODSON, L.J.: I agree.

Appeal allowed.

Solicitors: *Preston, Lane-Claypon & O'Kelly*, agents for *John Ray & Son*, Hastings (for the tenant); *Henry Boustred & Sons*, agents for *Percy Walker & Co.*, Hastings (for the trustee).

[Reported by J. D. PENNINGTON, Esq., Barrister-at-Law.]

BRITISH ELECTRICAL & ASSOCIATED INDUSTRIES
(CARDIFF) LTD. v. PATLEY PRESSINGS, LTD. REID BROS.
(GLASGOW) LTD., Third Party, DOUGLAS SCOTT, LTD.,
Fourth Party.

QUEEN'S BENCH DIVISION (McNair, J.), December 9, 10, 12, 1952.]

Contract—Unenforceable contract—Uncertainty of term—Agreement “subject to force majeure conditions”—Variety of force majeure conditions in trade—No concluded agreement.

A

A purported oral agreement for the sale of goods was evidenced by a contract note signed by the defendants which contained the following clause: “Conditions, prime quality bars to B.S.S. 15 specification. Bundled in one ton lots and subject to force majeure conditions that the government restricts the export of the material at the time of delivery”. There were a variety of force majeure conditions in the trade. In an action for damages for repudiation of the alleged agreement,

B

HELD: the words “force majeure conditions” in the clause meant “clauses” or “stipulations”; the clause did not indicate to what force majeure conditions the words applied; and, therefore, they were so vague and uncertain as to be incapable of any precise meaning, and there was no enforceable agreement on which the plaintiff could rely.

C

G. Scammell & Nephew, Ltd. v. Ouston ([1941] 1 All E.R. 14) and *Bishop & Baxter, Ltd. v. Anglo-Eastern Trading & Industrial Co., Ltd.* ([1943] 2 All E.R. 598), applied.

Semhle: an agreement for sale, otherwise precise, which contains the phrase “subject to force majeure”, is a valid and enforceable contract.

D

AS TO UNCERTAINTY OF TERMS OF CONTRACT, see HALSBURY, Hailsham Edn., Vol. 7, p. 330, para. 458.

Cases referred to:

- (1) *Scammell (G.) & Nephew, Ltd. v. Ouston*, [1941] 1 All E.R. 14; [1941] A.C. 251; 110 L.J.K.B. 197; 164 L.T. 379; 2nd Digest Supp.
- (2) *Love & Stewart, Ltd. v. Instone (S.) & Co., Ltd.*, (1917), 33 T.L.R. 475; 12 Digest, Replacement, 92, 524.
- (3) *Bishop & Baxter, Ltd. v. Anglo-Eastern Trading & Industrial Co., Ltd.*, [1943] 2 All E.R. 598; [1944] K.B. 12; 113 L.J.K.B. 26; 169 L.T. 351; 12 Digest, Replacement, 98, 587.
- (4) *Trans Trust S.P.R.L. v. Danubian Trading Co., Ltd.*, [1952] 1 All E.R. 970; [1952] 2 Q.B. 297.
- (5) *Lebeaupin v. Crispin (R.) & Co.*, [1920] 2 K.B. 714; 89 L.J.K.B. 1024; 124 L.T. 124; 12 Digest, Replacement, 430, 3307.

E

F

ACTION for damages for repudiation of a contract and for a declaration.

The plaintiffs claimed damages against the defendants for repudiation of an agreement to sell to them two hundred tons of mild steel angles. They also claimed a declaration that they were entitled to be indemnified by the defendants against any claim which might be made against them by American sub-buyers by reason of their inability to deliver under a similar agreement to sell through the defendants' defaulting in their agreement. They alleged that the defendants had entered into the agreement for sale with knowledge that the plaintiffs intended to re-sell at a profit. The defendants brought in the third parties from whom they had purchased on similar, but not identical, terms, claiming a declaration of indemnity in respect of any damages which they might be held liable to pay to the plaintiffs and also damages in their own right. The third parties brought in the fourth parties from whom they had purchased on similar, but not identical, terms, also claiming an indemnity in respect of damages which they might be held liable to pay and damages.

G

H

The plaintiffs alleged that they and the defendants had entered into either (i) an oral agreement of Dec. 11, 1950, evidenced by a contract note of that date signed by the defendants and a letter of Dec. 12, 1950, from the plaintiffs to the defendants, of which the contract note constituted an admission by the defendants of the terms of the agreement; or (ii) a contract in writing constituted by the contract note and the letter. The contract note read:

"We confirm having sold you the following material:

- A** *Description*, Mild steel angles [Then the specification was set out]
Quantity, two hundred tons; *price*, £32 15s. per ton, f.o.b. London/
 Liverpool; *delivery*, in mid-March;
Terms, net cash against wharfingers' receipt and weighbridge ticket;
Conditions, prime quality bars to B.S.S. 15 specification. Bundled in
 one ton lots and subject to force majeure conditions that the government
B restricts the export of the material at the time of delivery."

The plaintiffs' letter was as follows:

"We received your contract No. 1634 A dated Dec. 11, according to which we have bought from you the following materials."

- C** The terms following were substantially, though not identically, those contained in the contract note. The defendants contended that there was no enforceable contract, the meaning of the words

"subject to force majeure conditions that the government restricts the export of material at the time of delivery"

- D** being too uncertain. One of the documents relied on by the defendants against the third parties was a contract note signed by the defendants which read:

"We confirm having bought from you the following material".

There followed the description, quantity, price, delivery and terms as in the plaintiffs' contract note, except for a difference in the price, and under the heading "Conditions" the same conditions except that the final paragraph read:

- E** "Certified free for export and subject to force majeure conditions."

The contractual documents as between the third parties and the fourth parties, so far as material, were identical with those as between the defendants and the third parties.

Goodenday for the plaintiffs.

- F** *M. Waters* for the defendants.

Lord Hailsham for the third parties.

J. F. Donaldson for the fourth parties.

- G** **McNAIR, J.**, stated the facts, found as a fact that the contract note and letter did not constitute a written agreement, but purported to confirm a verbal contract already made, and continued: Accepting for a moment that the contract note constitutes an admission, the first question which I have to determine is whether or not the words

"subject to force majeure conditions that the government restricts the export of material at the time of delivery"

- H** prevent the court from holding that any enforceable contract was made. In my judgment, they do. In the first place I consider that, whether the word "conditions" means "stipulations" or "clauses", on the one hand, or "contingencies" or "circumstances", on the other, the whole sentence is so vague and uncertain as to be incapable of any precise meaning and so to bring the case within the principles stated in the House of Lords in *G. Scammell & Nephew, Ltd. v. Ouston* (1) where VISCOUNT MAUGHAM said ([1941] 1 All E.R. 16):

"In order to constitute a valid contract, the parties must so express

themselves that their meaning can be determined with a reasonable degree of certainty."

LORD WRIGHT said (*ibid.*, 25) that the first ground on which the court ought to hold on the facts of that case that there was no contract was

" . . . that the language used was so obscure and so incapable of any definite or precise meaning that the court is unable to attribute to the parties any particular contractual intention."

In the second place, however, I consider that the word "conditions" in this context as a matter of construction clearly means "clauses" or "stipulations" and not "contingencies" or "circumstances". If "conditions" means "contingencies" or "circumstances", the word adds nothing to the phrase "force majeure". Furthermore, such a construction would involve giving a different meaning to the word "conditions" where it appears in the phrase under construction from that which it bears in the side heading to that paragraph of the note. If, accordingly, as I hold, the word "conditions" means "clauses" or "stipulations", then, there being evidence given in the action before me that there were in the trade a variety of force majeure conditions, this case plainly falls within the line of authority of which *Love & Stewart, Ltd. v. S. Instone & Co., Ltd.* (2), where the House of Lords had to consider the effect of a contract containing the words "subject to strike and lock-out clauses", is an example, and also within the principle stated in *Scammell v. Ouston* (1) to which I have already referred (where the phrase was "upon hire-purchase terms") and *Bishop & Baxter, Ltd. v. Anglo-Eastern Trading & Industrial Co., Ltd.* (3), where the Court of Appeal, in considering a purported agreement (which contained the phrase "subject to . . . war clause"), held that, as the war clause took many forms and as there was no evidence that the parties had any particular form of clause in mind, there was no consensus ad idem, and, therefore, no completed contract. Those cases seem to me to establish that, notwithstanding that the parties may have thought and acted on the basis that a contract existed between them, no consensus ad idem will be held to exist where there still remains to be negotiated and agreed the exact form of the clauses or conditions referred to by the parties.

So far, I have considered the matter solely upon the basis of this contract note alone, but the matter was made even clearer by the evidence given on behalf of the defendants by Mr. Trup, their director, which established to my satisfaction that in the negotiations the parties must be taken to have used the term "conditions" in the sense I have indicated. Accordingly, the plaintiffs' claim against the defendants breaks down in limine on their failure to prove any concluded contract.

[HIS LORDSHIP said that if he had been satisfied that the parties had reached contractual certainty in the terms pleaded and that there had been a sufficient memorandum of the agreement to satisfy s. 4 of the Sale of Goods Act, 1893, he would have held that the defendants knew that the plaintiffs required the goods to re-sell at a profit, that the defendants had repudiated their contractual obligations, and that the plaintiffs would have been entitled to damages which he assessed at £250. As at present advised he would have refused the declaration asked for, *inter alia* following the decision of the Court of Appeal in *Trans Trust S.P.R.L. v. Danubian Trading Co., Ltd.* (4) with regard to declarations for an indemnity. HIS LORDSHIP referred to the facts in the case between the defendants and the third parties and continued:] For the reasons which I stated earlier, I am of opinion that the words "subject to force majeure conditions" preclude me from holding that any completed consensus ad idem was reached on the ground that, in this phrase, "conditions" means "clauses" or "stipulations" and not "contingencies" or "circumstances". Had I been of the opinion that the words had either of the latter meanings (*i.e.*, meant either "contingencies" or "circumstances") I should

not have acceded to the submission of counsel for the third parties that, on that hypothesis, the phrase was too vague to have contractual effect. Though many cases have been cited to me in which obvious difficulty has been experienced in construing the phrase "force majeure": see, in particular, *Lebeaupin v. R. Crispin & Co.* (5); in none of those cases was it considered that the phrase was too vague for construction. Nor would I have accepted the further submission that the phrase was too vague in the sense that it did not satisfy the legal consequences which would follow on proof of force majeure, i.e., whether it should be cancellation or dissolution. I am satisfied that an agreement for sale which was otherwise precise and contained the phrase "subject to force majeure" would be a valid and enforceable contract.

A [His Lordship held that, apart from the decision as to the meaning of "force majeure conditions", there would have been valid contracts as between the defendants and the third parties and as between the third parties and the fourth parties respectively, which had been repudiated by the third parties and the fourth parties respectively, and he assessed the defendants' damages at £400 and the third parties' damages on the basis of a price per ton of not less than £39 5s. at the date of the breach.]

B *Judgment for the defendants against the plaintiffs; for the third parties against the defendants; and for the fourth parties against the third parties.*

C Solicitors: *Alexander Fine & Co.* (for the plaintiffs); *Sylvester, Amiel & Co.* (for the defendants); *Berrymans*, agents for *Borland, King & Stewart*, Glasgow (for the third parties); *Beaumont, Son & Rigden* (for the fourth parties).

[Reported by F. A. AMIES, ESQ., Barrister-at-Law.]

D

NOTE.

Affirmed, C.A. [1953] 2 All E.R. 320. L. STEELFOUNDERS & ENGINEERS, LTD.

E [QUEEN'S BENCH DIVISION (Parker, J.), December 1, 2, 3, 4, 5, 8, 1952.]

Factory—Removal of dust—"All practicable measures" to be taken—Provision of exhaust appliances—Standard of duty—Factories Act, 1937 (c. 67), s. 47 (1).

F *Factory—Removal of dust—Sand blasting—Enclosed cabinet—Absolute duty to maintain to prevent escape of dust—Grinding of Metals (Miscellaneous Industries) Regulations, 1925 (S.R. & O., 1925, No. 904), reg. 13.*

FOR THE FACTORIES ACT, 1937, s. 47 (1), see HALSBURY'S STATUTES, Second Edn., Vol. 9, p. 1038.

Cases referred to:

- G (1) *McCarthy v. Coldair, Ltd.*, [1951] 2 T.L.R. 1226; 2nd Digest Supp.
 (2) *Lee v. Nursery Furnishings, Ltd.*, [1945] 1 All E.R. 387; 172 L.T. 285; 2nd Digest Supp.
 (3) *McCorkindale v. Lion Foundry Co., Ltd.*, (Ct. of Sess., Feb. 19, 1952), unreported.
 (4) *Clifford v. Charles H. Challen & Son, Ltd.*, [1951] 1 All E.R. 72; [1951] 1 K.B. 495; 2nd Digest Supp.

H ACTION for damages for negligence and breach of statutory duty.

The plaintiff was employed by the defendants at their steel foundry at Letchworth for various periods from 1940 to 1948. From July, 1940, to Oct. 22, 1944, he was engaged in alternate spells of two hours each in mixing dried sand, fresh sand, and a mixture known as bentonite, in a hopper, and shovelling mainly dry sand which was tipped out of moulds through a two-inch grill or grating on to a conveyor belt several feet below. A considerable amount of dust rose through the grating when the sand fell on the conveyor belt, and in January,

1942, the defendants installed an extractor plant which drew away the dust. From Oct. 23, 1944, to Sept. 21, 1945, the plaintiff was a foundry "slinger", taking castings and moulds with castings in them to gratings or grids over which the castings were knocked out. This was also, intermittently, a dusty process. From Dec. 30, 1946, to Apr. 5, 1948, he was a labourer in the shot blasting department, wheeling castings on a trolley into sand blasting or shot blasting cabinets, and, after the door of the cabinet had been closed and the shot blaster had shot the sand off the castings and opened the door, wheeling the trolley out with the castings on it. From Apr. 5, 1948, to Oct. 21, 1948, he was a "slinger" for the shot-blaster, bringing, with the assistance of the crane driver, castings on to the trolleys outside the shot blasting cabinet. If there was a great deal of sand on a casting he would strike it, while it was on its slings, on the ground or against another casting, and would knock off the biggest blocks of sand with a hammer. Both these operations were alleged to have caused considerable dust. In August, 1949, he was certified by the pneumoconiosis board to be suffering from pneumoconiosis, and he was found as a fact to have contracted pneumoconiosis in the course of his employment with the defendants by November, 1943. A B

The plaintiff contended that the defendants had failed to comply with the requirement of the Factories Act, 1937, s. 47 (1) that C

"... all practicable measures shall be taken to protect the persons employed against inhalation of the dust . . . and . . . where the nature of the process makes it practicable, exhaust appliances shall be provided and maintained, as near as possible to the point of origin of the dust . . ."

He further contended that the defendants had committed a breach of reg. 13 of the Grinding of Metals (Miscellaneous Industries) Regulations, 1925, which, he submitted, imposed an absolute duty to prevent the escape of dust from the cabinets. The defendants denied that they had been guilty of negligence or any breach of statutory duty. D

Croom-Johnson for the plaintiff.

P. M. O'Connor for the defendants. E

PARKER, J., said that counsel for the plaintiff pointed out, as was undoubtedly true, that at least three different standards were laid down under the Factories Act, 1937, and probably more. There was the standard which amounted to an absolute duty. That appeared in a number of sections and by means of various words, including in one section the words "effective measures". At the other end of the scale there were obligations which were to be discharged where reasonably practicable. That at once invoked a number of considerations apart from possibility, such as questions of cost and, probably, of practice. As had been said by the Court of Appeal in *McCarthy v. Coldair, Ltd.* (1), that expression probably came close to, or was equivalent to, the ordinary common law obligation of master and servant. In the middle there was an obligation, as here, to do something if it was practicable, and presumably "practicable" was something stricter than "reasonably practicable". The real question was: What did "practicable" mean? In **WEBSTER'S DICTIONARY** "practicable" was defined as "possible to be accomplished with known means or resources", and, though dealing with a different point, **LORD GODDARD**, in *Lee v. Nursery Furnishings, Ltd.* (2) ([1945] 1 All E.R. 389), adopted a definition in the **OXFORD DICTIONARY** of "capable of being carried out in action" or "feasible". It seemed to **HIS LORDSHIP** that "practicable" must impose a stricter standard than "reasonably practicable". Questions of cost might be eliminated under "practicable", but the measures must be possible in the light of current knowledge and invention. On the evidence he (**His Lordship**) was not satisfied that the pneumoconiosis was contracted as a result of any breach of statutory duty or common law duty on the part of the defendants. F G H

That left one further complaint. By reg. 13 of the Grinding of Metals (Miscellaneous Industries) Regulations, 1925, it was provided that

“Sand blasting shall not be done in any room except in an enclosed chamber or cabinet in which no other work is ordinarily performed and at which efficient means are provided, arranged and maintained to prevent the escape of dust to the outside of such chamber or cabinet.”

A As a matter of construction, that clearly imposed an absolute duty on employers with regard to preventing an escape of dust from these cabinets. That had been held in the Court of Session in *McCorkindale v. Lion Foundry Co., Ltd.* (3), but he would have come to the conclusion to which he had come quite apart from that decision. He was satisfied that there were dusty conditions outside the doors, but although technically, he supposed, one grain of dust coming out could be said to be a breach of reg. 13, in this case the cabinets were so well sealed and maintained that any escape which occurred was negligible.

Judgment for defendants.

Solicitors: *W. H. Thompson* (for the plaintiff); *Clifford-Turner & Co.* (for the defendants).

F.A.A.

NEWTON AND ANOTHER v. BIGGS.

[COURT OF APPEAL (Singleton, Birkett and Morris, L.JJ.), December 17, 18, 1952.]

D *Rent Restriction—Possession—House required by landlord—Landlord becoming such by purchase after Sept. 1, 1939—Purchase of house and granting of tenancy to vendor who remained in occupation—Rent and Mortgage Interest Restrictions (Amendment) Act, 1933 (c. 32), sched. I, para. (h), as amended by Rent and Mortgage Interest Restrictions Act, 1939 (c. 71), sched. I.*

E In 1947 the landlords entered into a contract to purchase a house of which the tenant was then the owner, vacant possession to be given to them of the ground floor and “the vendor [the tenant] . . . to pay to the purchaser [the landlords] the sum of 23s. per week inclusive for the upper floor . . .” The purchase was completed and the vendor remained in possession of the upper floor of the premises as tenant of the landlords. In 1952 the landlords served a notice to quit on the tenant, and on its expiry claimed possession of the upper floor on the ground that they reasonably required it for occupation as a residence for themselves, within the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, sched. I, para. (h). The tenant objected that the landlords were not entitled to possession on that ground since they had become landlords by purchasing the house after Sept. 1, 1939, within the meaning of para. (h) as amended by sched. I to the Rent and Mortgage Interest Restrictions Act, 1939.

G HELD: the object of para. (h) was to protect a sitting tenant from having the house bought over his head; in the present case no tenancy was in existence at the time of the purchase of the house by the landlords; and, therefore, the landlords became landlords for the purposes of para. (h), not by purchasing the house after the statutory date, but as a consequence of their agreement to grant the tenant a tenancy of the upper floor if the purchase of the house were completed, and they were not excepted from the provisions of para. (h) which enable a landlord to recover possession of a house if he reasonably requires it for occupation as a residence for himself.

Epps v. Rothnie ([1946] 1 All E.R. 146) and *Fowle v. Bell* ([1946] 2 All E.R. 668), applied.

FOR THE RENT AND MORTGAGE INTEREST RESTRICTIONS (AMENDMENT) ACT, 1933, s. 3 (1) and sched. I, para. (h), see HALSBURY'S STATUTES, Second

Edn., Vol. 13, pp. 1048, 1060; and FOR THE RENT AND MORTGAGE INTEREST RESTRICTIONS ACT, 1939, s. 3 (1) and sched. I, see *ibid.*, pp. 1077, 1084.

Cases referred to:

- (1) *Epps v. Rothnie*, [1946] 1 All E.R. 146; [1945] K.B. 562; 114 L.J.K.B. 511; 173 L.T. 353; 31 Digest, Replacement, 705, 7938.
- (2) *Fowle v. Bell*, [1946] 2 All E.R. 668; [1947] K.B. 242; [1947] L.J.R. 115; 31 Digest, Replacement, 708, 7957.

APPEAL by the landlords from an order of His Honour JUDGE TUDOR REES, sitting at Uxbridge County Court on Sept. 23, 1952, refusing the landlords an order for possession under the Rent Restrictions Acts, on the ground that the landlords had become landlords by purchase after Sept. 1, 1939.

Lodge for the landlords.

A. P. Fletcher for the tenant.

SINGLETON, L.J.: The learned county court judge had before him a claim by the landlords, Mr. and Mrs. Newton, for possession of the upper part of a house, No. 34, Colbrook Avenue, Hayes. The landlords are the owners of that house, and the defendant, William Arthur Biggs, is tenant of the upper floor of the premises, for which he pays a rent of 23s. a week to the plaintiffs. The tenancy, it is said, has been determined by a notice to quit which expired on Aug. 9, 1952, but the tenant has remained in possession as a statutory tenant although the landlords say that they reasonably require the premises for occupation as a residence for themselves. That is not admitted by the tenant, who claims the benefit of the Rent Restrictions Acts.

The tenant was formerly the owner of the house. By an undated agreement he sold it to the landlords in the year 1947 for £1,800. At some time after that agreement, probably on Oct. 31, 1947, the house was conveyed to the landlords. In the agreement for sale there are general conditions called National Conditions of Sale, and there are certain special conditions. The special conditions provide for the deposit and the date of completion, and special condition No. 9 is in these terms:

"The purchaser shall be given vacant possession of the ground floor with the joint use of the bathroom upstairs and the vendor is to pay to the purchaser the sum of 23s. per week inclusive for the upper floor of the premises."

A question arises as to what is the proper way to look at that condition, bearing in mind that completion took place, as provided in the agreement, shortly after the date of the agreement.

Section 3 (1) of the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, provides:

"No order or judgment for the recovery of possession of any dwelling-house to which the principal Acts apply or for the ejectment of a tenant therefrom shall be made or given unless the court considers it reasonable to make such an order or give such a judgment, and either—(a) the court has power so to do under the provisions set out in sched. I to this Act; or (b) the court is satisfied that suitable alternative accommodation is available for the tenant or will be available for him when the order or judgment takes effect."

Thus, if the case is covered by sched. I to the Act, it is not necessary for the court to consider whether or not there is suitable alternative accommodation, though the question of such accommodation is something which the court has before it in considering para. (h) of sched. I. It is important to bear that in mind when one has to apply the provisions of that part of sched. I to which our attention has been directed. Schedule I to the Act of 1933 is headed:

"Possession or ejectment without proof of alternative accommodation".

The schedule provides:

A "A court shall, for the purposes of s. 3 of this Act, have power to make or give an order or judgment for the recovery of possession of any dwelling-house to which the principal Acts apply or for the ejection of a tenant therefrom without proof of suitable alternative accommodation (where the court considers it reasonable so to do) if— . . . (h) the dwelling-house is reasonably required by the landlord (not being a landlord who has become landlord by purchasing the dwelling-house or any interest therein after July 11, 1931), for occupation as a residence for—(i) himself; or (ii) any son or daughter of his over eighteen years of age; or (iii) his father or mother: Provided that an order or judgment shall not be made or given on any ground specified in para. (h) of the foregoing provisions of this schedule if the court is satisfied that having regard to all the circumstances of the case, including the question whether other accommodation is available for the landlord or the tenant, greater hardship would be caused by granting the order or judgment than by refusing to grant it."

C By s. 3 (1) of the Rent and Mortgage Interest Restrictions Act, 1939, and sched. I to that Act the date mentioned in para. (h) of sched. I to the Act of 1933 was altered to Sept. 1, 1939, in the case of dwelling-houses brought within the Rent Restrictions Acts by the Act of 1939.

D It is said on behalf of the landlords that this case falls under para. (h) of sched. I in that the dwelling-house is reasonably required by the landlords for occupation as a residence for themselves. If that is shown, it becomes the duty of the learned county court judge to consider the questions arising on para. (h), and, in particular, to consider the proviso to para. (h) which I have just read. On behalf of the tenant it is claimed that para. (h) of sched. I, as amended, does not apply to this case, that submission being based on the words in para. (h):

"(not being a landlord who has become landlord by purchasing the dwelling-house or any interest therein after [Sept. 1, 1939])."

E The tenant says that the landlords became landlords by purchasing the dwelling-house after Sept. 1, 1939.

F The real question for consideration is whether the landlords became landlords by purchasing the dwelling-house after the relevant date. They became owners on completing the purchase of the house; before that they had an agreement for purchase. The vendor retained the upper floor, and he became tenant to the purchasers at some time, but, though the purchasers became owners by purchase, it does not seem to me that they became landlords by purchasing the dwelling-house. There was the condition in the agreement under which the vendor had to pay to the purchasers the sum of 23s. a week inclusive for the upper floor of the premises. On completion the purchasers were able to give the vendor a tenancy of the upper floor of the premises which they had undertaken to give him if they purchased. They did purchase, and after the date of the purchase he became their tenant either by reason of the carrying out of the agreement or by the handing to him of a rent book in pursuance of the agreement. They did not become landlords, I think, by purchasing the dwelling-house.

G In *Epps v. Rothnie* (1) SCOTT, L.J., said ([1946] 1 All E.R. 147):

H " . . . the county court judge held, and in my view held rightly, that the plaintiff did not ' become landlord by purchasing the dwelling-house '. The judge took the view, with which I agree, that the object of the exception in sched. I (h) is to protect a sitting tenant from having his house bought over his head, and it has no application to a case where an unoccupied house is purchased after the statutory date, and the owner thereafter lets it. In my opinion, the decision of the judge was right on this point . . . "

That case was considered by the Court of Appeal in *Fowle v. Bell* (2).

In my view, the bracketed words in para. (h) were inserted to prevent someone buying a house and turning out the sitting tenant under the provisions of para. (h). In the circumstances of the present case I do not think the words in brackets apply, for I do not consider that the landlords became landlords by purchasing the dwelling-house. It seems to me that this appeal must be allowed, and the case must go back for consideration of the other points which arise.

BIRKETT, L.J.: I am of the same opinion. The agreed statement of facts makes it plain that in October, 1947, the tenant was the owner of the whole of the premises. A contract, which is undated, gives the date of completion as Oct. 31, 1947, and, in view of the additional information we have had as to the date of the rent book, it would appear that completion did take place on that date and the rent book came into existence almost immediately afterwards. Condition 9 of the special conditions of sale reads in this way:

"The purchaser shall be given vacant possession of the ground floor with the joint use of the bathroom upstairs and the vendor is to pay to the purchaser the sum of 23s. per week inclusive for the upper floor of the premises."

Clearly, therefore, the tenant being the owner of the whole of the premises, there was no tenancy in existence at the time of this contract for sale, and the only question that we have to decide is whether the landlords became landlords by purchase.

I think the answer to that question is that they did not become landlords by purchase within the meaning of the section as it has been interpreted by decisions of the Court of Appeal. What, I think, was done by condition 9 was to make a term that a tenancy would be created. Counsel for the tenant submitted that the plaintiffs became landlords by purchase because, by reason of condition 9, the tenancy and the purchase were one indivisible transaction, and, therefore, by the mere act of purchase the tenancy came into existence at the same moment of time. I do not think that the construction of condition 9 supports that view. It is quite true that the provision that the vendor is to pay to the purchaser the sum of 23s. a week inclusive for the upper floor of the premises is included in the document by which the premises were to be sold, but I do not think it by any means follows that that means that the matters are one and indivisible. I think the plain common sense of this matter was that by condition 9 it was being said: "I will become the owner of the premises, but I will grant you a tenancy of the upper floor at the inclusive rent of 23s. a week."

My Lord has referred to the passage which occurs in the judgment of SCOTT, L.J., in *Epps v. Rothnie* (1), and I must refer to the further consideration given to this matter by the same learned lord justice in *Fowle v. Bell* (2) where he said ([1946] 2 All E.R. 669):

"In considering the bracketed exception to para. (h), we must bear in mind that it is found in an enabling provision which confers jurisdiction on the judge to order possession to be given to the landlord, and, therefore, if there be ambiguity in the exception, it ought to be construed in favour of the landlord and not against him. The phraseology seems to me necessarily to mean this, 'not being a landlord who, in relation to the tenant before the court, has become that tenant's landlord by purchasing the dwelling-house or any interest therein after' the given date. The exception so read would achieve what I cannot help thinking was the object of enacting it, namely, to prevent an outsider buying a house occupied by a tenant, giving the tenant notice to quit, and coming to the court for an order to get rid of him."

Then the learned lord justice goes on to deal with that situation.

In the present case it is true that the landlords became owners by purchase, and that, had they not purchased the premises, they would not have been in a position to grant a tenancy of any kind, but there is a world of difference between becoming owner by purchase and becoming a landlord by purchase within the meaning of para. (h), as interpreted by the Court of Appeal. In my view, this appeal ought to be allowed.

MORRIS, L.J.: I agree. The effect of the contract made in October, 1947, was that the landlords agreed to purchase the property and also that the tenant should have a tenancy as from the date of completion. Though the agreement for sale and the agreement for a tenancy were in the same document—and, no doubt, were parts of one transaction—the result was that the landlords agreed that when they became owners the tenant should become tenant. In those circumstances, in my judgment, the landlords did not become landlords of the tenant by purchasing. They became landlords because of the agreement that they had made with the vendor that the latter should become tenant when the landlords became owners.

Appeal allowed.

Solicitors: *E. D. C. Lord*, Southall (for the landlords); *Reginald Johnson & Co.*, Hayes, Middlesex (for the tenant).

[*Reported by C. N. BEATTIE, ESQ., Barrister-at-Law.*]

Re DOWNSHIRE'S SETTLED ESTATES. DOWNSHIRE (MARQUIS) *v.* ROYAL BANK OF SCOTLAND AND OTHERS.

Re CHAPMAN'S SETTLEMENT TRUSTS. CHAPMAN AND ANOTHER *v.* CHAPMAN AND OTHERS.

Re BLACKWELL'S SETTLEMENT TRUSTS. BLACKWELL *v.* BLACKWELL AND OTHERS.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Denning and Romer, L.JJ.), November 4, 5, 6, 7, 12, 13, 14, 24, 25, December 17, 1952.]

Settlement—Variation of trusts—Jurisdiction of court to authorise transaction not authorised by settlement or by law—No administrative problem—Settled Land Act, 1925 (c. 18), s. 64 (1)—Trustee Act, 1925 (c. 19), s. 57 (1).

Trust and Trustee—Variation of trusts by the court—No administrative problem—Trustee Act, 1925 (c. 19), s. 57 (1).

Per SIR RAYMOND EVERSLED, M.R., and ROMER, L.J.:—(i) It is not an objection to the sanction by the court of any proposed scheme in regard to trust property that its object or effect is or may be to reduce liability for tax (including death duties).

(ii) The court has power under its inherent jurisdiction to confer on trustees, quoad items of property vested in them, administrative powers to be exercised by them where a situation has arisen in regard to the property creating what may fairly be called an emergency. The power does not extend to changes or re-arrangements of the beneficial interests inter se as distinct from re-arrangements or reconstructions of the trust property itself, with two exceptions: (a) where a testator or settlor has so provided, particularly by way of a trust for accumulations, that the immediate beneficiaries have no fund for their present maintenance, the court will assume that the intention to provide for the family is so paramount that it will order maintenance in disregard of the trusts for accumulation; and (b) it must be taken (at any rate, since *Re Trenchard* [1902] 1 Ch. 378) that the court has a further power and jurisdiction to approve on behalf of persons interested under the trust who are under a disability (particularly

infants) and persons who may hereafter become interested compromises proposed by or between persons beneficially interested under the trust who are sui juris, and to direct and protect trustees accordingly, and the word "compromise" should not be narrowly construed so as to be confined to compromises of disputed rights.

Re New, Re Leavers, Re Morley ([1901] 2 Ch. 534), *Re Tollemache* ([1903] 1 Ch. 457), *Re Trenchard* ([1902] 1 Ch. 378) and *Re Wells* ([1903] 1 Ch. 848), explained.

(iii) The object of the Trustee Act, 1925, s. 57, was to secure that trust property should be managed as advantageously as possible in the interests of the beneficiaries, and, with that object in view, to authorise specific dealings with the property which the court might have felt itself unable to sanction under the inherent jurisdiction, either because no actual "emergency" had arisen or because of inability to show that the position which called for intervention was one which the creator of the trust could not reasonably have foreseen, but it was no part of the legislative aim to disturb the rule that the court will not re-write a trust or to add to such exceptions to that rule as had already found their way into the inherent jurisdiction.

Re Salting ([1932] 2 Ch. 57), considered.

Re Mair ([1935] Ch. 562), explained.

Observations of WYNN-PARRY, J., in *Municipal & General Securities Co., Ltd. v. Lloyds Bank, Ltd.* ([1949] 2 All E.R. 944), approved.

(iv) The jurisdiction conferred by the Settled Land Act, 1925, s. 64, is in some respects more ample in regard to the subject-matter to which it relates than that under the Trustee Act, 1925, s. 57. It is not restricted to practical steps of an administrative character, but a transaction, in order to fall within the section, must be shown to the satisfaction of the court to be for the benefit either of the settled land (or some part thereof) or of the persons interested under the settlement, but not necessarily of both. The transaction should affect or concern the settled land or any land, whether settled or not, and whether within or without England, and this requirement is satisfied by transactions indirectly as well as directly operating on the settled or other land, provided that in the former case the effect is real and substantial by ordinary common-sense standards.

(v) In the case of a settlement the trustees of which are trustees for the purposes of the Settled Land Act, 1925, but which no longer comprehends any unsold land, neither the Trustee Act, 1925, s. 57, nor the Settled Land Act, 1925, s. 65, applies.

By a deed of re-settlement dated Sept. 23, 1915, the settled properties, consisting of land in England, Northern Ireland, and Eire and invested capital moneys, were re-settled (a) to the use of the trustees during the life of A. on trust that if at the time of the recited trust taking effect in possession no act or event other than the exercise of any power conferred on A. should have been done or happened whereby the life estate thereby given to him under the trust premises or some part thereof would, if belonging absolutely to him, have become vested in or charged in favour of some other person or persons or a corporation, the trustees should allow A. to enter into and remain in possession or receipt of the rents and profits of the said premises during his life "or until some act or event as aforesaid should be done or happen"; (b) during such part of the life of A. as he should not be entitled to possession or receipt of the rents and profits the trustees should hold the same on discretionary trusts for A., his wife and children and remoter issue; (c) from and after the death of A. to the use of the first and other sons of A. successively according to seniority in tail male with remainder to the use of B. (A.'s brother) during his life,

with remainder to the use of the first and other sons of B. successively according to seniority in tail male with remainders over. The re-settlement gave to the tenant for life in possession powers of charging for jointure and portions. By a deed dated May 30, 1952, C., B.'s only son, disentailed the entirety of the settled property. A. was a bachelor aged fifty-eight years. A scheme was proposed whereby A. would surrender his interest for life in £700,000 (being the bulk of the capital moneys) so as to accelerate the interests in remainder, and would release such moneys from his powers of charging for jointure and portions. At the same time, B. would similarly release his life interest in favour of the remainderman, and also his powers of charging. In order to surmount the protective trusts, the scheme provided (i) that A.'s surrender of his interest should not be treated as causing a forfeiture of his life interest in the settled land, and (ii) that the trustees should be required to release the £700,000 from the discretionary trusts affecting them during A.'s life. To provide for the contingency of A.'s marriage and his having issue (a) a single premium policy of assurance would be taken out to assure to the trustees in the event of a son being born to A. £49,000 (calculated to make good the amount which would remain after payment of estate duty on £200,000), and (b) £20,000 war stock would be retained by the trustees to the intent that if and so long as there should at any time during A.'s life be in existence a wife or any issue of A., the trustees should pay the income thereof at their discretion for the maintenance or support of A.'s wife or issue. Of the £700,000 it was proposed that (i) £100,000 would be paid to A., (ii) £100,000 would be paid to B., and (iii) £500,000 would be employed to pay the premium on the said policy, and to provide the fund of war stock, and subject thereto would be held on the trusts of the re-settlement to take effect after the deaths of A. and B. Approval of the scheme (the object of which was to save estate duty) by the court was sought under its inherent jurisdiction or under the Settled Land Act, 1925, s. 64 (1).

HELD: the scheme constituted a compromise which it was within the power of the court to sanction under its inherent jurisdiction, and the scheme should be approved; and, further, the court was competent to approve it, and ought to approve it, under s. 64 (1).

Re Trenchard ([1902] 1 Ch. 378), applied.

Decision of ROXBURGH, J. ([1952] 2 All E.R. 603), reversed.

By a settlement dated Mar. 15, 1944, P. and his wife Q. declared that certain land or the proceeds of sale thereof and such further assets as might from time to time be brought into the settlement ("the trust premises") should be held by trustees, subject as thereafter by cl. 3 and cl. 4 provided, for all or any child of the settlors' son R. who should attain the age of twenty-one years or die under that age leaving issue and if more than one in equal shares. By cl. 3, it was provided: "... that until the youngest child of [R.] shall have attained the age of twenty-five years if that event shall happen within twenty-one years from the date hereof or until the expiration of twenty-one years from the death of the survivor of the settlors if the youngest surviving child of the said [R.] shall not then have attained the age of twenty-five years the trustees shall retain the trust premises and shall apply such part as they in their discretion shall think fit of the income thereof for or towards common maintenance education or other benefits of the children of the said [R.] for the time being living whether minors or adults or for or towards the maintenance education or other benefit of any one or more of them to the exclusion of the other or others and shall (subject as hereinafter mentioned) accumulate the surplus of such income until the time for distribution by investing the same and the resulting income thereof in any investments hereby authorised

in augmentation of the capital of the trust premises to be held upon the same trust as the original trust premises but so that the trustees may apply the accumulations of any preceding year or years in or towards the maintenance education or benefit of all or any of the said children in the same manner as such accumulations might have been applied had they been income arising from the original trust funds in the then current year. Provided always that after each child of [R.] has attained his or her majority the surplus income of his share in the trust premises not expended by virtue of the foregoing powers of this clause shall not be accumulated but shall be paid to such child." By cl. 4 the trustees had a discretionary power to advance up to one half of the expectant or presumptive or vested share of any child, whether minor or adult, of R. In order to save estate duty on the deaths of the settlors it was proposed that the trustees should with the sanction of the court advance their funds to the trustees of a new settlement which was to contain similar trusts, but omitting the provision for common maintenance contained in cl. 3.

HELD: the court had no jurisdiction under the Trustee Act, 1925, s. 57 (1), to sanction the scheme because it involved the alteration or re-moulding of the trusts; the scheme did not constitute a provision for maintenance or (DENNING, L.J., dissentiente) a compromise; and, therefore, was not within the two exceptions to the rule limiting the court's inherent jurisdiction to emergencies.

By a settlement dated Nov. 17, 1933, the settlor settled personalty on protective trusts for himself during his life, and subject thereto on trust for the children or remoter issue of the settlor as he should by deed or will appoint and in default for his children. Power was given to the settlor to appoint income to his widow. The ultimate remainder was for the general testamentary appointees of the settlor. The settlor was married and had one child, born on Dec. 28, 1951. The settlor proposed to surrender his life interest in one-half of the trust funds so as to accelerate the interests in reversion in that half and to release that half from his powers of appointment, on terms that the discretionary trusts during any part of the settlor's life as regards that half of the fund were wholly released and his life interest in the other half was not forfeited.

HELD: the court had no jurisdiction to sanction the scheme under the Trustee Act, 1925, s. 57 (1), because it could not fairly be described as a disposition or transaction in the "management or administration of the property vested in the trustees", but the scheme constituted a compromise which under its inherent jurisdiction the court was competent to approve.

Decision of ROXBURGH, J. ([1952] 2 All E.R. 647), reversed.

AS TO GENERAL POWER TO EFFECT TRANSACTIONS UNDER ORDER OF COURT, see HALSBURY, Hailsham Edn., Vol. 29, p. 745, para. 1037, and Vol. 33, pp. 296-299, paras. 519-521; and FOR CASES, see DIGEST, Vol. 43, pp. 839-841, Nos. 2857-2867.

Cases referred to:

- (1) *Tate v. Williamson*, (1866), 2 Ch. App. 55; 15 L.T. 549; 40 Digest 356, 2998.
- (2) *Re C.W.M.*, [1951] 2 All E.R. 707; [1951] 2 K.B. 714; 2nd Digest Supp.
- (3) *Winchelsea (Earl) v. Norcliffe*, (1686), 1 Vern. 435; 23 E.R. 569; 43 Digest 944, 3825.
- (4) *Pierson v. Shore*, (1739), 1 Atk. 480; 26 E.R. 305; 18 Digest 9, 59.
- (5) *Inwood v. Twyne*, (1762), Amb. 417 (27 E.R. 279); 2 Eden, 148 (28 E.R. 853); 43 Digest 870, 3145.
- (6) *Re New, Re Leavers, Re Morley*, [1901] 2 Ch. 534; *sub nom. Re New's Settlement*, 70 L.J.Ch. 710; 85 L.T. 174; 43 Digest 840, 2866.

- (7) *Re Tollemache*, [1903] 1 Ch. 457; 72 L.J.Ch. 225; 88 L.T. 13; *affd.* C.A., [1903] 1 Ch. 955; 72 L.J.Ch. 539; 88 L.T. 670; 43 Digest 841, 2867.
- (8) *D'Eyncourt v. Gregory*, (1864), 34 Beav. 36; 3 Ch.D. 635; 10 L.T. 317; 55 E.R. 545; 43 Digest 611, 547.
- (9) *Johnstone v. Baber*, (1845), 8 Beav. 233; 4 L.T.O.S. 392; 50 E.R. 91; *subsequent proceedings*, (1856), 22 Beav. 562; 52 E.R. 1225; 43 Digest 840, 2862.
- A (10) *Re Crawshaw*, (1890), 43 Ch.D. 615; 59 L.J.Ch. 395; 62 L.T. 489; 43 Digest 573, 223.
- (11) *Re Morrison*, [1901] 1 Ch. 701; 70 L.J.Ch. 399; 84 L.T. 384; 43 Digest 840, 2861.
- (12) *Havelock v. Havelock*, (1881), 17 Ch.D. 807; 50 L.J.Ch. 778; 44 L.T. 168; 28 Digest 223, 824.
- B (13) *Re Collins*, (1886), 32 Ch.D. 229; 55 L.J.Ch. 672; 55 L.T. 21; 50 J.P. 821; 28 Digest 223, 825.
- (14) *Revel v. Watkinson*, (1748), 1 Ves. Sen. 93; 27 E.R. 912; 40 Digest 692, 2283.
- (15) *Re Walker*, [1901] 1 Ch. 879; 70 L.J.Ch. 417; 84 L.T. 193; 28 Digest 224, 827.
- C (16) *Greenwell v. Greenwell*, (1800), 5 Ves. 194; 31 E.R. 541; 23 Digest 451, 5232.
- (17) *Re Trenchard*, [1902] 1 Ch. 378; 71 L.J.Ch. 178; 86 L.T. 196; 28 Digest 331, 1993.
- (18) *Re Wells*, [1903] 1 Ch. 848; 72 L.J.Ch. 513; 88 L.T. 355; 28 Digest 186, 446.
- D (19) *Re Salting*, [1932] 2 Ch. 57; 101 L.J.Ch. 305; 147 L.T. 432; Digest Supp.
- (20) *Re Mair*, [1935] Ch. 562; 104 L.J.Ch. 258; 153 L.T. 145; Digest Supp.
- (21) *Municipal & General Securities Co., Ltd. v. Lloyds Bank, Ltd.*, [1949] 2 All E.R. 937; [1950] Ch. 212; 2nd Digest Supp.
- (22) *Re Scarisbrick Re-settlement Estates*, [1944] 1 All E.R. 404; [1944] Ch. 229; 113 L.J.Ch. 148; 170 L.T. 245; 2nd Digest Supp.
- E (23) *Re Mount Edgcumbe (Earl)*, [1950] 2 All E.R. 242; [1950] Ch. 615; 2nd Digest Supp.
- (24) *Re White-Popham Settled Estates*, [1936] 2 All E.R. 1486; [1936] Ch. 725; 105 L.J.Ch. 368; 155 L.T. 553; 2nd Digest Supp.
- (25) *Witter v. Witter*, (1730), 3 P. Wms. 99; 24 E.R. 985; 28 Digest 199, 575.
- F (26) *Bridges v. Bridges*, (1752), SETON ON DECREES, 2nd ed., p. 345.
- (27) *Ashburton (Lord) v. Ashburton (Lady)*, (1801), 6 Ves. 6; 31 E.R. 910; 28 Digest 185, 438.
- (28) *Ex p. Phillips*, (1812), 19 Ves. 118; 34 E.R. 463; 28 Digest 186, 441.
- (29) *A.-G. v. Ailesbury (Marquis)*, (1887), 12 App. Cas. 672; 52 L.J.Q.B. 83; 58 L.T. 192; 20 Digest 362, 1006.
- G (30) *Ex p. Annandale (Marchioness)*, (1749), Amb. 80; 27 E.R. 50; 20 Digest 402, 1406.
- (31) *Ex p. Grimstone*, (1772), Amb. 706; 27 E.R. 458; 33 Digest 168, 542.
- (32) *Cavendish v. Mercer*, (1776), 5 Ves. 195, n.; 31 E.R. 543; 23 Digest 457, 5307.
- (33) *Errat v. Barlow*, (1807), 14 Ves. 202; 33 E.R. 498; 23 Digest 451, 5237.
- H (34) *Haley v. Bannister*, (1820), 4 Madd. 275; 56 E.R. 707; 28 Digest 227, 844.
- (35) *Brooke v. Mostyn (Lord)*, (1864), 2 De G., J. & Sm. 373; 34 L.J.Ch. 65; 11 L.T. 392; 46 E.R. 419; 28 Digest 329, 1978.
- (36) *Robinson v. Wheelwright*, (1856), 6 De G., M. & G. 535; 25 L.J.Ch. 385; 27 L.T.O.S. 73; 43 E.R. 1342; 20 Digest 426, 1558.
- (37) *Re Horrocks*, [1939] 1 All E.R. 579; [1939] P. 198; 108 L.J.P. 86; 160 L.T. 324; Digest Supp.

- (38) *Re Diplock's Estate*, [1948] 2 All E.R. 318; *sub nom. Re Diplock*, [1948] Ch. 465; [1948] L.J.R. 1670; 2nd Digest Supp.
- (39) *Van der Linde v. Van der Linde*, [1947] Ch. 306; [1947] L.J.R. 592; 176 L.T. 297; 2nd Digest Supp.
- (40) *Whiteside v. Whiteside*, [1949] 2 All E.R. 913; [1950] Ch. 65; 2nd Digest Supp.
- (41) *James v. Couchman*, (1885), 29 Ch.D. 212; 54 L.J.Ch. 838; 52 L.T. 344; 40 Digest 543, 855.

APPEALS.

In *Re DOWNSHIRE'S SETTLED ESTATES*, the plaintiff and second and third defendants appealed against an order of ROXBURGH, J., made on July 30, 1952, and reported [1952] 2 All E.R. 603. ROXBURGH, J., held that the court had no jurisdiction either under its inherent jurisdiction or under the Settled Land Act, 1925, s. 64 (1), to authorise transactions proposed in relation to a settlement of land which had as their object the saving of estate duty.

Raymond Jennings, Q.C., and *J. A. Brightman* for the plaintiff, the tenant for life, and the second and third defendants, the tenant for life in remainder and a remainderman interested in capital.

Jopling for the first defendant, the trustee of the settlement.

Denys B. Buckley appeared as *amicus curiae*.

In *Re CHAPMAN'S SETTLEMENT TRUSTS*, the plaintiffs appealed against an order of HARMAN, J., made on July 28, 1952. HARMAN, J., held that the court had no power, either under its inherent jurisdiction or under the Trustee Act, 1925, s. 57 (1), to sanction a scheme whereunder, with a view to saving estate duty, it was proposed that trustees should transfer the settled funds to the trustees of a new settlement, the trusts of which were similar to those of the existing settlement save that in the new settlement discretionary powers of maintenance had been excluded.

Gray, Q.C., and *J. A. Armstrong* for the plaintiffs, the settlors who were also two of the trustees, and the third trustee, and the first and second defendants, trustees.

J. F. Bowyer for the third, fourth and fifth defendants, infants.

Denys B. Buckley appeared as *amicus curiae*.

In *Re BLACKWELL'S SETTLEMENT TRUSTS*, the plaintiff appealed from an order of ROXBURGH, J., made on July 31, 1952, and reported [1952] 2 All E.R. 647. ROXBURGH, J., held that a scheme which he was asked to sanction involving the variation of the trusts of a settlement could not be authorised under the general jurisdiction of the court or under the Trustee Act, 1925, s. 57 (1), which did not authorise a transaction not of an administrative character.

J. A. Brightman for the plaintiff, the tenant for life.

Rink for the third and fourth defendants, the trustees.

Denys B. Buckley appeared as *amicus curiae*.

The first and second defendants were not represented by counsel.

Dec. 17. The following judgments were read.

Cûr. adv. vult.

SIR RAYMOND EVERSLED, M.R.: The judgment which I am about to read, which is the judgment in all three cases, is the judgment of ROMER, L.J., and myself.

These three appeals are concerned with the exercise by Her Majesty's judges sitting in chambers in the Chancery Division of their useful and characteristic jurisdiction in relation to trusts. In each case the question raised has been of the extent of the jurisdiction, not of the discretion which in every case undoubtedly regulates the exercise of the court's powers where the jurisdiction exists. The Court of Appeal has been required to review (for the first time for half a century) the extent of the court's inherent jurisdiction which was

invoked in cases of this kind until the creation in 1925 of the statutory jurisdictions conferred by the Trustee Act and the Settled Land Act of that year. We have also been called on to examine those statutory jurisdictions, contained respectively in s. 57 of the former Act and s. 64 of the latter. In each of the three cases, the learned judges from whom the appeals have come, ROXBURGH, J., in the first and third, HARMAN, J., in the second, held that the orders sought were beyond their jurisdiction, whether inherent or statutory, to make. The

A distinction is, no doubt, a fine one between saying: "I have no jurisdiction to make the order sought", and: "Though jurisdiction exists, this is not a case or a case of a kind in which the jurisdiction should be exercised". But the distinction is there, and is a real distinction, and, as we have said, in each of the present three cases the decision of the learned judge took the form of the first of the two alternatives. In none of the cases was there any purported
B exercise of discretion, nor did either of the judges intimate (as we understand the judgments) that had he jurisdiction he would nevertheless in his discretion have refused to make the order asked.

The appeals raise, then, matters of considerable general importance affecting, as we have been told and do not doubt, many other cases now, or likely to come, before the judges in the Chancery Division, and it is necessary that we should
C express our views on the extent of the jurisdiction, inherent and statutory, at least so far as requisite for the decision of the three appeals. On these matters we have had the advantage of very full and careful arguments, and since in none of the cases was there any person or class of persons concerned to argue against the appellants' contentions, we thought it proper to suggest that counsel should be instructed on behalf of the Attorney-General to assist
D us as *amicus curiae* with such arguments as seemed to him proper. We are greatly indebted to Mr. Buckley, who appeared in each case in response to this suggestion.

We think it useful to preface our judgment with two general observations. The first is this. The Court of Chancery has over many centuries evolved in relation to its peculiar or "extraordinary" jurisdiction many salutary powers
E including the "inherent jurisdiction" invoked in the present cases. It has not in general been the practice of the court to attempt precise definitions of such powers and thereby to run the risk of imposing undue fetters on their future application: see, for example, per LORD CHELMSFORD, L.C., in *Tate v. Williamson* (1) (2 Ch. App. 60), in reference to the court's jurisdiction to give relief in cases of undue influence. In the present case we do not propose to
F depart from the well-established practice.

Our second general observation is of a different character. In each of the present cases a principal object of the scheme presented to the court has been to achieve (so far as foresight can achieve it) a limitation of the future liability of the corpus of the trust property to serious diminution from estate duty. The high rates of taxation, in the form both of income tax and of death duties,
G is a phenomenon of the present generation. It must be taken as notorious that many persons, having families and free estates, so dispose of their estates as to reduce, within the law, liability for income tax during their lives and for death duties on their deaths, and in the recent case before this court of
H *Re C.W.M.* (2) a scheme for the settlement and disposition of the property of a person of unsound mind having for one of its main objects limitation of liability for death duties was approved by this court in the exercise of its statutory jurisdiction in regard to the property of persons under such disability. It follows, in our judgment, that it is not an objection to the sanction by the court of any proposed scheme in regard to trust property that its object or effect is or may be to reduce liability for tax (including death duties).

We turn now to the inherent jurisdiction of the court to authorise or direct trustees to participate in schemes such as the present. It was the argument

of the learned counsel for all the appellants (founded on *Earl of Winchelsea v. Norcliffe* (3), before SIR GEORGE JEFFREYS, L.C., and other early cases, including *Pierson v. Shore* (4), before LORD HARDWICKE, L.C., and *Inwood v. Twyne* (5), before LORD NORTHINGTON, L.C.), that the jurisdiction of the court to modify or vary trusts and to direct the trustees accordingly was unlimited, provided (i) that all persons interested who were sui juris assented and (ii) that it was clearly shown to be for the advantage or convenience of all persons interested who were not sui juris including persons unborn or not presently ascertainable. In other words, that the court has unlimited jurisdiction in relation to the property of infants, including the beneficial interests of infants and unborn cestuis que trust under a settlement, and will exercise that jurisdiction so as to secure any benefit or advantage for the infants or unborn persons which they could have themselves secured had they been in esse and sui juris, even to the extent of sanctioning a departure from the beneficial trusts of the trust instrument from which the interests in question are derived.

In our judgment, such a broad and general jurisdiction is inconsistent with the two decisions of this court in 1901 and 1903, never so far as we are aware subsequently qualified or criticised, viz., *Re New*, *Re Leavers*, *Re Morley* (6) and *Re Tollemache* (7). On the contrary, one thing is, we think, clear. Just as the court has always insisted on the due and proper observance by trustees of the terms of their trusts, so also will it in its own orders depart as little as possible from the strict letter of the trust instrument. An example of this is to be found in the cases in which the court has empowered trustees to invest trust funds in unauthorised securities. In such cases it is (as we believe) the invariable rule to insert in the order a time limit for retention, which will only be extended by the court itself on further application. The general rule, as we have said, is that the court will give effect, as it requires the trustees themselves to do, to the intentions of a settlor as expressed in the trust instrument, and has not arrogated to itself any overriding power to disregard or re-write the trusts: see, e.g., *D'Eyncourt v. Gregory* (8); *Johnstone v. Baber* (9). There have been cases in which the court has made orders which did, undoubtedly, result in a departure from the trusts declared by the settlor. In our opinion, however, these cases did not establish new rules, but only exceptions to the general rule. Thus, the earlier cases already mentioned establish that in regard to property belonging beneficially to an infant, including "property" of all kinds, the court has power to direct persons in whom such property is vested (as trustees) or persons having the management of such property (as guardians) on the infant's behalf respectively, so to deal with the property as will be in the infant's best interests. But it is not, in our judgment, legitimate (in the light of *Re New* (6) and *Re Tollemache* (7)) to proceed thence to the conclusion that the court has an unlimited jurisdiction where property is subject to trusts under which classes, for example, consisting of infants or unborn or unascertainable persons, are interested, to authorise and direct trustees to participate in or give effect to schemes modifying or "re-moulding" the trusts because it is shown that the trusts so modified or "re-moulded" will be or are likely to be for the better advantage of such classes.

In our judgment (but without departing from the principle stated in our first general observation above), the inherent jurisdiction or the aspect of the jurisdiction invoked in *Re New* (6) and sought to be invoked in these appeals is of a more limited character. It is a power or jurisdiction to confer on trustees, quoad items of trust property vested in them, administrative powers to be exercised by them as the persons in whom the property is vested (notwithstanding that such powers were not conferred by the trust instrument) where a situation has arisen in regard to the property (particularly a situation not originally foreseen) creating what may be fairly called an "emergency", that is, a state of affairs that has to be presently dealt with—by which we do not

imply that immediate action then and there is necessarily required—and such that it is for the benefit of everyone interested under the trusts that the situation should be dealt with by the exercise of the administrative powers proposed to be conferred for the purpose. The power or jurisdiction does not, in our view, extend to changes or re-arrangements of the beneficial interests inter se under the trust as distinct from re-arrangements or reconstructions of the trust property itself.

A In *Re New* (6) the power desired for the trustees was a power to enable them, as holders of certain shares, to concur in a proposed reconstruction of a mercantile company—a thing shown to be advantageous to those beneficially interested under the trusts and liable to be incapable of achievement without concurrence on the trustees' part. We cite two passages from the report of the case and of the judgment of the court delivered by ROMER, L.J. The first is taken from B the argument, where ROMER, L.J., interjects to observe ([1901] 2 Ch. 543):

“The principle seems to be this—that the court may, on an emergency, do something not authorised by the trust. It has no general power to interfere with or disregard the trust; but there are cases where the court has gone beyond the express provisions of the trust instrument—cases of C emergency, cases not foreseen or provided for by the author of the trust, where the circumstances require that something should be done.”

The second is a passage from the judgment of the court (*ibid.*, 544):

D “As a rule, the court has no jurisdiction to give, and will not give, its sanction to the performance by trustees of acts with reference to the trust estate which are not, on the face of the instrument creating the trust, authorised by its terms. The cases of *Re Crawshay* (10), decided by NORTH, J., and *Re Morrison* (11), decided by BUCKLEY, J., are E instances where the court was asked to sanction steps to be taken by trustees which it thought unjustifiable, and which it declared it had no jurisdiction to authorise. But in the management of a trust estate, and especially where that estate consists of a business or shares in a mercantile company, it not infrequently happens that some peculiar state of circum- F stances arises for which provision is not expressly made by the trust instrument, and which renders it most desirable, and it may be even essential, for the benefit of the estate and in the interest of all the cestuis G que trust, that certain acts should be done by the trustees which in ordinary circumstances they would have no power to do. In a case of this kind, H which may reasonably be supposed to be one not foreseen or anticipated by the author of the trust, where the trustees are embarrassed by the emergency that has arisen and the duty cast upon them to do what is best for the estate, and the consent of all the beneficiaries cannot be obtained by reason of some of them not being sui juris or in existence, then it may be right for the court, and the court in a proper case would have jurisdiction, to sanction on behalf of all concerned such acts on behalf of the trustees as we have above referred to. By way merely of illustration, we may take the case where a testator has declared that some property of his shall be sold at a particular time after his death, and then, owing to unforeseen change of circumstances since the testator's death, when the time for sale arrives it is found that to sell at that precise time would be ruinous to the estate, and that it is necessary or right to postpone the sale for a short time in order to effect a proper sale: in such a case the court would have jurisdiction to authorise, and would authorise, the trustees to postpone the sale for a reasonable time. It is a matter of common knowledge that the jurisdiction we have been referring to, which is only part of the general administrative jurisdiction of the court, has been constantly exercised, chiefly at chambers. Of course, the jurisdiction is one to be exercised

with great caution, and the court will take care not to strain its powers. It is impossible, and no attempt ought to be made, to state or define all the circumstances under which, or the extent to which, the court will exercise the jurisdiction; but it need scarcely be said that the court will not be justified in sanctioning every act desired by trustees and beneficiaries merely because it may appear beneficial to the estate; and certainly the court will not be disposed to sanction transactions of a speculative or risky character."

It was contended before us that the judgment of this court in *Re New* (6) and the passages which we have quoted do not qualify, but are merely illustrative of, the broad generality already formulated and sought to be derived from the earlier cases. We have been unable to accept this argument. It is true that the jurisdiction invoked and exercised in *Re New* (6) was stated by ROMER, L.J., to be a part of the general administrative jurisdiction of the court, but that is not the same thing. The argument is for a general power, not to administer trusts, but (where it is shown to be advantageous so to do) to override them, and the argument is, in our judgment, inconsistent with the later case of *Re Tollemache* (7). In that case what was sought was (in effect) power to enable the tenant for life to enjoy a larger income by empowering the trustees to acquire—as the relevant trusts did not permit them to do—a mortgage of the tenant for life's interests, a transaction which (it was claimed) could not prejudice the remaindermen. The application was refused by KEKEWICH, J. His judgment contained an elaborate analysis of the jurisdiction based on previous authority, including *Re New* (6). One citation will, for present purposes, suffice. After referring to certain instances, he says ([1903] 1 Ch. 462):

"The above are illustrations of the exercise by the court, justified by the practical necessity of the case, of jurisdiction going beyond the mere administration of trusts according to the terms of the instruments creating them. Others might be given, the applications or rather the circumstances inducing them exhibiting large varieties, but those mentioned suffice to explain the scope of the practice of the court. There might be added illustrations of the refusal of the court to exercise this extraordinary jurisdiction, but there is no occasion. All the cases of refusal may be grouped under one of two classes. Either, notwithstanding the advantage actual and prospective of what is proposed to be done, there is no urgency for it, and the existing state of things may without great mischief be allowed to remain, or the terms on which the advantage can be gained are such that the court would by accepting them create a new trust in lieu of that which it is administering."

The brief judgments of this court dismissing the appeal are an affirmation of the reasoning of KEKEWICH, J., and they should be cited in full (*ibid.*, 956):

"VAUGHAN WILLIAMS, L.J.: It is admitted that the applicant cannot succeed unless she can bring herself within *Re New* (6). Putting that case shortly, it is this—that a case may arise in which, in the course of the administration of an estate, such an emergency may occur that it must be dealt with at once; but it cannot be said that there is any such emergency here. The appeal must, therefore, be dismissed, and with costs."

"ROMER, L.J.: I agree. *Re New* (6) shows how far the court will go, and beyond what point it will not go."

"COZENS-HARDY, L.J.: I agree. I will only add that, in my opinion, *Re New* (6) constitutes the high-water mark of the exercise by the court of its extraordinary jurisdiction in relation to trusts."

These judgments are, in our view, consistent and only consistent with the conclusion we have expressed above, and are irreconcilable with the broad

general proposition for which counsel for the appellants have contended. It is to be noted that ROMER, L.J., who had delivered the judgment in *Re New* (6), was a member of the court in *Re Tollemache* (7), and if, in view of the arguments now put forward, the present members of the Court of Appeal wish that he had more precisely stated the limits of the jurisdiction which he plainly had in mind, he indicated no dissent from or qualification of the other judgments of the court or the judgment of KEKEWICH, J. We may add that if the scope of the "inherent jurisdiction" was as wide as the appellants would have it, the statutory provisions of the Trustee Act, 1925, and the Settled Land Act, 1925 (to which we come later) must have been otiose or (at best) declaratory.

But to the principle that the court's inherent jurisdiction does not extend to sanctioning, generally, modification or re-moulding of the beneficial trusts there are, in our judgment, two exceptions. They are:

(i) Where a testator or settlor has so provided, particularly by way of a trust for accumulation, that the immediate beneficiaries have no fund for their present maintenance, the court—which has shown dislike for trusts for accumulation—will assume that the intention to provide, sensibly, for the family is so paramount that it will order maintenance in disregard of the trusts for accumulation. This must (we think) be taken as well established—see *Havelock v. Havelock* (12), and earlier cases—the principle being stated by PEARSON, J., in *Re Collins* (13) (32 Ch.D. 232):

"The ground of the decision [in *Havelock v. Havelock* (12)] I take to be, that where a testator has made a provision for a family, using that word in the ordinary sense in which we take the word, that is the children of a particular stirps in succession or otherwise, but has postponed the enjoyment, either for a particular purpose or generally for the increase of the estate, it is assumed that he did not intend that these children should be left unprovided for or in a state of such moderate means that they should not be educated properly for the position and fortune which he designs them to have, and the court has accordingly found from the earliest time that where an heir-at-law is unprovided for, maintenance ought to be provided for him."

The jurisdiction did not depend on the infancy of the life tenant: see *Revel v. Watkinson* (14); and was thought by FARWELL, J. (*Re Walker* (15)) to be rested on construction, but by LORD LOUGHBOROUGH, L.C. (*Greenwell v. Greenwell* (16)) to be inherent. Whatever may be the true view, it is impossible, in our opinion, to spell out of the orders made in those cases a general power vested in the court to disregard directions in a trust instrument merely because the beneficiaries wish it so to do. FARWELL, J., in *Re Walker* (15) said ([1901] 1 Ch. 885):

"I decline to accept any suggestion that the court has an inherent jurisdiction to alter a man's will because it thinks it beneficial. It seems to me that is quite impossible."

This exception has, therefore, no bearing on the present cases, and need not be further elaborated.

(ii) It must also now be taken, in our judgment (at any rate since the decision of *Re Trenchard* (17)), fifty years ago, that the court has a further power and jurisdiction (again without prejudice to the general observation first above stated) to approve, on behalf of persons interested under the trust who are under a disability (particularly infants) and persons who may hereafter become interested, compromises proposed by or between persons beneficially interested under the trust who are sui juris, and to direct and protect trustees accordingly, and the word "compromise" should not be narrowly construed so as to be confined to "compromises" of disputed rights.

In *Re Trenchard* (17) the tenant for life had been given the right or privilege of residing free of rent, etc., in certain premises, a right or privilege which

was stated to be worth to her £350 per annum. Although, therefore, if she merely ceased so to reside, she would (according to the language of the will) lose all benefits in respect of the house, it had been decided that she would none the less be entitled as tenant for life by virtue of her statutory powers under the Settled Land Act, 1882, to sell the premises and thereafter enjoy the income of the proceeds of sale. It was contended on her behalf before BUCKLEY, J., that the requirement as to residence was void, i.e., so that she could enjoy any rents or other income from the property remaining unsold but not used by her as her residence. This argument was in terms rejected by BUCKLEY, J. ([1902] 1 Ch. 381). The learned judge's conclusion cannot, therefore, be founded on the compromise of a doubtful question of the validity of the condition as to residence. On the other hand, the tenant for life and the other persons interested under the trusts (including the class of infants and unborn persons ultimately entitled) had what may fairly be called conflicting "nuisance values". It was shown to be plainly to the advantage of everyone interested other than the tenant for life that the house and property on which it stood should be developed. Such a scheme required the retention of the property unsold and the departure therefrom of the tenant for life, and she was not prepared to depart—and thereby lose the equivalent of £350 per annum—unless some compensating payment were made to her. She was willing to take the less sum of £275 per annum and this arrangement, mutually satisfactory and beneficial, was approved by the court. The basis of the jurisdiction exercised—i.e., as a compromise in the broad sense in which we have used it—plainly appears, in our judgment, from the last lines of the judgment (ibid., 385):

"In fact, the beneficiaries are receiving something; they are not paying anything. They pay something less than before, and to that extent get a benefit. The widow gives up something; but she obtains this benefit—that she is no longer obliged to reside in a certain house. The trustees get this benefit—that they are relieved from the difficulty in which they have been placed from the circumstance that the widow might have continued to reside, and thus have interfered with the building scheme; or she might have sold the house under her statutory powers, and yet retained her interest in the proceeds of sale. It seems to me that this is a fair compromise for all parties, and I declare that it is within the power of the trustees to enter into it, and I sanction it accordingly."

Re Wells (18) in the following year before FARWELL, J., creates at first sight a greater difficulty. It was particularly relied on by Mr. Neville Gray and Mr. Bowyer to support their contention for a broad and general jurisdiction to depart from the terms of a trust instrument. We cannot so regard it. If FARWELL, J., thought that he was exercising such a jurisdiction he would have been departing entirely from the principle he had stated two years earlier in *Re Walker* (15) in the passage from his judgment already cited. The facts of the case were most unusual. The relevant will provided that life annuities should be paid to the testator's two daughters and to certain other persons of whom one survived at the date of the proceedings. Subject to these annuities, the estate was divisible equally among the children of the two daughters who survived the last annuitant and attained majority or (in the case of daughters) married. At the date of the proceedings there were living seven children of the two daughters, and all had attained the age of twenty-one. The two daughters were the testator's heiresses and next of kin. They were aged fifty-eight and fifty-seven respectively and were deemed past child-bearing. On this footing, the annuitants and the daughters and their children between them were capable of putting an end to the trusts of the will, as they desired to do. Settlements had, however, been made by the children of the two daughters and under two of these sub-settlements (but not the rest) children or possible

children of the daughters' children were interested. There was, however, in existence at the time of the proceedings only one such grandchild of the daughters—a son of a son of one of them. This child was represented by counsel, and the trustees of each of the sub-settlements were also (according to the report of the case in the *LAW TIMES* and the *LAW JOURNAL*, but not according to the *LAW REPORTS*) similarly represented. The proposal was that, subject

- A to certain payments being made to the daughters and the other annuitants (or their assignees) in satisfaction of their respective life interests, the corpus of the estate should be immediately divided among the seven children of the daughters or their assignees. Thus, each child or the trustees of his or her sub-settlement, would receive at once a substantial sum instead of the chance of getting, when the last annuitant died, the same or a larger sum—if, but
- B only if, the child in question survived that date. On this ground (supported by other circumstances not material for present purposes) FARWELL, J., had no difficulty in holding that what was proposed was for the benefit of the grandchild represented before him and other unborn interests. He relied on the old cases, *Pierson v. Shore* (4) and *Inwood v. Twyne* (5), as authority enabling him to approve, on behalf of the grandchild and unborn issue, the substitution
- C for the contingent subject-matter of the sub-settlement made by the grandchild's father of the more certain amount to be paid over under the proposed scheme. As regards the other sub-settlements where possible grandchildren were interested, viz., a sub-settlement made by an unmarried child, Edith Newman, he regarded the circumstance that this child had insured her life for a sum sufficient on her death to recoup to the trustees one-seventh of the
- D sum paid out to the annuitants or their assignees as removing any special difficulty as her share. The learned judge seems, according to the report in the *LAW REPORTS*, to have regarded himself as concerned only, if “any difficulty” as regards Edith Newman's share was removed, to protect the interest of the one living grandchild. Thus, at the beginning of his judgment, he says ([1903] 1 Ch. 851):

- E “The only question which causes me any difficulty is the question of jurisdiction. The arrangement, so far as Andrew's share is concerned, appears to me to be obviously for the infant's benefit, for he gets the certainty of £2,000 and upwards instead of the contingent reversionary chance of a sum which in all probability would amount to nothing at all.
- F As regards Edith there is more difficulty, because the interests of the annuitants and the testator's co-heiresses and the statutory next of kin, who would take in the event of none of the seven children surviving, are being bought up out of corpus; but inasmuch as Edith is willing to insure her life for an amount sufficient to replace the sum so paid so far as attributable to her share, and to have the premiums payable made a first charge on the income of the money which is coming to her, that
- G difficulty, I think, is obviated. Have I then jurisdiction?”

Later in the judgment, FARWELL, J., expressly disclaimed jurisdiction on the basis that what was proposed was a compromise. He said (*ibid.*, 854):

“It is true that the case before the court is not a compromise, and that, no doubt, makes some difficulty . . .”

- H True, there was no element of compromise in the narrow sense of a settlement of some disputed claim or question, but in the broader sense of the word, in the sense in which it may be applied to *Re Trenchard* (17), we venture to think there was. But, in any case, there was no re-arrangement or altering of any trusts. All persons interested under the trusts of the testator's will, according to its terms, were *sui juris* and capable of determining the trusts. The difficulty arose solely from the fact that derivative settlements had been made by the persons contingently entitled to the corpus of the estate. No alteration was

required of any of the trusts of these settlements. What was proposed was that the trustees of the settlements should receive a present and certain subject-matter instead of their previously existing contingent rights. *Re Wells* (18), then, cannot, in our opinion, support the propositions for which the appellants' counsel relied on it. In any case too, *Re Tollemache* (7) in the Court of Appeal, where the limits of *Re New* (6) were emphasised, followed *Re Wells* (18), though the latter case does not appear to have been then mentioned.

It is to be noted that *Re New* (6) was cited in *Re Trenchard* (17), and whether in strictness the principle underlying the latter case is consistent with the reasoning in *Re New* (6) it seems to us too late now usefully to debate. The correctness of *Re Trenchard* (17) has never, so far as we are aware, been questioned. We are, indeed, satisfied—and we were referred to one or two modern instances of orders made in chambers—that the same principle has since been frequently applied. We think it would be most undesirable to throw doubt on the validity of those decisions through want of jurisdiction unless at least there was shown to be no authority to support them. Although, therefore, we do not disagree with the view of ROXBURGH, J., as regards the effect of *Re New* (6), we do not think that the jurisdiction of the court to sanction schemes of the character presented in these three appeals is limited to the kind of transaction illustrated by the facts of *Re New* (6).

We now turn to s. 57 of the Trustee Act, 1925. It was presumably the intention of Parliament, in enacting this section, to confer new powers on the court rather than to codify or define existing powers, though it may well be that the new extended jurisdiction does in some degree overlap the old. We have already examined the inherent jurisdiction of the court, and we have found that the common characteristic of the orders which were made by virtue of that jurisdiction was the determination of the court never to depart from the strict letter of the trust further than the exigencies of any particular case demanded. The question now to be considered is whether, and to what extent, s. 57 has empowered the court to depart from that principle.

It was argued before us that, whatever may have been the position before the passing of the Trustee Act, 1925, the court now has jurisdiction, by virtue of s. 57, to sanction the alteration or re-arrangement of the dispositions declared by a trust instrument, if it is satisfied that it is to the substantial advantage of infants and unborn issue who are beneficially interested thereunder so to do. If this proposition be well founded, it is at least clear that a jurisdiction has been created of a quality which has never been assumed or recognised by our courts before, viz., a jurisdiction to eliminate, vary or re-mould dispositions and trusts which the settlor himself has thought proper to establish, provided only that the beneficiaries who are sui juris desire it and the court is satisfied that the order which it is being asked to make is materially advantageous to the infants and unborn issue concerned. Whether it is said that the court would possess this jurisdiction notwithstanding that the settlor was himself alive and objected to the order proposed, or that one or more of the adult beneficiaries similarly objected, we are not sure. The suggestion is, we think, that the jurisdiction would exist but that the court would or might, in such circumstances, decline to exercise it; and the same suggestion was made as to cases where the advantage to infants or unborn issue which might reasonably be expected from a scheme would be no more than moderate or even small.

The question whether this far-reaching jurisdiction has in fact been conferred by s. 57 can only be answered by a consideration of the language of the section itself:

“(1) Where in the management or administration of any property vested in trustees, any sale, lease, mortgage, surrender, release, or other disposition, or any purchase, investment, acquisition, expenditure, or other transaction, is in the opinion of the court expedient, but the same cannot

be effected by reason of the absence of any power for that purpose vested in the trustees by the trust instrument, if any, or by law, the court may by order confer upon the trustees, either generally or in any particular instance, the necessary power for the purpose, on such terms, and subject to such provisions and conditions, if any, as the court may think fit and may direct in what manner any money authorised to be expended, and the costs of any transaction, are to be paid or borne as between capital and income. (2) The court may, from time to time, rescind or vary any order made under this section, or may make any new or further order. (3) An application to the court under this section may be made by the trustees, or by any of them, or by any person beneficially interested under the trust. (4) This section does not apply to trustees of a settlement for the purposes of the Settled Land Act, 1925."

It seems to us that the section envisages, on analysis, (i) an act unauthorised by a trust instrument (ii) to be effected by the trustees thereof (iii) in the management or administration of the trust property (iv) which the court will empower them to perform (v) if in its opinion the act is expedient. It is, we think, mainly on the proper interpretation of the phrase "management or administration", in the context in which it appears, that the question at issue primarily depends.

ROXBURGH, J., in his judgment in *Re Blackwell's Settlement Trusts*, after observing that the Settled Land Act, 1925, s. 64, and the Trustee Act, 1925, s. 57, ought, in his view, to be considered together said ([1952] 2 All E.R. 648):

"Looking at s. 57 (1), I notice that it does not begin with a reference to a 'settlement' or the 'trusts of a settlement', but to a transaction 'in the management or administration of any property vested in trustees.' This suggests a practical step of an administrative character. Further, this step must be capable of being effected by the trustees. The section does not authorise the court to do anything beyond conferring such a power on the trustees (either generally or in any particular instance, and either conditionally or unconditionally) and directing how any expenditure so authorised is to be borne as between capital and income."

After making some observations with regard to the Settled Land Act, 1925; s. 64, the learned judge referred to the argument which had been addressed to him to the effect that the legislature could not have intended by s. 57 to leave the rule in *Re New* (6) unchanged and said (*ibid.*, 649):

"It certainly has not done that. The jurisdiction is no longer 'extraordinary'. It extends to transactions which are neither urgent nor of an emergency character, but does it extend to a re-writing of the trusts of the settlement, to a re-arrangement of the beneficial interests thereunder for the advantage of the beneficiaries generally where there is no administrative problem? As I look at these two sub-sections together, it seems to me that they have been carefully framed so as to imply a negative answer. If it be asked why, in that case, the Act does not in its express terms supply the negative answer, I would reply that it could not do so without defining the boundary between administrative action and re-writing the trusts, and that is a boundary which is incapable of precise definition. It seems to me that neither section authorises a transaction which is not of an administrative character, and that the court cannot confer on tenant for life or trustees the power to execute a re-settlement or deal with the trust estate on the footing that a re-settlement has been executed. No language could be less apt than this for conferring such a novel and extensive power on the court. If I am wrong in this view, I would hold in the alternative that the legislature has by its language given clear indication that the court ought not to exercise its discretion in favour

of a transaction or series of transactions which, in its opinion, are not of an administrative character, but involve a substantial re-writing of the trusts in order to re-arrange beneficial interests to greater advantage."

It was argued before us that the learned judge attributed too limited an effect to the words "management or administration" in s. 57 and that in indicating that the phrase, in its context, suggested a practical step of an administrative character, he failed to give sufficient weight to the fact that the words "management" and "administration" are divided by the disjunctive "or", which shows, it is said, that the words were intended to bear separate and individual meanings. Counsel for the appellants submitted that, although certain acts of trustees might equally well be described as either managerial or administrative, a broad distinction ought properly to be drawn between the management of trust property, on the one hand, and its administration by the trustees, on the other. Under the head of management would come, it was argued, the general care and control by trustees over the property of which, so far as legal title goes, they are the absolute owners, and an act of management would be one referable to that ownership, for example, the sale or purchase of trust investments. Administration, on the other hand, it was contended, covers all the activities of a trustee which derive from the fiduciary character of the position which he holds, e.g., the payment of income to beneficiaries or the execution of a discretionary trust. Reference was made in this connection to the managerial and administrative powers which were conferred on the court by the Lunacy Act, 1890, and especially to s. 116 (4) of the Act, under which such powers could be exercised both for the maintenance of a patient and the management of his property, and it was suggested that these provisions for management and administration throw some light on the powers which appear in s. 57 under a similar description, and may have been the source of their inspiration. Although we do not think that the Lunacy Act, 1890, affords any very useful analogy (for in matters of lunacy the court is dealing in general with property of which the patient is the legal and absolute owner), it is very possible that the words "management" and "administration" in s. 57 are each capable of some shade of meaning which could not properly be attributed to the other, and, indeed, if they were intended by the legislature to be precisely synonymous it is difficult to see why they were both introduced into the section. To enable the appellants, however, to succeed in the two appeals in which the section is relied on, it is necessary for them to show that one of the two words is fairly applicable to beneficial interests, and as "administration" is, at first sight, more readily adapted to this purpose than "management" they naturally founded their argument on the former word in preference to the latter.

In our opinion, the word "administration" is not capable, in the context in which it appears, of bearing the meaning which the appellants seek to attach to it. It is clear, in our judgment, that the subject-matter both of "management" and of "administration" in s. 57 is trust property which is vested in trustees, and, in our opinion, "trust property" cannot by any legitimate stretch of the language include the equitable interests which a settlor has created in that property. We think that the reason for the appearance of the word "administration" as an alternative to "management" in the section is that, although the words do largely overlap, it was thought possible that an unduly narrow interpretation might be adopted if only one word were to be used without the other. Be that as it may, we are satisfied that the application of both words is confined to the managerial supervision and control of trust property on behalf of beneficiaries. Such is the natural scope of both expressions, and to attribute to them, or either of them, an additional association with the beneficial interests themselves, would be to superimpose on their ordinary significance an interpretation that is both unnatural and unwarranted. Nor are

further objections wanting, as the following observations (some of which at least are applicable also to the Settled Land Act, 1925, s. 64) will show. We have already pointed out that neither trustees nor the court itself at any time, prior to 1925, had any general power to depart from the precise directions (provided that they were within the law) that a settlor thought proper to declare. If Parliament, in enacting s. 57, had intended to confer this power on the court it is, in our view, inconceivable that it would not have done so in express terms, having regard not only to the novelty but also to the width of the jurisdiction that it was creating, and it is equally incredible that it should have done so without imposing any kind of limit, other than expediency, on the extent to which, or the manner in which, the court was to exercise its powers. Not only did the legislature do neither of these things, but it did not even mention beneficial interests from the beginning of the section to the end, or give the slightest indication that it was intending to give power to vary or interfere with such interests or intermeddle with them in any way—except to the extent that they might incidentally be affected by the exercise of the powers which the section does in terms confer. Further, the examples which are given in the section of the kind of “transaction” which the legislature had in mind are all instances of management of property in the ordinary sense, e.g., sales, leases, exchanges, etc. Again, the authorised transactions are those proper to be undertaken by the persons in whom the control of the property is vested, viz., the trustees, and not the beneficiaries. And, finally, the word “trustees” in the section includes legal personal representatives as well, and one can scarcely suppose that Parliament was intending, by a side-wind, as it were, to enable an executor, even with the authority of the court, to depart from the dispositions of his testator’s will.

In our judgment, the object of s. 57 was to secure that trust property should be managed as advantageously as possible in the interests of the beneficiaries, and, with that object in view, to authorise specific dealings with the property which the court might have felt itself unable to sanction under the inherent jurisdiction, either because no actual “emergency” had arisen or because of inability to show that the position which called for intervention was one which the creator of the trust could not reasonably have foreseen, but it was no part of the legislative aim to disturb the rule that the court will not re-write a trust or to add to such exceptions to that rule as had already found their way into the inherent jurisdiction.

Of the very many orders which have been made under the section by the judges of the Chancery Division since the Trustee Act, 1925, passed into law, only a few have been reported, for the applications which come before them are almost invariably, and rightly, heard and disposed of in chambers. A few, however, were brought to our attention which were wholly or partially dealt with in open court and it will be convenient to consider them shortly. In only two of them were orders made which support a wider interpretation of s. 57 than that which we ourselves have attributed to it. *Re Salting* (19) was reported on a point which is not material for present purposes, viz., whether an order which had been made in the same proceedings in chambers had brought about a forfeiture of the interest of the tenant for life in the trust fund. It is that earlier order which is relevant. Under the will of the testatrix, a sum of £150,000 was held in trust to pay the income thereof to the plaintiff until he should assign, charge or otherwise execute, do or suffer some deed, act or thing (except as therein mentioned) whereby the income or some part thereof would, if belonging absolutely to him, become payable to some other person or corporation and, on failure of such trust in his lifetime, then on discretionary trusts for the benefit of the plaintiff, his wife and children or, if there should be no wife or children of the plaintiff in existence, for the benefit of the plaintiff and his brothers, sisters, nephews and nieces for the time being in existence

in such manner as the trustees should in their discretion think fit. The plaintiff, who was married but had no children, was in debt, and he applied to the court under the Trustee Act, 1925, s. 57, for authority to the trustees of the will to raise £15,000 out of the capital of the trust legacy and to apply the same in discharge of his debts and otherwise for his benefit on his effecting a policy of assurance for £15,000 on his own life and assigning it to the trustees to secure repayment of the advance. An order was made sanctioning (subject to certain qualifications) the above proposal. The result of the order was to secure the repayment of the £15,000 to the trust capital on the death of the life tenant and the interests of the remaindermen were, accordingly, safeguarded. It will, however, be observed that if at any time subsequent to the order the plaintiff should forfeit his life interest, the income from the £15,000 which had been withdrawn for payment of his debts would not be available for the objects of the discretionary trust. We have referred to the original order (which EVE, J., made on Mar. 7, 1932) and it would appear that there were four objects of the trust before the court of whom two (viz., the plaintiff's wife and Mrs. O'Brien, who was probably a sister of the plaintiff) consented to the order, whilst the other two were infants and, therefore, could not consent. The order also shows that no provision of a compensatory character was made for the benefit of the objects of the discretionary trust as a whole who would be disappointed, in the way that we have indicated, in the event of the plaintiff forfeiting his interest. It was held by EVE, J., in the case as reported that the order made in chambers did not itself work a forfeiture. It may well be that the loss of income on the £15,000 between the date of any forfeiture that the plaintiff might subsequently incur and the date of his death was not present to the minds of anyone when the proposed scheme for payment of his debts was discussed and sanctioned in chambers. Had it been considered we think that, at the least, some provision for compensating the objects of the discretionary trust would have been insisted on, for, in our opinion, the court had no power, whether under s. 57 or otherwise, to override the interests of the plaintiff's nephews and nieces, however "expedient" the transaction might be from the point of view of the plaintiff himself and his immediate family.

In *Re Mair* (20) it could again be said that an order was made which might defeat, without compensation, the claims of the objects of a discretionary trust which had not, but might thereafter, come into operation. At the date when the order was made, the income of the fund which was there in question was held on determinable trusts for the benefit of two ladies who were aged respectively sixty-nine and seventy. In the event of either of the ladies forfeiting her interest her share of income would be held on a discretionary trust for the two ladies and their husbands, and subject thereto the ladies together were absolutely entitled to the fund. The court was asked to sanction, under s. 57, a proposal for the payment to each of the ladies of a portion of the capital of the trust fund. Both the ladies were married and their husbands supported the proposal. Accordingly, the only beneficial interests which were not before the court (except in so far as they were represented by the trustees) and which could possibly be affected by the order were the future husbands of these two elderly ladies who (if they should ever come into existence) would be objects of the discretionary trusts if a forfeiture were incurred. It is true that the interests of these hypothetical persons were disregarded by the court when it sanctioned the proposal, but it was so unlikely that their claim would ever arise that the omission to provide for it is not, perhaps, very surprising. In the course of his judgment in *Re Mair* (20) FARWELL, J., said ([1935] Ch. 565):

"If and when the court sanctions an arrangement or transaction under s. 57, it must be taken to have done it as though the power which is being put into operation had been inserted in the trust instrument as an over-riding power."

This view has been repeatedly followed and adopted in later cases, and it is not without importance in connection with the opinion which we have already expressed as to the limited scope of the section, for it would be difficult to regard as inserted in a trust instrument a general power to override the trusts which were declared by the very instrument itself.

A In *Municipal & General Securities Co., Ltd. v. Lloyds Bank, Ltd.* (21), WYNN-PARRY, J., was asked (inter alia) to sanction, under s. 57, the sale by trustees of certain stock. This the learned judge declined to do, and, in the course of his judgment on the point, he expressed himself as follows ([1949] 2 All E.R. 944):

B "The first point which I have to decide is whether there is jurisdiction in the court under the Trustee Act, 1925, s. 57, . . . to make any such order, either as regards authority to sell or . . . authority to re-invest. The section is couched in wide language, and there is little guidance in the reported cases, a circumstance which is explained by the fact that most applications under this section are dealt with in chambers. It appears to me that there must be some limit to the scope of this section. It cannot be construed as a section having such wide import as would C allow a complete re-writing of a trust deed or a substitution of a completely different object for that to achieve which the trust was brought into being. I find support in the view that there must be some limit to the scope of s. 57 (1) in the opening words, which are: 'Where in the management or administration of any property vested in trustees . . .'
D If those words 'management or administration' are to have no significance, it would have been the easiest thing in the world for the section to have opened with the words: 'Where any property is vested in trustees . . .'
E I do not intend to attempt to state what, in my view, is the exact scope of the section. I cannot see that I should be doing any service by embarking on any such attempt, for it is much better that each case as it comes up should be considered separately. I do feel, however, that I have to consider whether this application is one which I have jurisdiction to entertain, on the view, which I take, that the words 'management or administration' at the beginning of the section have a limiting effect on the jurisdiction conferred on the court."

F It follows from what we have already said that we are in agreement with those observations of the learned judge, and that, in our judgment, unless any proposed transaction is one which is specifically related to the management or administration by trustees of trust property, quoad property, it does not fall within the scope of s. 57.

There remains the Settled Land Act, 1925, s. 64, which is relevant to and invoked in the first of the appeals before us:

G "(1) Any transaction affecting or concerning the settled land, or any part thereof, or any other land (not being a transaction otherwise authorised by this Act, or by the settlement) which in the opinion of the court would be for the benefit of the settled land, or any part thereof, or the persons interested under the settlement, may, under an order of the court, be effected by a tenant for life, if it is one which could have H been validly effected by an absolute owner. (2) In this section 'transaction' includes any sale, extinguishment of manorial incidents, exchange, assurance, grant, lease, surrender, re-conveyance, release, reservation, or other disposition, and any purchase or other acquisition, and any covenant, contract, or option, and any application of capital money . . . and any compromise or other dealing, or arrangement . . ."

I think I need not read further, except to say that "the references to land include references to restrictions and burdens affecting land".

ROXBURGH, J., said ([1952] 2 All E.R. 648):

"Looking at s. 64 (1) of the Settled Land Act, 1925, I observe that it also does not begin with a reference to a 'settlement' or the 'trusts of a settlement', but to a 'transaction'. This suggests a practical step of some sort. A reference to the definition in s. 64 (2) suggests that the practical steps under consideration are of an administrative character, and a reference back to s. 64 (1) shows that they must be such as are capable of being effected by the tenant for life. The section does not empower the court to do anything beyond authorising the tenant for life to effect the transaction."

With all respect to the learned judge, we are unable to agree that the word "transaction" in this section should be given a restricted meaning such as he suggests. The word is one of the widest import, as is emphasised, in our judgment, by the terms of sub-s. (2) which make the meaning of the word comprehend (inter alia) any application of capital money "and any compromise or other dealing, or arrangement". A further objection to the suggested view that the only transactions envisaged by s. 64 are "practical steps of an administrative character" seems to us to be afforded by the fact that acts of that description are at least to a considerable extent provided for by s. 71 of the Act. It is, of course, by no means impossible to think of managerial or administrative acts involving capital expenditure in addition to those enumerated in s. 71 and, in the course of argument, Mr. Buckley suggested as an example expenditure for opposing a proposed hydro-electric scheme on other land which might affect the settled land or its amenities. It is, however, very improbable, in our opinion, that the object of s. 64 was to act merely as a supplement, as it were, to s. 71. If such had been the intention it would have been easier and more natural to amend s. 71 itself. It is true (as was pointed out in argument) that the transaction is one that must be effected, as the judge observed, by the tenant for life. But having regard to the general scheme of the Act, whereunder the settled land is vested in the tenant for life with wide powers of ownership, and to s. 75 (2) which contemplates the giving of discretions to the trustees as to capital moneys by the tenant for life, this qualification does not appear to us (at least for present purposes) to present difficulty. It is also necessary that the court should be satisfied that the transaction proposed should be for the benefit of either the settled land or some part thereof or of the persons interested under the settlement; but not necessarily of both. Of more significance is the qualification that the transaction should affect or concern (and the disjunctive "or" is to be noted) the settled land "or any other land" (which we construe as meaning any land whether settled or not and whether within or without England). In our judgment, the test imported by this last qualification is satisfied by transactions indirectly as well as directly operating on the settled land (or other land) provided that in the former case the effect is real and substantial by ordinary common-sense standards as distinct from that which is oblique or remote and merely incidental. This view is, in our judgment, supported by the circumstance that the transaction is within the jurisdiction of the court to approve, though it is, in the opinion of the court, for the benefit of the persons interested under the settlement and not of the settled land. There is, we think, nothing inconsistent with the view which we have expressed in the judgment of COHEN, J., in *Re Scarisbrick* (22), and of HARMAN, J., in *Re Mount Edgcumbe* (23). On the other hand, our conclusion on the scope of the section is in accordance with the decision of this court in *Re White-Popham Settled Estates* (24).

The learned judge, as we understand him, thought that the two sections, s. 57 of the Trustee Act, 1925, and s. 64 of the Settled Land Act, 1925, were closely analogous, conferring parallel jurisdictions, the one in regard to settlements not comprising land, the other in regard to settled land. It follows

from what we have said that we have not altogether shared this view. The jurisdiction under s. 64 of the Settled Land Act, 1925, is, in our judgment, in some respects more ample in regard to the subject-matter to which it relates than is s. 57 of the Trustee Act, 1925. If this result is regarded as unexpected, we point out that the language of the two sections is to a material degree dissimilar, and the conclusions which we have formed are based on what we regard, in each case, as the natural meaning of the words used. It is, perhaps, worth observing that in the case of a settlement the trustees of which are trustees for the purposes of the Settled Land Act, 1925, but which no longer comprehends any unsold land, neither section has any application.

We now proceed to apply the principles we have stated to the three cases before us.

Re DOWNSHIRE

The relevant facts in this case are that by a deed of re-settlement made Sept. 23, 1915, between the sixth marquess, of the first part, the plaintiff in the present proceedings, now the seventh marquess, of the second part, and the trustees of the settled estate, of the third part, the settled properties consisting of lands in England, Northern Ireland and Eire, and invested capital moneys (particulars of which are hereafter stated) were re-settled (subject to a prior power of joint appointment, which was never exercised on the part of the sixth Marquess and the plaintiff) to the following uses so far as material, to take effect after the death which occurred on May 29, 1918, of the sixth marquess:—first, to the use of the trustees during the life of the plaintiff on trust that if at the time of the recited trust taking effect in possession

“no act or event other than the exercise of any power conferred on the plaintiff should have been done or happened whereby the life estate thereby given to him under the trust premises or some part thereof would, if belonging absolutely to him, have become vested in or charged in favour of some other person or persons or a corporation”,

the trustees should allow the plaintiff to enter into and remain in possession or receipt of the rents and profits of the said premises during his life “or until some act or event as aforesaid should be done or happen”; secondly, during such part or parts of the life of the plaintiff as he should not be entitled to the possession or receipt of the rents and profits of the settled property by virtue of the preceding trust, the trustees should pay all or any part of the net rents and profits or apply the same for the maintenance or personal support or benefit of all or any one or more to the exclusion of the others or other of the following persons, viz., the plaintiff and his wife, if any, and his children or remoter issue for the time being in existence in such manner as the trustees should in their absolute discretion think proper, and should accumulate any surplus of such rents or profits and hold the accumulations as capital moneys.

From and after the death of the plaintiff the uses of the re-settlement were (a) to the use of the first and other sons of the plaintiff successively according to seniority in tail male with remainder (b) to the use of the second defendant (the plaintiff's brother) during his life with remainder (c) to the use of the first and other sons of the second defendant successively according to seniority in tail male with remainders over. The re-settlement contained powers for

the plaintiff and for every person thereby made tenant for life of the settled property at any time or times and either before or after becoming entitled to the possession of the settled property by deed or will to appoint to any wife in the event of her surviving him during the residue of her life or any less period a jointure rentcharge of £4,000 per annum without any deduction except for death duties, and also to charge the settled property with sums for the portions of younger children of the appointor, the maximum amount capable of being so appointed by any appointor being £50,000. At the present time

the second defendant has two daughters, but one son only, viz., the third defendant, who has attained the age of twenty-one years. Further, by a disentailing deed dated May 30, 1952, the third defendant has disentailed the entirety of the settled property. The plaintiff, who is now fifty-eight years of age, has never been married. The present effect, therefore, of the re-settlement is that, subject to the uses and trusts declared to take effect during the plaintiff's life and to the possibility of the plaintiff having issue, the settled property will devolve on the second defendant for life and thereafter belongs absolutely to the third defendant. As above stated, the settled property consists both of land and investments of capital moneys. Its total value is upwards of £1,100,000, of which approximately £400,000 is represented by land, the greater part being in Northern Ireland. The land in England includes a house at Bracknell occupied by the plaintiff, and there is also a house in Northern Ireland, known as Murlough House, which constitutes the plaintiff's home.

The scheme proposed and submitted to the court for its sanction on behalf of the trustees is to the effect that the plaintiff will surrender all his interest for his life in £700,000, being the bulk of the capital moneys subject to the settlement, so as to accelerate the interests in remainder to come into effect after his death, and will also release such capital moneys from his powers of charging for jointure or portions. At the same time the second defendant similarly releases his own life interest in these capital moneys in favour of the remainderman, and similarly releases his own powers of charging the £700,000 for jointure and portions. If it were not for the trusts affecting the plaintiff's life estate (commonly known as "protective trusts"), there would so far be no difficulty: the result would be that the capital of the £700,000 would be absolutely vested in the third defendant subject to its being divested in favour of a son hereafter born of the plaintiff. In order, therefore, to surmount the difficulty created by the "protective trusts" during the plaintiff's life, the scheme provides (i) that the plaintiff's surrender of his interest in the £700,000 capital moneys shall not be treated as involving a forfeiture of his life estate in the English and Irish lands; (ii) the trustees are required to release the same capital moneys from the discretionary trusts affecting the income of such funds during any part of the plaintiff's life.

But, although the plaintiff is now unmarried, he may hereafter marry and have children. In that event, notwithstanding the disentailing assurance, the absolute interest of the third defendant would be divested in favour of the plaintiff's sons. Further, there would then come into existence objects other than the plaintiff of the discretionary trusts, viz., the plaintiff's wife and issue. In order to provide for these contingencies, (a) it is part of the scheme that a single premium policy should be taken out assuring payment to the trustees in the event of a son being hereafter born to the plaintiff of the sum of £49,000, this amount being calculated to make good the premium on the policy (£9,000) and the sum that would remain on the death of the plaintiff, after payment of estate duty at the appropriate rate now ruling of eighty per cent. of £200,000 (part of the sum of £700,000), which it is proposed to distribute as hereafter appears; (b) it is also provided that a sum of £20,000 war stock should be retained by the trustees to the intent that if and so long as there should at any time during the plaintiff's life be in existence a wife or any child or remoter issue of the plaintiff, the trustees should pay and apply the income of this stock, or the investments representing the same, for the maintenance or personal support of all or any one or more of the plaintiff's wife, children, or remoter issue, as they should in their discretion think fit, and that subject thereto such sum of stock should fall into that part of the corpus of the funds which is not to be distributed as hereafter appears.

In order to give effect to this scheme it is proposed that the capital moneys

should be divided into three funds: first, a sum of £100,000 which would be paid absolutely to the plaintiff in consideration of his giving up all interest for his life in the capital moneys, which sum, according to the evidence, represents something less than half the present value of the plaintiff's life interest, on the footing that no forfeiture is incurred, and having due regard to his age and state of health; second, a further sum of £100,000 which will be paid to the second defendant in consideration of his surrender of his life interest in the £700,000 capital moneys; and third, a sum of £500,000 (referred to in the scheme as the third defendant's fund) which will, subject to payment thereout of the costs of the scheme, of the premium on the policy above mentioned, and to retention thereout of the sum of £20,000 war stock also above referred to, be held by the trustees on the uses and trusts of the settlement to take effect after the deaths of the plaintiff and the second defendant, i.e., on trust for the third defendant absolutely subject to being divested in favour of a son of the plaintiff hereafter to be born.

We have already stated that it is part of the scheme that the powers of the plaintiff and the second defendant to charge the settled property with jointures and portions should be restricted to the settled lands, so as to release the £700,000 capital moneys entirely therefrom. Other provisions are contained in the scheme to provide for payment of estate duty on the plaintiff's death in respect of the fund payable to the second defendant and otherwise, but it is not necessary for present purposes to refer to these matters in any further detail. It will be seen that the scheme is so devised that if the plaintiff lives the requisite length of time after the scheme, if approved, becomes effective, the third defendant's fund would not appear, under the law as it at present stands (though we are not of course so deciding), to pass or be deemed to pass, on the plaintiff's death.

The scheme proposed being of the character which we have indicated, ROXBURGH, J., took the view that, whatever its merits, he had no jurisdiction either under the inherent jurisdiction of the court or under the Settled Land Act, 1925, to give his approval to it. He said ([1952] 2 All E.R. 608):

"I hold that the transactions involved in this scheme amount in substance to a re-writing of the trusts or a substantial part thereof, or to directions to administer the trust property on the footing that new trusts have been declared and old trusts have been struck out or varied, and the admitted purpose of the scheme is not to solve any administrative problem but to re-arrange beneficial interests to greater advantage. Such proposals fall, in my judgment, outside the scope of the court's 'extraordinary' jurisdiction (if, indeed, it has not been superseded by s. 64 (1) and s. 57 (1)). They also fall outside the ambit of s. 64 (1)."

We agree with the learned judge that the case cannot fairly be brought within the scope of that aspect of the court's jurisdiction expounded in *Re New* (6). We have already stated what we conceive to be the effect of that decision and the later case of *Re Tollemache* (7), and what, accordingly, are the nature, and, broadly, the limits, of that aspect of the court's jurisdiction which was in those cases invoked. It is sufficient to say that the scheme now proposed, in our view, plainly falls outside those limits, but, as we have explained, the jurisdiction exercised in *Re New* (6) is not exhaustive. In our judgment, the present scheme does fall fairly within the ambit of the court's jurisdiction to approve compromises (used in the broad sense of the word) which is illustrated in the decision of BUCKLEY, J., in *Re Trenchard* (17).

Forfeiture clauses are always strictly construed by the court. It was, therefore, suggested during the argument that the particular terms of the so-called "protective trusts" during the life of the plaintiff were not such as to disable the plaintiff from surrendering his limited interest in the capital moneys so as to accelerate the interests to take effect after his death and exclude the coming

into operation of the discretionary trusts during his life on the ground that the effect of a surrender may fairly be said not to "vest the life estate" as such in the remaindermen, and that he was capable of making the surrender without incurring any forfeiture of his interest in the unsold land. This argument, unless rejected by the court, would, no doubt, give the court power to consider and sanction the scheme as constituting a compromise in the strict sense of the word, but it is, in our judgment, unnecessary to go so far, for we think that, apart from that argument, the proposals may fairly and properly be regarded as constituting a compromise in the broader sense of the word in which it was used in *Re Trenchard* (17). The plaintiff has a real and present interest in the £700,000 of capital moneys, viz., the right to enjoy the income thereof during his life until the happening of an event which it is (except in very special circumstances) in his power to avoid. The plaintiff offers to give up this right and interest for the benefit of the persons next entitled after his death—but on terms. The persons presently so entitled (being *sui juris*) are prepared to accept the offer. The only question, therefore, is whether adequate provision is made for persons now unborn or unascertainable who might be affected. The court is asked to answer the question affirmatively and authorise the trustees to act accordingly, at the same time relieving (if the plaintiff so long lives) those who would have to bear the burden from liability to suffer a very large payment of death duties. In our judgment, accordingly, the scheme is one which it was within the court's jurisdiction to sanction, and having also considered the details of the scheme to which we have already referred, we are of opinion that (subject to one or two matters on which we should wish to have the further assistance of counsel) it is one which in the exercise of the court's discretion should now be approved.

In the circumstances, it is in strictness unnecessary for us to express a view whether the scheme also properly falls within the ambit of the Settled Land Act, 1925, s. 64. It is, however, to be noted that the land, that is, all the land both in England and in Ireland, is "affected" or "concerned" in that (a) all jointure and portions charges are under the scheme thrown exclusively on it, and (b) the plaintiff remains tenant for life in possession of all the land, notwithstanding that on a true construction of the settlement he might cease so to be. Whether or no these features alone would suffice to satisfy the test inherent in the first two lines of the section, that test would, as we think, be satisfied if in addition it were shown (as we were informed that it could be shown) to be a real object of the scheme that the land should be substantially preserved so as to provide a home or homes for the future holders of the plaintiff's title by relieving the estate from claims for death duties which would otherwise be likely to cause the properties to be wholly or largely broken up. We further think that the scheme may fairly be described as, or as involving, a "transaction" to be effected by the tenant for life since, apart from his own surrender of his limited interest, the payments and appropriations of the £700,000 of capital moneys by the trustees will be effected by them (having regard to s. 75 (2) of the Act) at the plaintiff's direction. We do not think this conclusion is altered by the circumstance that the second defendant also surrenders his reversionary life interest and his powers in and over the capital sum, since he is in any case free so to do. The court being, therefore (as already indicated), of opinion that the transaction is for the benefit (at any rate) of the persons interested under the settlement, we think that the scheme is also one which the court is competent to approve and ought to approve (subject to the discussion on certain matters already mentioned) under its statutory jurisdiction conferred by the Settled Land Act, 1925, s. 64.

Re CHAPMAN

Three settlements are concerned in this application. By the first of such settlements dated Mar. 15, 1944 (hereinafter sometimes referred to as "the

1944 settlement"), after reciting that Col. Robert Chapman and his wife, Helene Paris Chapman (hereinafter referred to respectively as Sir Robert and Lady Chapman), as settlors had (in effect) purchased a certain piece of land therein mentioned to be held on the trusts of the settlement and to be conveyed to the trustees thereof and that certain further assets might from time to time be brought into the settlement by the settlors it was declared by cl. 1 that the said land or the proceeds of sale thereof and such further assets as aforesaid were thereafter referred to as "the trust premises". Clause 2, cl. 3 and cl. 4 of the 1944 settlement are as follows:

"2. The trustees shall stand possessed of the trust premises (subject to cl. 3 and cl. 4 following) for all or any the child or children of the settlors' son Robert Macgowan Chapman who shall attain the age of twenty-one years or die under that age leaving issue and if more than one in equal shares as tenants in common. 3. Provided always that until the youngest child of the said Robert Macgowan Chapman shall have attained the age of twenty-five years if that event shall happen within twenty-one years from the date hereof or until the expiration of twenty-one years from the death of the survivor of the settlors if the youngest surviving child of the said Robert Macgowan Chapman shall not then have attained the age of twenty-five years the trustees shall retain the trust premises and shall apply such part as they in their discretion shall think fit of the income thereof for or towards common maintenance education or other benefits of the children of the said Robert Macgowan Chapman for the time being living whether minors or adults or for or towards the maintenance education or other benefit of any one or more of them to the exclusion of the other or others and shall (subject as hereinafter mentioned) accumulate the surplus of such income until the time for distribution by investing the same and the resulting income thereof in any investments hereby authorised in augmentation of the capital of the trust premises to be held upon the same trust as the original trust premises but so that the trustees may apply the accumulations of any preceding year or years in or towards the maintenance education or benefit of all or any of the said children in the same manner as such accumulations might have been applied had they been income arising from the original trust funds in the then current year. Provided always that after each child of the said Robert Macgowan Chapman has attained his or her majority the surplus income of his share in the trust premises not expended by virtue of the foregoing powers of this clause shall not be accumulated but shall be paid to such child. 4. Provided also that the trustees may at any time raise any part or parts not exceeding in the whole one half of the then expectant or presumptive or vested share of any child whether minor or adult of the said Robert Macgowan Chapman in the trust premises under the trust hereinbefore contained and pay or apply the same to him or her for his or her advancement or otherwise for his or her exclusive benefit in such manner as the trustees shall think fit and as to the part or parts so raised the maintenance and other trusts of the last preceding clause shall cease to be applicable and no interest on any such advance shall be charged to any child so advanced in the accounts of the trust."

H The remaining clauses of the settlement were administrative and are not relevant for the purposes of this appeal.

By the second of the said settlements dated Feb. 8, 1950 (hereinafter sometimes referred to as "the 1950 settlement"), Lady Chapman settled certain further funds on substantially the same trusts for the benefit of Mr. Robert Chapman's children as those declared by the 1944 settlement. In particular, the provisions for common maintenance and accumulation contained in cl. 3 of the 1944 settlement were repeated by cl. 4 of the 1950 settlement, save that

the reference in the former clause to the expiration of twenty-one years from the death of the survivor of the settlors was altered in the latter clause to the expiration of twenty-one years from the death of Lady Chapman.

By the thirdly above-mentioned settlement, dated Feb. 10, 1950 (hereinafter sometimes referred to as "the Nicholas settlement") which was made on the occasion of the marriage of Henry James Nicholas Chapman with Anne Barbara Croft, Lady Chapman settled certain funds on trusts for the benefit of the children of that marriage and of the husband and the wife, or (if none of such children attained a vested interest) then on similar trusts for the benefit of the children of Nicholas by any subsequent marriage and of Nicholas and any subsequent wife, and it was provided (cl. 4) that in the event of the determination or failure of such trusts the trustees should pay over the trust funds (subject as therein mentioned) to the trustees of the 1950 settlement to be held by them on the trusts of that settlement.

Mr. Robert Chapman (who is the son of Sir Robert and Lady Chapman) has been married once, viz., to his present wife, Barbara May Chapman, and there have been three children of the marriage, viz., the defendants David Robert Macgowan Chapman, who was born on Dec. 16, 1941, Peter Stuart Chapman, who was born on Aug. 24, 1944, and Elizabeth Mary Chapman, who was born on May 11, 1946. There has been no issue as yet of the marriage between Henry James Nicholas Chapman and his wife, Anne Barbara. As at Mar. 24, 1952, the estimated values of the funds comprised in the three settlements were respectively as follows: the 1944 settlement £43,300, of which £27,700 was settled by Sir Robert, and £15,600 by Lady Chapman; the 1950 settlement £14,700; and the Nicholas settlement £19,600. By reason of the discretionary trusts for the common maintenance of Mr. Robert Chapman's children contained respectively in cl. 3 of the 1944 settlement and cl. 4 of the 1950 settlement the trustees of those settlements were advised that except in certain unlikely events a claim for estate duty would arise in respect of the funds comprised in the former settlement on the death of the survivor of Sir Robert (now aged seventy-two) and Lady Chapman (now aged sixty-five) and in respect of the funds comprised in the latter settlement on the death of Lady Chapman. Further, the trustees of the Nicholas settlement were advised that if the substitutive limitation contained in that settlement, and before referred to, is valid and should become effective, a claim for estate duty will arise in respect of their fund by reason of that limitation. If the present rates of estate duty remain unchanged it is estimated that nearly £30,000 will be exigible for duty in respect of the three trust funds whether Sir Robert survives or predeceases Lady Chapman.

In these circumstances a scheme of arrangement was prepared the object of which was to avoid the expected claims for duty on the deaths of Sir Robert and Lady Chapman. This object could only be achieved by freeing the 1944 and 1950 settlement funds from the provisions for common maintenance contained in cl. 3 and cl. 4 of those settlements respectively. It was, accordingly, proposed that the trustees of those settlements should, with the sanction of the court, advance their respective funds to the trustees of a new settlement which was to be entered into containing similar trusts but omitting those provisions, and that the trustees of the Nicholas settlement should, on the failure of the trusts therein contained for the benefit of Nicholas Chapman and his present and any future wife and issue, similarly transfer their fund to the trustees of the proposed new settlement to be held on the trusts thereof. On June 16, 1952, the originating summons in these proceedings was issued by the trustees of the 1944 and 1950 settlements. The defendants are Mr. Robert Chapman and Nicholas Chapman (as trustees with the plaintiffs, Sir Robert and Lady Chapman, of the Nicholas settlement) and the three infant children of Mr. Robert Chapman. The summons asks for an order authorising the

trustees of the 1944 and 1950 settlements and of the Nicholas settlement respectively to do respectively all such acts and things and to execute respectively all such documents as may be necessary on their part to give full and proper effect to the provisions of the scheme of arrangement hereinbefore referred to, and, alternatively, for an order authorising the trustees of the 1944 and 1950 settlements to release all property which is now or may hereafter become subject to the said settlements respectively from the trusts declared, in the case of the 1944 settlement, by cl. 3 thereof, and, in the case of the 1950 settlement, by cl. 4 thereof, to the intent that the trust premises shall from and after such release be held, in the case of the 1944 settlement, on the trusts declared by cl. 2 thereof, and, in the case of the 1950 settlement, on the trusts declared by cl. 3 thereof. The summons further asks for an order that, from and after the bringing into effect of the said scheme or, as the case may be, the execution of such release as aforesaid, the same shall be binding on all persons interested in the property affected thereby. The summons came on for hearing before HARMAN, J., in chambers on July 28, 1952. The learned judge, without going into the merits of the scheme, dismissed the summons on the ground that he had no jurisdiction, either under the inherent jurisdiction of the court or under the Trustee Act, 1925, s. 57, to make the order asked for, and from that dismissal the plaintiffs have appealed to this court.

The case as presented before us on behalf of the appellants was mainly founded on the inherent jurisdiction of the court, but, in the alternative, it was submitted that the scheme was a "transaction" within the Trustee Act, 1925, s. 57, which the court, accordingly, has statutory power to authorise. In our opinion, if the court has no power under its general jurisdiction to make the order for which the appellants ask, then the order cannot be made at all. The reason for this view is that, as we have already pointed out, the alteration or re-moulding as such of trusts declared by a settlement is not within the scope of s. 57, which only empowers the court to make orders, if it thinks it expedient so to do, with reference to the management or administration by trustees of the trust property which is vested in them. The scheme which is proposed in the present case does not in any sense arise out of any administrative or managerial difficulty affecting the trust assets. Its origin and aim are solely referable to the desire of the parties concerned to avoid a charge which will or may become leviable for death duties in consequence of the trusts as framed by eliminating from the 1944 and 1950 settlements the particular provisions which it is feared may give rise to the claims for duty. Such a scheme is, accordingly, in our view, clearly outside the purview of s. 57 having regard to the interpretation and effect which we have attributed to the section.

As to the inherent powers of the court it was sought, in the first place, to argue that the court has unlimited jurisdiction in relation to the property (including equitable interests) of infants and, indeed, of unborn beneficiaries, and will exercise that jurisdiction whenever it is satisfied that a position has arisen (and it is said that such a position has now arisen) which requires its intervention. That contention has been dealt with in the observations which we have made on the inherent jurisdiction of the court, from which it appears that the argument, as so formulated, is far wider than reported authority warrants. The position is, as we have said, that the court will not in general assume power to vary the trusts of a settlement even though it might be of advantage to infant or unborn interests so to do. We have pointed out, however, that the general rule is subject to two exceptions and the only question to be considered in connection with this appeal is whether the appellants have succeeded in bringing themselves within either of them. The proposal in this case, as already indicated, is in effect to strike out of the 1944 and 1950 settlements the provisions for unequal or selective maintenance during the lives of the settlors and for the accumulation of any surplus income, and to leave the

settlements unaffected in other respects. It is clear, we think, that this scheme is not within the exception to the general rule under which the court has sanctioned the maintenance of immediate beneficiaries out of income notwithstanding that its order *pro tanto* overrides a direction for accumulation contained in the settlement.

The only possible way, therefore, as it seems to us, that the scheme could be brought within the inherent jurisdiction of the court is by showing that it involves a compromise or composition of beneficial interests to which the principle exemplified in *Re Trenchard* (17) can properly be applied. We are unable, however, to see how any such compromise or composition arises. Certainly there is no question of compromise in the strict sense, for none of the relevant beneficial interests gives rise to any question of construction or is otherwise in dispute. It is suggested, however, that something in the nature of a composition of the rights of Mr. Macgowan's children is to be found in the elimination, during the lifetime of the settlors, of the expectation that each may have of receiving more, or less, than the others and in substituting equal rights among the class, as between themselves, in its place. We think that there are two objections to the acceptance of this view. First, although it is true that the scheme, if sanctioned, would have the result described, we cannot regard that result as constituting a composition of rights in any real sense at all. It is nothing more than a re-arrangement of beneficial interests which, to the extent that it might prove to be of advantage to some members of the class, would correspondingly operate to the prejudice of others. It cannot, therefore, be compared to a proposal under which, for example, the contingent interests of all of the members of a class in a fund are converted into vested interests in a smaller fund, for in such a case the proposal, if beneficial to one member of the class, would of necessity be beneficial to them all. Secondly, it is impossible to say, on the facts of the case, that the rights and interests of the children under the existing discretionary trusts are prejudicial to them, and should, therefore, be eliminated. Both of the settlements were executed within the last ten years, and the trusts in question were presumably inserted therein because the settlors thought that their introduction would be of advantage to the children. They may well have thought, for example, that some of the children might need more for maintenance than others, and, accordingly, they empowered the trustees to provide for this if occasion should require. Nothing has since transpired to show that their views on this matter were wrong. All that has transpired is that the manner in which the discretionary trusts were framed may attract an unexpected claim for death duties. The object of the scheme, accordingly, is not to compound the interests which the children have under the discretionary trust but to avoid the claim for duties, and such avoidance does not, and cannot, be regarded as a composition of rights for the purpose of the second exception to the rule. Moreover, although, as we have previously said, the fact that a scheme will result in the saving of death duties or income tax is, in itself, no ground for its rejection, the acceptance of the scheme now under consideration might well be followed by the presentation of further proposals of a similar character whenever it should be considered desirable in the future to avoid or mitigate the effect of such changes as may occur hereafter in the existing fiscal legislation. We would point out, therefore, that it is no part of the functions of Her Majesty's courts to re-cast settlements from time to time merely with a view to tax avoidance even if they had the power to do so which, in our opinion, they have not.

It follows from what we have said that the scheme proposed is, in truth, what it appears on its face to be, namely, the destruction of trusts expressly declared, and that inasmuch as it cannot be brought within the first exception to the general rule and cannot, under the guise of a composition, invoke the second

exception, the rule applies, and the court, accordingly, has no jurisdiction to authorise the trustees to carry it into effect. This appeal, in our judgment, must, therefore, fail. We would add in conclusion that if, by reason of mistake, a settlement fails to give effect to the real intention of the parties, recourse may in certain circumstances be made to the special jurisdiction of the court to reform or rectify written instruments. It was conceded that the circumstances of the present case were not such as to justify such a recourse. Nevertheless, this application is in substance an attempt to obtain rectification, although it purports, in point of form, to invoke the inherent jurisdiction exemplified in *Re New* (6) as supplemented by the Trustee Act, 1925, s. 57. Attempts of this kind should not, in our view, be encouraged.

Re BLACKWELL

This is a case of a voluntary settlement of personalty made by the plaintiff himself on Nov. 17, 1933, shortly after attaining his majority. Under that settlement, the trust fund is held on protective trusts for the plaintiff during his life in the following terms:

"Upon trust to pay the income thereof to the settlor during his life or until he does or attempts to do or suffers any act or thing or until any event happens (other than an advance under the statutory power of advancement) whereby if the same income were payable to him absolutely for his life he would be deprived of the right to receive the same or any part thereof in any of which cases the trust hereinbefore declared for payment to him of the said income shall determine and the trustees during the residue of his life shall apply the income of the trust estate for the maintenance and support or otherwise for the benefit of the settlor and of any wife or issue which he may have as the trustees in their absolute discretion without being liable to account for the exercise of their discretion think fit."

Subject thereto the corpus of the settled property is held on trust for the children or remoter issue of the plaintiff as he should by deed or will appoint and in default of appointment for the children of the plaintiff in unequal shares, sons taking twice the shares of daughters. Power is given to the plaintiff to appoint income to the extent therein provided to his widow. The ultimate remainder under the settlement is for the general testamentary appointees of the plaintiff. The present capital value of the trust premises is approximately £83,000, and the gross income amounts to about £4,000 per annum. The plaintiff has married the second defendant, and there is one child of the marriage, the first defendant, who was born on Dec. 28, 1951.

The plaintiff has, since the date of the settlement, succeeded, on his father's death, to a substantial fortune, so that he pays income tax (including surtax) on the settlement income at the maximum rate of 19s. 6d. in the pound and should he die tomorrow estate duty would be leviable on the corpus of his settled property at the rate of sixty-five per cent. Having regard to the view which we have formed on it and the course which, we think, should now be taken, it is unnecessary to refer in detail to the scheme proposed. Its broad effect is that the plaintiff proposes to surrender his life interest in one half of the trust funds so as to accelerate the interests in reversion expectant on his death in that half of the fund (whether in accordance with an exercise of his power of appointment by deed or otherwise) and also to release that half of the trust funds from the power of appointment in favour of a widow and other powers of appointment mentioned in the scheme, but upon terms that the discretionary trusts during any part of the plaintiff's life as regards that half of the fund are wholly released or overridden and that the plaintiff's life interest in the other half of the trust fund is not thereby forfeited. It will be seen that the general purpose and character of the scheme are similar to

those in *Re Downshire*. In this case the settlement was, in fact, made by the plaintiff himself. Mr. Buckley did not, however, contend (in our view, rightly) that this was for present purposes a material circumstance. It is also to be observed that the terms of the protective trusts are in this case such as to exclude any argument that the proposed surrender would not determine the plaintiff's right to enjoy any part of the income of the trust fund.

The scheme has been framed, as learned counsel frankly admitted, with an eye, as it were, on s. 57 of the Trustee Act, 1925. Its form was intended to bring it within the scope of that section as it was sought to be construed. We are satisfied that the scheme is not within the competence of the jurisdiction which the section confers. In our judgment, what is proposed to be done in this case can no more fairly be described as a disposition or transaction in the "management or administration of the property vested in the trustees" than could the proposals put forward in the case of *Re Chapman*. On the other hand, the present scheme is, in our view, of the same essential character as that in *Re Downshire*. Here (as in the other case) the tenant for life desires and offers to give up his interest for his life in part of the settled property for the benefit of the class of persons to take after his death and so as to accelerate the interests of that class. The existence of the protective trusts stands in the way of his so doing, and the offer of the tenant for life is conditional on his life interest in the rest of the settled property not being thereby destroyed. In our judgment, therefore, the scheme is of a nature which it is competent for the court to sanction in exercise of its jurisdiction to approve compromises in the wide sense of that word which we have already indicated. It seems, however, to us that the form of the scheme may require re-consideration so as to make it more appropriate for the court's consideration under its non-statutory jurisdiction, and it seemed that in other respects the tenant for life was not finally decided on all aspects of the matter. We think it better, therefore, in this case to say no more about the scheme, but to refer it back to the learned judge with liberty to the parties to amend the scheme in the meantime if and as they may be advised.

DENNING, L.J.: These three cases raise questions of great importance as to the jurisdiction of the Court of Chancery. It is said that the Court of Chancery has no jurisdiction to sanction acts which are not authorised by the trust instrument except in cases of emergency. That proposition is said to have been established by the decision of this court in *Re New* (6). In my opinion, the jurisdiction of the court is not so limited. It was certainly not so limited in the days of LORD HARDWICKE. He proceeded on the broad principle that the court had power to deal with the property and interests of infants or other persons under disability in a manner not authorised by the trust whenever the court was satisfied that what was proposed was most advantageous for them provided, of course, that everyone of full age agreed to it. I hope to show that that is the true principle today, and for this purpose I will trace the history of the matter, for it is supported by the greatest names of English equity.

The first group of cases arose out of the differences that used to exist between real and personal property both in regard to succession on intestacy (realty going to the heirs-at-law and personalty to the next of kin) and also to the power of testamentary disposition (personalty could be disposed of by will at the age of seventeen, but realty not till twenty-one). The general rule in those days was that the trustees for an infant could not change the nature of an estate from personalty to realty, or vice versa, because that would prejudice the succession and also the power of disposition: see *Witter v. Witter* (25) per LORD KING, L.C. (3 P. Wms. 99). Nevertheless, it was held from the earliest days of equity that the court itself could sanction a change in the nature of an estate even though it did alter the succession. Thus, in 1686, three years after

the death of the father of equity, LORD NOTTINGHAM, we find SIR JOHN TREVOR, M.R., declaring that if it was "for the benefit of the infant" to have money laid out in the purchase of land, the court could sanction the change of estate, and his opinion on this point was accepted by SIR GEORGE JEFFREYS, L.C., who is said in equity matters to have been quite a good judge: see *Winchelsea v. Norcliffe* (3) (1 Vern. 435, 436). Fifty years later, in the days of LORD HARDWICKE, we find the court regularly exercising this jurisdiction. In 1739, when a guardian for an infant surrendered an old lease and took a new one which altered the descent, LORD HARDWICKE sanctioned it because it "was the most beneficial purchase for the infant that could be": *Pierson v. Shore* (4). In 1752, still in LORD HARDWICKE's time, the court sanctioned a purchase of land by trustees for an infant out of his personal estate, thus changing the nature of it, but inserted a proviso that the land was to be treated as personalty until the infant became twenty-one: see *Bridges v. Bridges* (26) (July 30, 1752).

The best account, however, of what LORD HARDWICKE did was given by his successor, LORD NORTHINGTON, who, as Robert Henley, had one of the biggest practices in LORD HARDWICKE's court, and succeeded him in 1756. He was himself a great lawyer and was so described by LORD ELDON. In 1762 he gave this account of the practice of the court in *Inwood v. Tuwne* (5) (Amb. 419):

"It was said, that the nature of an infant's estate cannot be changed. This is a matter of consequence, and if there was any such rule laid down by the court, I would acquiesce in it; but in my opinion it is otherwise: the court has often changed it for the convenience of the infant . . . where it is manifestly for the advantage or convenience of the infant. The court has done it in many cases, in making compositions, and often contrary to the direction of the donor or testator: as where money is directed to be laid out in freehold land, the court has, for conveniency, ordered part to be laid out in leasehold."

Forty years later, in 1801, we find LORD ELDON himself following the same practice in the important case of *Ashburton v. Ashburton* (27). In that case, the late Lord Ashburton gave his personal estate to his executors in trust to invest in mortgages of land or government securities as they should judge best during his son's minority. When the son was eighteen, an opportunity arose of buying lands in Devon near the rest of the Ashburton landed property, and the trustees for the infant asked the court for liberty to use the personal estate in buying lands. When Mr. Romilly made the application LORD ELDON asked (6 Ves. 7)

"whether there was any instance in which the court took upon itself to change the nature of the property in such a case, when there was no clause in the will authorising it."

Counsel, appearing as amicus curiae, said that orders on the subject had been made, and thereupon LORD ELDON sanctioned the purchase, but with the usual proviso that until the son was twenty-one the land should be treated as personal estate. Thereafter, LORD ELDON adopted that form whenever the occasion required it, and he explained the jurisdiction on the ground that it was "for the benefit of the infant"; see *Ex p. Phillips* (28) (19 Ves. 123). Seventy-five years later LORD SELBORNE and LORD MACNAGHTEN treated those cases as settling the law on the subject: see *A.-G. v. Ailesbury* (29) (12 App. Cas. 682, 694). The important thing to notice in all these cases is that the court did not proceed on the grounds of emergency or necessity, but only for the benefit of the infant, and it sanctioned the transaction, even though it was not authorised by the trust instrument, so long as it was for his benefit. A similar principle was applied in the case of lunatics. It was laid down in 1749 by LORD HARDWICKE in *Ex p. Annandale* (30) (Amb. 81), in 1772 by LORD BATHURST in *Ex p.*

Grimstone (31) (Amb. 708), and in 1887 in *A.-G. v. Ailesbury* (29) when LORD MACNAGHTEN said (12 App. Cas. 688): "The leading principle, the paramount consideration, is the interest of the lunatic".

The second group of cases arose when money was needed for the maintenance and education of a child. LORD HARDWICKE started this also. In 1748 a testator left property on trust for his wife for life and afterwards for his daughter, but said that the debts and incumbrances were to be paid out of income before his daughter received anything. Despite the words of the will, LORD HARDWICKE declared that "the daughter must be allowed a maintenance out of this trust estate during the mother's life": see *Revel v. Watkinson* (14) (1 Ves. Sen. 95). This was followed by many cases where the court ignored an express provision for accumulation and ordered maintenance for children. It was done by LORD BATHURST, L.C., in 1776 in *Cavendish v. Mercer* (32), and by LORD THURLOW, L.C., in 1779 in *Fendall v. Nash*, reported as a note to *Greenwell v. Greenwell* (16). In the last named case, LORD LOUGHBOROUGH, who had a considerable reputation as an equity judge, was quite aware of the significance of overriding the direction to accumulate. When the application for maintenance was made to him, he said (5 Ves. 195): "I fear, if I should make the decree, it would be my will, and not the testator's". But he did it. Seven years later, LORD ELDON followed these precedents. He observed that "where there is an express direction for accumulation, it is strong to say that the direction shall not have effect", but SIR WILLIAM GRANT, M.R., under his direction, did that strong thing: see *Errat v. Barlow* (33). Since his time it has been done repeatedly. It is obvious, of course, that the grant of maintenance to the father for the benefit of one or more of his children will reduce the amount coming to the others under the trust for accumulation, but, nevertheless, the court does it for the benefit of the children as a whole: see *Havelock v. Havelock* (12). The jurisdiction does not rest on the presumed intention of the testator, as PEARSON, J., thought it did: see *Re Collins* (13) (32 Ch.D. 232), nor on the construction of the will, as FARWELL, J., said on one occasion: see *Re Walker* (15) ([1901] 1 Ch. 879). Nor is it confined to cases of emergency or necessity, for maintenance has been allowed to a father when the mother had ample means of her own to bring up the children: see *Haley v. Bannister* (34) per SIR JOHN LEACH, V.-C. (4 Madd. 275). The jurisdiction rests on the benefit of the children.

The third group of cases arises out of the power of the court to sanction compromises or compositions, i.e., agreements between beneficiaries about their beneficial interests whereby those interests are changed and distributed between them differently from the directions of the testator or settlor. When all the beneficiaries are sui juris there is, of course, no difficulty. They can by agreement between themselves put an end to the trust, or, with the consent of the trustees, they may alter or vary the trusts as they please. When they are not all sui juris, but some are infants or under disability and others are unborn or unascertained, the bargain cannot be implemented without the consent of the court, for the simple reason that they cannot consent themselves, and the court, as *parens patriae*, must consent on their behalf. In giving or withholding its consent the function of the court is to protect the interests of those who cannot protect themselves, and so long as they are adequately protected, the court will as a rule give its consent. This was common practice in LORD HARDWICKE's time. That appears from the passage I have already quoted from LORD NORTHINGTON's judgment in *Inwood v. Twyne* (5) when he said (Amb. 417) that the court had "done it in many cases, *in making compositions*, and often contrary to the direction of the donor or testator". It has been common practice ever since. It was explicitly stated in 1864 by TURNER, L.J., in *Brooke v. Mostyn* (35) in these words (2 De G. J. & Sm. 415):

"That this court has power to compromise the rights and claims of

infants and persons under disabilities, where those rights and claims are merely equitable, has not been and cannot be disputed. It is a power which has been continually exercised by the court, and results almost necessarily from the jurisdiction which the court exercises over trustees. In the exercise of that jurisdiction the court may in general order the trustees to deal with the trust property in *whatever mode it may consider to be for the benefit of cestuis que trust who are infants or under disabilities*.
A I have thought it right to make these observations, because I consider it of great importance that no doubt should be cast upon this power of the court . . . The rights of infants and incapacitated persons must in many cases be sacrificed if the power be not maintained."

This jurisdiction is not confined to cases where there is a dispute about the extent of the beneficial interests, nor to cases of emergency or necessity, but extends wherever there is a bargain about the beneficial interests which is for the benefit of the infants or unborn persons. It was exercised in striking fashion in 1902 in *Re Trenchard* (17), where it was argued that "the court cannot sanction a compromise (that is, a bargain) which is directly opposed to the testator's wishes", but BUCKLEY, J., did sanction it.
B

Finally, I come to a case which formulates the one general principle which emerges from the cases. It is the case in 1903 of *Re Wells* (18) ([1903] 1 Ch. 848, but better reported in 72 L.J. 513, and 88 L.T. 355) where there was a trust for such members of a class as should survive a certain event and they desired to exchange these contingent rights for vested indefeasible interests. This was nothing more nor less than putting an end to the trust contrary to the directions of the testator, but FARWELL, J., sanctioned it on behalf of the infants and unborn sons interested. He refused to put this decision on the ground that the scheme was a compromise. He said it was not a compromise. He referred to the old cases and came to the conclusion that "they went on the footing that what was done was for the benefit of the infants". That simple principle is the basis of the decision. It should be noted that FARWELL, J., quoted another group of cases, viz., those in which the court has allowed policies comprised in a settlement to be surrendered when there has been difficulty in keeping up the premiums. He added that "it may be said that it is *ex necessitate rei*; but still the principle is the same, namely, the benefit of the infants".
D
E

To conclude this review of equitable jurisdiction, I should like to call to witness one whose knowledge of equity has never been surpassed. I refer to LORD PARKER, who as junior counsel in *Re New* (6) put an argument which seems to me to sum up both principle and practice in a way which is very appropriate to each of these cases we have to decide today. He said ([1901] 2 Ch. 543):
F

"We all agree that it is to the advantage of everyone that this scheme should be carried out, and the only difficulty is that some of the beneficiaries are not *sui juris* and, therefore, cannot consent. If the broad principle were adopted that where trustees cannot do a particular thing the court cannot do it, the advantages arising out of the equitable jurisdiction of the Court of Chancery would disappear. But, as a matter of practice, the court has been in the habit of acting on the principle that it has power to deal with the property of *cestuis que trust* who are under disability, that is, in a proper case—on a special case being made, although not provided for in the trust—when the court is satisfied that what is proposed is most advantageous to those *cestuis que trust*."
G
H

There can be no doubt that that argument of Mr. Parker helped greatly to persuade the court to give its consent, as it did there, to a change of investment not authorised by the trust. ROMER, L.J., expressed the judgment of the court in very guarded language which was sufficient for the decision of that

case. He treated it as an emergency case, but not in such a way as to exclude other cases. The Chancery judges of that time did not understand that *Re New* (6) confined their jurisdiction to emergency cases, for otherwise BUCKLEY, J., would not have consented to the scheme in *Re Trenchard* (17), nor FARWELL, J., to the scheme in *Re Wells* (18). The case of *Re Tollemache* (7) creates no difficulty because the scheme there was for the benefit of the adults, not for the benefit of the infants.

It is noteworthy that, whenever the court has, of its own motive, placed limitations on its own jurisdiction—as it did on a few occasions in the second half of the nineteenth century—the legislature has intervened to remove those limitations. Thus, when it was held that a court of equity could not discharge a restraint on anticipation (*Robinson v. Wheelwright* (36)) the legislature intervened to permit it whenever it appeared to the court to be for the benefit of the married woman: see the Conveyancing Act, 1881, s. 39, and the Law of Property Act, 1925, s. 169. Again, when it was held that a court of equity could not order a sale of heirlooms (*D'Eyncourt v. Gregory* (8)) the legislature intervened to permit it by order of the court: see the Settled Land Act, 1882, s. 37, and the Settled Land Act, 1925, s. 67. So, also, when it was held that a court of equity could not authorise a change of investment merely on account of benefit to the estate (*Re New* (6); *Re Tollemache* (7)) the legislature intervened to permit it whenever it was, in the opinion of the court, expedient: see the Settled Land Act, 1925, s. 64, and the Trustee Act, 1925, s. 57. These statutory provisions should not be read as delimiting the jurisdiction of the court, but rather as removing limitations which the court had imposed on itself. They show that the judges of the late nineteenth century made a mistake in tying their own hands in these matters. We ought not to make the same mistake today.

In applying this jurisdiction to the three cases here in hand, the first question is whether the court can give its consent to a scheme when the avowed object of it is to avoid death duties. To that question the answer is "Yes". Just as people of full age and understanding are entitled so to arrange their affairs as to reduce the incidence of death duties on their successors, so also the court will permit the receiver of a lunatic to do it: *Re C.W.M.* (2). If the court goes thus far, there is no reason why it should not give its consent to a scheme on behalf of infants for the like purpose. After all, the very object of the scheme is to benefit the infants, and the court, as their protector, ought to consent on their behalf unless it owes some overriding duty to protect the revenue, which I do not think it does. Once that question is out of the way there is no reason why the court should not consent to the proposed scheme for the DOWNSHIRE estates. It is a composition where the persons sui juris have agreed on a re-arrangement of their beneficial interests so as to save death duties, and all that is needed is the consent of the court on behalf of unborn or unascertained persons. Their interests arise only under a protective trust and have been amply covered by insurance. It means, no doubt, a departure from the trusts declared by the settlor because the protective trusts are struck out, but that is no reason for not sanctioning the composition. It is only because the trusts are being altered that the consent of the court is required. I think the court should give its consent.

The proposed scheme for the CHAPMAN settlement is more troublesome. We are told that the lawyer who drew up the deed made a mistake. He did not have in mind the statutory definition about property passing "on the death" for the purpose of death duties, and he included a discretionary trust for common maintenance when he ought to have omitted it. He ought to have left the children to receive maintenance equally instead of giving the trustees a discretion to grant more to one than the others. It is a small mistake, but it means a difference of £30,000 in death duties. The mistake

A cannot be remedied under the strict doctrine of rectification because it is not a mistake in expressing the settlor's intentions, but only a mistake as to the legal consequences. Nevertheless, I do not myself see why the mistake should not be corrected by the settlors themselves. This is not like a will which the testator, being dead, has no power to alter. In the case of a will it has been held that the court cannot correct a solicitor's mistake, even though it is quite obvious that he has made one: *Re Horrocks* (37); and even though it means defeating the testator's intentions altogether: *Re Diplock* (38). I see no reason why the treatment thus meted out to the dead should be extended to the living also. This is a voluntary settlement where the settlors are still alive and able to speak for themselves. If their lawyer has made a mistake and drawn up the settlement so as to produce consequences which were never intended, why should not the settlors be at liberty to correct the mistake?

B They have provided all the money for the settlement, and all they desire to do is to see that it benefits their grandchildren in the best possible way. Why should they not do it? In the case of an agreement between two parties of full age the two can correct the error themselves by making a new agreement to cover the future. The court will not, of course, rectify the agreement so as to cover the past: see *Van der Linde v. Van der Linde* (39), *Whiteside v. Whiteside* (40), but the two parties together can do it by agreement so as to cover the future. Indeed, it was done by the parties themselves in those very two cases, and they did it expressly to avoid tax. Why should not the same apply to a voluntary settlement? The only difficulty is that some of the persons interested are under age or unborn and cannot give their consent.

C But that is just where the Court of Chancery is able to exercise its most beneficent jurisdiction. It can give its consent on their behalf to cover the future when it is satisfied that the proposal is most advantageous to them. The correction does not speak from the date of the original deed as it would in the case of rectification, but only from the date of the correction. The grandparents will have to live yet another five years for the children to get the benefit of it, but they should at least be able to correct it to that extent.

E I find that the judges in the past have interpreted in a liberal fashion the power of equity to relieve against mistakes. For instance, in *James v. Couchman* (41), NORTH, J., allowed a settlor to alter a voluntary settlement so as to correct his lawyer's mistake. I think we should interpret its power liberally today. I do not suggest, of course, that the court would sanction a scheme to alter trusts so as to overcome the intentions of the legislature as disclosed in subsequent legislation. It would, no doubt, refuse it, but it would do so in the exercise of its discretion, not for want of jurisdiction. Even if the settlement cannot be corrected on the ground of mistake, I think that the scheme can be brought within *Re Wells* (18). Each of the infants gives up the chance of a contingent greater allowance in return for the certainty of a proportionate share. The only difference between *Re Wells* (18) and the present case is that the benefit to the infants in *Re Wells* (18) was a direct result of the composition, whereas in this case it is an indirect result by the elimination of death duties. Such a distinction cannot go to jurisdiction, but at most to discretion, and as matter of discretion this scheme deserves the discretion of the court as much as *Re Wells* (18), unless the elimination of death duties is a bar, which we have decided in *Re Downshire* it is not.

H If the Court of Chancery should refuse its consent to this scheme the paradoxical situation will be reached that the court, whose function it is to protect the interests of the grandchildren, shows itself to be their own worst enemy. The grandparents are ready and anxious to correct the mistake. So is everyone else. If the grandchildren and unborn persons were at liberty to consent, any prudent adviser would tell them that they ought to consent because the scheme is so greatly advantageous to them. Is the court to stand in the

way and not give its consent? Not so long as it is inspired by the principles laid down by LORD HARDWICKE. I think that consent should be given in the *Chapman* case.

The proposed scheme for the BLACKWELL estates is less troublesome. The settlor, who is also tenant for life under a protective trust, desires to release his interest in one-half of the trust funds and to accelerate the interests of his children. That is clearly for their benefit and everyone else agrees to it. The only difficulty is that it squeezes out the remoter issue and a possible second wife who might take under the protective trust, but provision can be made to cover those contingent interests. The scheme falls within the same principle as the Downshire scheme and should be sanctioned when it has been put in proper form.

I would, therefore, myself allow the appeal in all three cases, and I am the more ready to do so because I am told that the Chancery judges in chambers have in the past exercised their jurisdiction in similar cases in a very beneficent manner, and this is confirmed by the approval given to the schemes in *Re Salting* (19) by EVE, J., in *Re Mair* (20) by FARWELL, J., and by SIMONDS, J., in a case in chambers in 1938 under the inherent jurisdiction which was drawn to our attention. The jurisdiction has been so freely exercised that the rejection of the schemes in the present cases has taken Lincoln's Inn by surprise, so much so that many proposed schemes have been held up pending our decision. The practice of the profession in these cases is the best evidence of what the law is—indeed, it makes law. It would be most disturbing if we were to say that the Chancery judges for many years have been acting without jurisdiction. What would be the result? I suppose that the schemes could be ignored by the Revenue and by all persons not sui juris, which would be a very unsatisfactory state of affairs. It is not right to unsettle the jurisdiction of the court on these matters unless some high principle demands it, and I see none. I whole-heartedly agree with my Lords in allowing the appeals in *Re Downshire* and *Re Blackwell*, and for myself I would allow the appeal in *Re Chapman* also.

Re Downshire's Settled Estates: appeal allowed.
Re Chapman's Settlement Trusts: appeal dismissed.
Re Blackwell's Settlement Trusts: appeal allowed.

Solicitors in *Re Downshire's Settled Estates*: *Gustavus Thompson & Sons* (for all parties except amicus curiae); *Treasury Solicitor*.

Solicitors in *Re Chapman's Settlement Trusts*: *Blundell, Baker & Co.*, agents for *Wheldon, Houlby, Moore & Armstrongs*, South Shields (for all parties except amicus curiae); *Treasury Solicitor*.

Solicitors in *Re Blackwell's Settlement Trusts*: *Neish, Howell & Haldane* (for the plaintiff); *Baileys, Shaw & Gillett* (for the third and fourth defendants); *Treasury Solicitor* (for amicus curiae).

[Reported by F. GUTTMAN, ESQ., Barrister-at-Law.]

ETABLISSEMENT BAUDELLOT v. R. S. GRAHAM AND CO., LTD.

[COURT OF APPEAL (Singleton, Birkett and Morris, L.JJ.), December 15, 16, 1952.]

Practice—Parties—Misnomer—Amendment—Plaintiffs a French trading firm—Wrongly described as corporate body—Addition of names of members of firm—R.S.C., Ord. 16, r. 2; Ord. 72, r. 2.

A The plaintiffs, the heirs under the will of a deceased Frenchman who were carrying on his business, issued a writ against the defendants for the price of goods sold and delivered. In intended compliance with R.S.C., Ord. 4, r. 1, there was indorsed on the writ a statement that the plaintiffs were a company incorporated according to the laws of France, the plaintiffs' solicitors having been so advised by French lawyers. In fact, that was not correct, as there had been no formal act of incorporation. The defendants applied to strike out the name of the plaintiffs and all subsequent proceedings, whereupon the plaintiffs applied to amend the writ by adding as plaintiffs the names of the individuals who were actually carrying on the business.

B
C HELD: the case was not one in which the writ had been issued in the name of a non-existent person as plaintiff, but one of misnomer of the plaintiffs, and, accordingly, the court had power to make the amendment, either (per SINGLETON and MORRIS, L.JJ.) under R.S.C., Ord. 16, r. 2, or (per BIRKETT and MORRIS, L.JJ.) in pursuance of its earlier procedure and practice which was preserved by R.S.C., Ord. 72, r. 2.

D AS TO SUBSTITUTION OR ADDITION OF PLAINTIFF, see HALSBURY, Hailsham Edn., Vol. 26, p. 20, para. 17; and FOR CASES, see DIGEST, Practice, p. 404, Nos. 1051-1057.

Cases referred to:

- (1) *Clay v. Oxford*, (1866), L.R. 2 Exch. 54; 36 L.J.Ex. 15; 15 L.T. 286; Digest, Practice, 405, 1063.
- E (2) *Tellow v. Orela, Ltd.*, [1920] 2 Ch. 24; 89 L.J.Ch. 465; 123 L.T. 388; Digest, Practice, 404, 1056.
- (3) *Alexander Mountain & Co. v. Rumere, Ltd.*, [1948] 2 All E.R. 482; [1948] 2 K.B. 436; 2nd Digest Supp.
- (4) *Belgian Economic Mission v. A. P. & E. Singer, Ltd.*, [1950] W.N. 418; 94 Sol. Jo. 579; 2nd Digest Supp.

F INTERLOCUTORY APPEAL by the defendants from an order of SELLERS, J., made on Oct. 21, 1952, whereby he allowed the plaintiffs to amend the writ which they had issued by adding the names of the individuals comprising the plaintiffs' house of business as co-plaintiffs in the action.

G Monsieur Baudelot, a Frenchman, was formerly the proprietor of a business in France. On his death in 1937 the business continued to be carried on by his wife and two children as his testamentary heirs under the name of "Etablissement Baudelot". When the firm issued a writ against the defendants claiming the price of goods sold and delivered, the plaintiffs' solicitors, being informed by French lawyers that the plaintiffs were an incorporated body under French law, indorsed the writ, in pursuance of R.S.C., Ord. 4, r. 1, with a statement that the plaintiffs were a company H incorporated according to the laws of France. Correspondence passed between the defendants' solicitors and the plaintiffs' solicitors as to who the plaintiffs were, and shortly before the action came on for hearing the defendants issued a summons for an order that the name of the plaintiffs and all subsequent proceedings be struck out on the ground that the plaintiffs were a non-existent person. On the following day the plaintiffs issued a summons for an order that the names of the individuals who were carrying on the business should be added to the name of the plaintiffs. On the two summonses coming on for

hearing before the master, they were referred to SELLERS, J., who, after hearing evidence of French law, held that Etablissement Baudelot was not a corporate body, but allowed the writ to be amended by adding the names of the individuals as plaintiffs. The judge then heard the action, and gave judgment for the plaintiffs for £4,759. The defendants appealed against the order of the judge on the summonses allowing the addition of the individuals as plaintiffs.

Leonard Caplan for the defendants.

Adams, Q.C., and *J. F. Donaldson* for the plaintiffs.

SINGLETON, L.J., stated the facts and continued: The defendants appeal to this court not on the amount—there is no doubt that they have had the goods; there is no doubt that they owed to someone the sum of £4,759—but on that which was treated by SELLERS, J., as a preliminary point. The submission which was made to the judge on the two summonses was that in the circumstances leave to amend could not be given to the plaintiffs and that the action, as it stood, was dead, and, therefore, judgment ought to have been entered for the defendants. The submission of counsel for the defendants in this court was, in effect, that the writ is issued in the name of Etablissement Baudelot, and at the foot of it, after the words “address for service”, there are inserted the words: “A company incorporated according to the laws of France”. There is no such company, said counsel and, as no such company exists, the writ was bad and cannot be amended.

His submissions were based on two cases which state the principle. The first of those is *Clay v. Oxford* (1), where it was decided that where an action is commenced in the name of a dead man his representatives cannot be substituted as plaintiffs. I take six lines from the judgment of BRAMWELL, B. (L.R. 2 Exch. 55):

“It cannot be said that this is an amendment ‘necessary for the purpose of determining in the existing suit the real question in controversy between the parties’, nor is this an application made between the parties to the suit; for there is no plaintiff, and, therefore, no existing suit, and no question in controversy between the parties.”

The same principle is stated in the judgment of RUSSELL, J., in *Tellow v. Orela, Ltd.* (2), which was decided after R.S.C., Ord. 16, rr. 2 and 11, came into force. R.S.C., Ord. 16, r. 2, is in these terms:

“Where an action has been commenced in the name of the wrong person as plaintiff, or where it is doubtful whether it has been commenced in the name of the right plaintiff, the court or a judge may, if satisfied that it has been so commenced through a bona fide mistake, and that it is necessary for the determination of the real matter in dispute so to do, order any other person to be substituted or added as plaintiff upon such terms as may be just.”

RUSSELL, J., in dealing with r. 2 of Ord. 16, on which counsel for the plaintiffs relies in part, said ([1920] 2 Ch. 26):

“In my opinion that rule means that, where an action has been commenced between two living parties by a living plaintiff, and the living plaintiff afterwards turns out to be the wrong person, an application may be made to the court, and the court can substitute another person for the living plaintiff or may add another person as co-plaintiff as the case may be. But it does not justify the court in creating a plaintiff in an action for the first time.”

The question thus arises: Was there a plaintiff? Counsel for the plaintiffs submitted that the writ was good, the plaintiff on the writ being Etablissement Baudelot. He agrees that there might be an amendment necessary according to the practice, an amendment which would name the three people who

constituted Etablissement Baudelot or traded as such. He submitted that the fact that on the foot of the writ there appeared the words: "A company incorporated according to the laws of France" was merely something to comply with the requirements of R.S.C., Ord. 4, r. 1, on indorsement of address, and that it did not go to the merits of the question. He submitted, further, that the point taken by counsel for the defendants that there was no plaintiff was wrong, for, said he, the defendants had traded with Etablissement Baudelot and knew what it was. The judge allowed the plaintiffs to amend by putting in the names of three partners (if that is the right description of them). The defendants knew all about them. It was not a case of a dead plaintiff. It was not a case of a bad writ. Etablissement Baudelot existed, traded, and corresponded with the defendants. It existed and traded as a body, occupied premises, and paid taxes. It was a body consisting of three persons who were the successors in title of the late Monsieur Baudelot, and, if that be right, counsel submitted, the provisions of R.S.C., Ord. 16, r. 2, applied. Application having been made to the judge, he allowed the amendment asked for. It is said that he might have acted under r. 11 of Ord. 16, too. I do not think it is necessary to read that rule.

Both the learned counsel referred us to other useful authorities. Counsel for the plaintiffs drew our attention to Ord. 72, r. 2, which provides:

"Where no other provision is made by the Act or these rules, the present procedure and practice remain in force."

He was not able to state very clearly what the practice and procedure on which he relied was at the time of the making of the rules. He put it generally that there is inherent power in the court to do that which is right and just. Counsel for the defendants replied: At least the authorities show that you cannot make an amendment if a party is dead or if that party never existed in law. Obviously there must be some limit.

The question was discussed in *Alexander Mountain & Co. v. Rumere, Ltd.* (3), which was before this court in 1948, and it was decided that in the case of the mere misnomer of a plaintiff on a writ, the defendant, by a summons supported by an affidavit, can compel the plaintiff to amend. If the defendant does not exercise this power, and the matter proceeds to trial, the misnomer can then be amended, and in no circumstances can it affect the substantive judgment which the court is called on to pronounce. That was a judgment of the Court of Appeal consisting of SCOTT and COHEN, L.JJ. The first judgment was given by COHEN, L.J., and he, having dealt with the facts, reached the conclusion that in that case there was merely a misnomer. The learned lord justice read from an article in the LAW JOURNAL of May 9, 1942, and said ([1948] 2 All E.R. 485) that he agreed with that statement of the law. The concluding part of the article (which is also referred to in the ANNUAL PRACTICE, 1951, at p. 11) is this:

"This was the position up to the passing of the Civil Procedure Act, 1833, s. 11 of which abolished pleas in abatement for misnomer altogether. It gave the defendant the right, instead of pleading in abatement, 'to cause the declaration to be amended, at the cost of the plaintiff, by inserting the right name, upon a judge's summons founded on an affidavit of the right name'. This Act is now itself repealed, and all pleas in abatement are finally abolished by R.S.C., Ord. 21, r. 20. A plaintiff, whether an individual or a corporation, is, of course, still required to bring his action in his proper name. There does not appear to be any specific rule of court dealing with the matter, nor do the rules of court deal with misnomer in any way. It, therefore, appears that R.S.C., Ord. 72, r. 2, applies; i.e., 'the present procedure and practice' (i.e., the practice in force when the rules of 1883 were framed) remains in force, and the defendant by summons, supported by affidavit, could compel the plaintiff to amend.

If he does not do so, and the matter proceeds to trial, it is submitted that the misnomer can then be amended; and that in no circumstances could the misnomer affect the substantive judgment which the court is called upon to pronounce."

Amendment to correct a misnomer is something which the court could do prior to the rules. It is not expressly dealt with in the rules unless it can be said to be covered by the provisions of R.S.C., Ord. 16. I am inclined to think that counsel for the plaintiffs is right in regarding the two powers as quite separate. That would appear to be the view of the writer of the article in the LAW JOURNAL, which is adopted by COHEN, L.J., as a correct statement of the law, and with COHEN, L.J.'s judgment SCOTT, L.J., agreed. Thus counsel for the plaintiffs submitted: (a) The amendment is right under Ord. 16, r. 2; alternatively (b) the power to allow amendment of that which is no more than a misnomer is inherent in the court. I should add that in *Belgian Economic Mission v. A. P. & E. Singer, Ltd.* (4) DEVLIN, J., had made an order for the amendment of the writ by substituting as plaintiffs, instead of the Belgian Economic Mission, "Paul Van Zeeland in his capacity as Ministre des Affaires Etrangères et du Commerce Extérieur suing on behalf of the kingdom of Belgium." On an appeal the Court of Appeal held the amendment was right.

I have formed the view that SELLERS, J., was right in allowing the amendment. I think it could be allowed under the provisions of R.S.C., Ord. 16, r. 2, and that, therefore, it is unnecessary to go further into the powers under the inherent jurisdiction of the court. I need hardly say that it is satisfactory to me to find that there was power to make such an order. The money is due and owing from a company trading in this country to Etablissement Baudelot who carry on business in France. The defendants have had the goods from France, and the money is due. I think the defendants' solicitors were quite right in 1951 to inquire who really was the plaintiff or who were the plaintiffs, if there was any doubt about it. It may be they were right to raise the question before SELLERS, J., though I think they ought to have raised it earlier if they were going to raise it. SELLERS, J., decided that there was power to amend, so that under this judgment the French traders were able to obtain judgment against those in this country who had contracted to buy their goods and had had those goods supplied to them. The French plaintiffs, under the advice of their solicitors, thought it right to bring their action in this country. They need not have done so. I wonder what they think of it now, and I wonder what they would have thought if the decision of this court had been the other way. These considerations are not of importance to us. We merely have to administer the law, but there is another side to this, and I could wish that there had not been an appeal after SELLERS, J., gave leave to amend. It adds to everyone's costs. It keeps the plaintiffs out of their money, and they must wonder what is happening to the courts in England of which they used to hear good reports. There is another consideration. People in this country are anxious to do trade with other countries; we depend on trade to live. This sort of conduct by, or on behalf of, a trading company in this country which knows that it owes the money—it does not dispute that (and by "this sort of conduct" I mean appealing on a technical matter of this kind)—will not help trade. In my view, the judgment of SELLERS, J., was right, and this appeal ought to be dismissed.

BIRKETT, L.J., stated the facts, expressed his regret that an English firm of standing, repute, and substance should have taken a technical point that had no merit, and continued: Counsel for the defendants asserted and re-asserted, affirmed and re-affirmed, that a writ had been issued in the name of a non-existent person or body, and, that being so, the authorities which deal with the case of a dead man—he referred to *Clay v. Oxford* (1) and *Tellow v. Orela, Ltd.* (2)—supported him and the plaintiffs could do nothing about it. "This writ", said he, "was issued in the name of a corporate body. There

was no such corporate body. There never had been such a corporate body, and, therefore, the corporate body never existed, the writ was in the name of a non-existent person, and all the consequences follow." SELLERS, J., when dealing with that matter, said:

A " . . . I unhesitatingly accept the view that the rule is not wide enough to permit me to accede to the plaintiffs' application to join these three named partners in this action if in fact the action was from the outset brought by a party in circumstances comparable to those two cases of a dead man."

B It is, I think, important to notice that the way the corporate body creeps into this case is because, in view of the provisions of R.S.C., Ord. 4, r. 1, it was stated:

" This writ was issued by Messrs. Keene, Marsland & Co. whose address for service is 52, Mark Lane, London, E.C.3, solicitors for the said plaintiffs, a company incorporated according to the laws of France, whose place of business is situate at Montereau, France."

C Counsel for the defendants says that that addition to the address, to comply, as it was thought, with R.S.C., Ord. 4, r. 1, vitiates the whole matter and there is no redress of any kind. It was, therefore, clear, that counsel must establish, first, that the circumstances were truly comparable with those of the cases dealing with a dead man. He further submitted (and I think the importance of this can scarcely be exaggerated) that, had those words attached to the address for service—" a company incorporated according to the laws of France "—been omitted, all would have been well inasmuch as, by powers of amendment, if amendment were necessary, everything could have been made right. It was the addition of those words which he said made this comparable with the other cases.

E The first question to be determined is whether the plaintiffs' description in the writ, " Etablissement Baudelot ", represented something which existed. I assume for the purpose of this case that it was not a corporate body. The answer to the question I have posed can only be that, of course, it did. It existed, certainly, so far as this case is concerned, from March, 1949, down to the day of the hearing, as a trading concern, to use a neutral expression. It has, in fact, traded with the defendants, delivering to them goods and receiving payment from them, and when difficulties arose it made a compromise on various points of difference as appears from the statement of claim. F It was perfectly plain from the headed notepaper and from the transactions between the parties, that this trading concern existed. The second question is: Does it make any difference, so far as the remedy is concerned, that there was added to the writ the words that the defendants were a corporate body to comply with R.S.C., Ord. 4, r. 1? I think that the proper way to regard that is that it is a case of misnomer. It is said: Here is the name of the plaintiffs. They have existed, and are existing, to your knowledge, and merely because they are described in that way it does not alter the fundamental question whether they exist or not. It is idle to say the question is: Do they exist as a corporate body?, because it has been conceded that this description G as a corporate body was a mistake. I think that the provisions of Ord. 72, r. 2, H are quite sufficient to enable this court to deal with the situation which has arisen here, and I think it would be a great pity if this court were not able so to do. I think that the judgment of SELLERS, J., was right and this appeal ought to be dismissed.

MORRIS, L.J.: I agree. It seems to me that the solicitors for the plaintiffs made their position entirely clear. When asked for information they said in the letter of Mar. 27, 1951:

" . . . with regard to the constitution of our clients we would inform you that we are instructed that they are an incorporated body under French law, which provides for the incorporation of the heirs of an individual who carry on his business, the instrument of incorporation being a testamentary document of the late Monsieur Baudelot."

Therefore, they made it quite clear that they had been advised that those for whom they acted were the heirs of the individual, Monsieur Baudelot, who carried on his business, and who, as a result, by French law, were incorporated. The solicitors thereupon issued the writ in the name "Etablissement Baudelot". The learned judge, having heard the whole of the evidence, including the evidence of French law, decided, though not without some hesitation, that "Etablissement Baudelot" were not an incorporated body. It does not follow from that that this writ was issued in the name of a non-existent company. It was not. It was issued in the name, or the trading name, used in their continuing trading activities by three living trading active persons. I agree with the way in which the matter was summarised by the learned judge, when he said:

" . . . I think this application on behalf of the defendants to strike out the proceedings as being in the name of a non-existent plaintiff is misconceived and that the only error that exists is one of mistake in suing in this name, or misnomer, which is an erroneous name, because in fact this partnership of these three individuals is not in a position to sue under that name but must sue certainly in this court, and possibly in France as well, in the name of the individual partners."

I, therefore, concur fully with all that my Lords have said.

Appeal dismissed.

Solicitors: *Crawley & de Reya* (for the defendants); *Keene, Marsland & Co.* (for the plaintiffs).

[Reported by C. N. BEATTIE, Esq., Barrister-at-Law.]

KENT v. CONNIFF AND ANOTHER.

[COURT OF APPEAL (Singleton, Birkett and Morris, L.JJ.), November 24, 25, 26, December 17, 1952.]

Agriculture—Agricultural holding—Claim by landlord for damages for breach of covenant—Claim made during currency of tenancy—Claim not displaced by statutory provisions for compensation on termination of tenancy—Agricultural Holdings Act, 1948 (c. 63), s. 57 (3) (a).

During the currency of the lease of an agricultural holding the landlord issued a writ claiming forfeiture and damages for breaches of covenant involving dilapidation or deterioration of or damage to the holding. On the issue of damages for breach of covenant, the tenants contended that the court had no jurisdiction to entertain the landlord's claim, as the right of the landlord to claim compensation under s. 57 of the Agricultural Holdings Act, 1948 (which claim could only be made on the tenants' quitting the holding on the termination of the tenancy) displaced the common law remedy.

HELD: section 57 (3) (a) of the Act gave a landlord a remedy for the dilapidation, etc., of an agricultural holding on the termination of the tenancy only; there was nothing in the sub-section to displace his common law right to claim damages for breach of covenant during the currency of the tenancy; and, therefore, the landlord was entitled to recover.

Observation of SINGLETON, L.J., in *Gulliver v. Catt* ([1952] 1 All E.R. 931), explained.

FOR THE AGRICULTURAL HOLDINGS ACT, 1948, s. 57 (3), s. 65 (1), and s. 101, see HALSBURY'S STATUTES, Second Edn., Vol. 28, pp. 72, 76, 100.

Cases referred to:

(1) *Re Arden & Rutter*, [1923] 2 K.B. 865; 130 L.T. 51; *sub nom. Arden v. Rutter*, 92 L.J.K.B. 894; Digest Supp.,

(2) *Gulliver v. Catt*, [1952] 1 All E.R. 929; [1952] 2 Q.B. 308.

APPEAL by the tenants from an order of SLADE, J., dated May 22, 1952.

On the ground that the tenants of an agricultural holding had been guilty of breaches of covenant relating to the condition of the holding, the landlord, during the currency of the lease, claimed forfeiture under a proviso for re-entry and damages for breach of covenant. SLADE, J., declined to order a forfeiture as he was of opinion that the tenants had been given insufficient time to remedy the breaches. As regarded the claim for damages, the tenants contended that, in view of the provisions of s. 57 (3) (a) of the Agricultural Holdings Act, 1948, read with s. 65 (1) and s. 101, no claim lay until the termination of the tenancy. SLADE, J., held that the claim was maintainable, and awarded the landlord £386 damages.

W. D. Collard for the tenants.
L. A. Blundell for the landlord.

Cur. adv. vult.

Dec. 17. The following judgments were read.

SINGLETON, L.J.: The landlord is the owner of, and the tenants are lessees of, an agricultural holding of some five acres at Woodmansterne. The holding was the subject of a lease of Apr. 8, 1938, by which the land was demised to the tenants' predecessors for a term of seven years from Mar. 25, 1938, at a yearly rent of £40. The lease contained an option to renew for seven years, and it is common ground that the lessees exercised this option. By virtue of s. 3 of the Agricultural Holdings Act, 1948, the tenancy continued as a tenancy from year to year until the tenants gave notice to terminate, which notice expires on Mar. 25, 1953. On May 11, 1951, the landlord commenced

this action against the tenants in which he alleged that the tenants had committed breaches of covenants contained in the lease, that he had served on them notice in accordance with the requirements of s. 146 of the Law of Property Act, 1925, and that the tenants had not remedied the breaches. He claimed possession (or forfeiture) and damages. SLADE, J., decided against the landlord on the forfeiture claim, but he held that the landlord was entitled to damages, which he assessed at the sum of £386, and he gave judgment for the landlord accordingly with seven-eighths of the costs of the action. The tenants appeal against the judgment, and the only question raised on the appeal is on the decision of the judge on a preliminary point whether the action was maintainable at the time at which it was brought. A

The nature of the covenants in respect of which the landlord claimed that there were breaches is shown by para. 2 of the statement of claim, and particulars of the breaches were given in a schedule of dilapidations. It is clear that some of them were in respect of matters of husbandry. The appeal of the tenants is based on the plea in para. 9 of the defence: B

“The premises are an agricultural holding within the meaning of the Agricultural Holdings Act, 1948. If (which is denied) there is any dilapidation or deterioration of or damage to any part of the said holding or anything in or on the holding, the defendants will rely on the provisions of s. 57 of the said Act.” C

It was submitted to SLADE, J., and to this court that the effect of s. 57 of the Agricultural Holdings Act, 1948, read with s. 65, was to postpone any claim of this nature until the termination of the lease. SLADE, J., was of opinion that there was nothing in the two sections, read together, which ousted the right of the landlord to pursue his ordinary common law remedy or which postponed his claim until the quitting of the holding by the tenant on the termination of the tenancy. D

The claim put forward by counsel for the tenants was a bold one. It was that the landlord of this agricultural holding cannot recover damages during the tenancy for breach of any of the covenants embraced in his claim, that he must wait until the termination of the tenancy, and that his compensation must then be determined in accordance with the provisions of the Act of 1948. The landlord had, he said, other remedies open to him, such as an injunction or forfeiture, but he could not recover damages. True, the landlord might be given damages under s. 146 of the Law of Property Act, 1925, but that was not strictly awarding damages to him but granting relief to the tenants at the tenants' request. One would have thought that, if the rights of one party to a contract were to be so seriously affected as counsel claims, the Act of 1948 would have said so in plain terms. It would have been easy to say that from the date on which the Act came into force no landlord of an agricultural holding should have any right of action for damages for breach of any covenant contained in the lease or tenancy agreement, and that any claim, whenever it arose, should be postponed until the termination of the tenancy. There is no such provision in the Act, either generally or in relation to covenants which cover questions of husbandry. In the absence of clear words a party ought not to be deprived of his rights: see the words of SCRUTTON, L.J., in *Re Arden & Rutter* (1) ([1923] 2 K.B. 878). E F G

Section 101 of the Act preserves the rights and remedies of landlord and tenant subject to the provisions of s. 11 (2) and s. 70 (1) and “to any other provision of this Act which otherwise expressly provides”. Now, under s. 11 (2) the landlord may obtain an injunction and has a right to recover damages on the tenants quitting the holding, “but no other”, from which it would appear that in cases within that sub-section the right to recover damages is preserved, but is postponed. Section 70 deals only with settlement of claims on termination of the tenancy. It was not suggested that it covered this case. H

It was claimed by counsel for the tenants that s. 57 was brought in by the words in s. 101, "any other provision of this Act which otherwise expressly provides". Section 57 (1) deals with compensation recoverable by a landlord. The time at which the right (if any) arises is on the tenant's quitting the holding on the termination of the tenancy. Sub-section (2) deals with the amount of compensation, which is to be the cost at the date of the tenant's quitting the holding of making good the dilapidation, deterioration or damage. Sub-section (3) provides that the landlord may claim compensation in respect of what might be described as damage for breach of agreement instead of claiming compensation under sub-s. (1), but he cannot claim both. It is para. (a) of this sub-section which gives rise to some difficulty

" . . . so however that—(a) compensation shall be so claimed only on the tenant's quitting the holding on the termination of the tenancy."

It was submitted on behalf of the tenants that s. 57 (3) is a provision of the Act which provides for compensation within the meaning of s. 65, and that, consequently, the landlord has no longer any right to damages, but can only claim compensation, and that his claim is postponed to the time at which the tenants quit the holding on the termination of the tenancy.

Section 57 is framed so as to deal with the landlord's claim to compensation "on termination of tenancy", and the measure of compensation is based on the position as at the date of the tenant's quitting the holding. A wholly different position arises if there are breaches of covenants in the early stages of a long lease. Even if it can be said that the landlord may await the end of the lease and then claim compensation under s. 57 (3), there is no reason why he should do so. Section 65 only bars an action for damages in a case for which the provisions of the Act provide compensation. If the landlord adopted the procedure under s. 57 (3) in respect of damage for breaches of covenants, compensation (if any) would arise by reason of the landlord exercising the option so to frame his claim. Unless he does so, there is no provision for compensation. The view which I take is that sub-s. (3) gives the landlord an option. He may be content with compensation under sub-s. (1) or he may claim (in respect of matters specified) under a written contract of tenancy. If he is content with sub-s. (1), his right to recover arises on the tenant's quitting the holding on the termination of the tenancy. If he wishes to claim under sub-s. (3), it might be said that there is no certainty as to when the claim arises, or can be made, apart from para. (a). In other words, he might put forward his claim under the agreement before the termination of the tenancy in lieu of the claim he might have made under sub-s. (1) on the termination of the tenancy. The introduction of para. (a) makes it clear that under either sub-s. (1) or sub-s. (3) the claim is postponed. There is nothing in s. 57 which compels a landlord who has a right of action for damages for breaches of covenant in a lease or in a tenancy agreement to resort to arbitration if the breaches of covenant and the right of action arise during the tenancy. *Prima facie*, he has a right of action in the courts when the breach takes place. It is common ground that he might have a right to an injunction, but it is said on behalf of the tenant that by reason of s. 57 he cannot recover damages in an action in which he is granted an injunction. I do not agree. I draw attention to the fact that this action, in which forfeiture and damages were claimed, was commenced on May 11, 1951, whereas the tenancy continues until March, 1953.

The effect of s. 65 is to provide that neither tenant nor landlord can have any other remedy than compensation under the Act in any case for which the provisions of the Act provide for compensation, and it avoids any agreement to the contrary. It does not appear to me to have any bearing on this appeal unless it can be said that s. 57 provides compensation for the breaches of which the landlord complains, breaches which, on the findings of the judge, arose

long before the termination of the tenancy. And I have expressed my opinion that the landlord's claim did not arise under s. 57, and certainly he has not exercised the option given to him by sub-s. (3) of that section. If the legislature had thought fit, it would have been simple to say that there should be no right to recover damages for breach of covenant in any tenancy agreement in relation to an agricultural holding, but that any such claim should be treated as a claim to compensation (and should be postponed until the termination of the tenancy).

Counsel for the tenants referred to the decision of this court in *Gulliver v. Catt* (2), and he drew attention to the fact that in the course of my judgment in that case ([1952] 1 All E.R. 931) I described the words in s. 57 "on the tenant quitting the holding on the termination of the tenancy" as a different proposition from "on . . . the termination of the tenancy" in s. 70 (1) (b). In that case I was endeavouring to show the absurdity of the position taken up by the tenant who was still in occupation and who sought to say that he could defeat the landlord's claim to bring an action in the courts by reason of s. 57. In fact, the tenant remained in possession until two days before the hearing in the Court of Appeal in March, 1952, though the notice to quit had expired at Michaelmas, 1949, and BARRY, J., had held that the notice to quit was a good notice. At the same time I should say that I see the force of the submission of counsel for the tenants, and it may well be that the words "on the tenant's quitting the holding" in s. 57 (1) are inserted to cover a case in which there have been several tenancies by the same tenant of the same holding and to show that the right to compensation does not arise when one tenancy ends and another begins, but only when the tenant quits the holding on the last of them. As counsel pointed out, it is only by so reading them that compensation recoverable under s. 57 would fall to be dealt with by arbitration under s. 70. In my opinion, the judgment of SLADE, J., on the preliminary point was right, and this appeal should be dismissed.

BIRKETT, L.J.: This appeal raises a point of some importance to landlords and tenants in view of the submissions made on behalf of the tenants in this case. The claim made before SLADE, J., was for a forfeiture of the lease and damages for breaches of specified covenants. The tenants, by their counterclaim, asked for relief from the forfeiture under s. 146 (2) of the Law of Property Act, 1925. All the requirements of that Act had been fulfilled by the landlord in these proceedings. SLADE, J., refused to grant the claim for forfeiture, but awarded a sum for damages for breaches of the covenants in the lease between the parties. The substantial point raised before SLADE, J., on behalf of the tenants, and the only point raised in this appeal, was that since the Agricultural Holdings Act, 1948, it was no longer possible to claim damages for breach of covenant, such as were claimed in this action, during the continuance of the tenancy, but any such claim must be brought on the quitting of the holding at the termination of the tenancy, and not otherwise, because of the provisions of s. 57 of the Act of 1948.

Counsel for the tenants argued that, revolutionary as his submission might sound, it was none the less the design and the premeditated policy of the Act of 1948 that the jurisdiction of the Queen's courts should give way to the scheme which he said was embodied in the Act, that claims for damages must be deferred until the quitting of the holding on the termination of the tenancy, and that compensation should then be awarded under the Act. He discussed various sections of the Act with some fullness to support the submission he made. It was, of course, a considerable weakness in the argument that he was not able to quote any clear and direct language in the Act itself to support his submission, but had perforce to rely on the inferences which he said might be drawn from certain of the sections, and he was thus confronted by the difficulty that, if well-established rights of access to the courts were being taken away,

it has always been held that the language authorising this deprivation must necessarily be clear and direct in its terms. The sections of the Act of 1948 which were relied on have already been subjected to close analysis in the judgment of my Lord, and it is not necessary to repeat the process.

A The real point in this appeal is: What is the construction to be put on s. 57 of the Act of 1948? I am not insensible to the attraction of the argument of counsel for the tenants, and to certain difficulties of construction which arise on an examination of the language used in s. 57. The Act of 1948 was, no doubt, designed to make an effective working code for landlords and tenants, and to simplify much of the procedure. It was because of this purpose that counsel was able to argue, for example, that the combined effect of ss. 65, 101 and 57, was to take away from the landlord the right he formerly enjoyed of proceeding by way of an action for damages, and to substitute the award of compensation referred to in s. 57. These sections have already been discussed, but it is clear that s. 65 only limits the rights of the landlord or tenant where other provisions of the Act provide a specific remedy, and the general effect of s. 101 is the same. It, therefore, becomes essential to counsel's argument that he should be able to show that s. 57 does provide a specific remedy, so that ss. 65 and 101 apply. In my opinion, this is where the argument breaks down. It is perfectly true that s. 57 does make elaborate provision for compensation, but, in my view, it only does so in well-defined circumstances. Sub-section (3) permits the landlord to claim compensation in respect of matters specified in sub-s. (1) under and in accordance with a written contract of tenancy, instead of claiming compensation under sub-s. (1) itself. I interpret this to mean that when the tenant quits the holding on the termination of the tenancy the landlord may elect to proceed under sub-s. (1) or sub-s. (3), but not both, and the compensation is to be for such matters as arise on the quitting of the holding at the termination of the tenancy. But neither expressly nor by implication is it said that the procedure laid down in s. 57 is to prohibit the landlord from proceeding against the tenant at any other time for breaches of covenant committed during the continuance of the term. Indeed, I am not sure that the very action which was heard by SLADE J., does not supply in some measure the answer to counsel's submission. If the learned judge had thought it right to decree a forfeiture, counsel does not dispute that he might also have granted relief to the tenants under s. 146 (2) of the Law of Property Act, 1925, on terms. These terms include the word "damages".

F I think the whole difficulty has arisen because of the wording in s. 57 (3) of the Act of 1948—

" . . . so however that—(a) compensation shall be so claimed only on the tenant's quitting the holding on the termination of the tenancy; "

G but I do not think that the use of the word "only" in that context means that a landlord may not bring an action for damages during the continuance of the tenancy. It means that for claims arising on the quitting of the holding at the termination of the tenancy the landlord, proceeding under either of the sub-sections in respect of that claim, must make his claim at that time and no other. In my opinion, SLADE, J., decided the preliminary point correctly, and this appeal ought to be dismissed.

H MORRIS, L.J.: A lease was granted on Apr. 8, 1938, of premises which constitute an agricultural holding. It was granted by the predecessor of the landlord to the predecessors of the tenants. The term was one of seven years from Lady Day, 1938, at a rent of £40 per annum. There was an option in the tenants enabling them to have a lease for a second term of seven years. That option was exercised by the tenants. The landlord became the landlord on Feb. 24, 1949. He considered that there had been breaches of certain repairing covenants in the lease. Accordingly, he prepared a schedule of

dilapidations, and on or about Dec. 14, 1950, he served a notice on the tenants under s. 146 of the Law of Property Act, 1925, and called on the tenants to remedy within two months the breaches of which he complained. As they were not remedied he issued a writ dated May 11, 1951, claiming a forfeiture of the lease (which contained a proviso for re-entry on breach of covenant) and also claiming damages for breaches of covenant. The action did not come on for hearing until after Mar. 25, 1952, when the second term of seven years expired, but it was common ground that, subject to the determination of the court of the claim for forfeiture, s. 3 of the Agricultural Holdings Act, 1948, operated to give the tenants a tenancy from year to year as from Mar. 25, 1952. In fact, the tenants themselves, as tenants, gave a notice on Mar. 19, 1952, that they would quit the premises on Lady Day, 1953. When the landlord issued his writ he did not know that the tenants would give such a notice to quit.

After a lengthy hearing the learned judge was satisfied that there had been breaches of covenant. He considered that insufficient time had been given to the tenants to remedy the breaches, and he declined to order forfeiture, but he awarded damages for the breaches (at the amount that he assessed) notwithstanding the submission of the tenants that he was precluded from awarding damages by reason of the provisions of s. 57 of the Agricultural Holdings Act, 1948. It is solely with this submission that the court is concerned in this appeal. The submission thus raised calls for an examination of the provisions of s. 57 of the Act. In considering their effect regard must be had to their setting within the scheme of the Act. The tenants contend that damages may not be awarded for any breaches of covenant which can be related to certain wording in s. 57 (1), that is, the wording,

“dilapidation or deterioration of, or damage to, any part of the holding or anything in or on the holding”

save on the tenant's quitting the holding on the termination of the tenancy. It might seem strange if such an important statutory modification of contracts should be introduced into the law merely by way of an ancillary stipulation to a provision giving compensation to landlords where particular parts of an agricultural holding have deteriorated through bad husbandry. If, however, the words used lead to this result, they must be given their full and due significance. It is, however, not suggested that other remedies for breaches of contract are to have a similar quiescence enforced on them. Thus, it is said that there is nothing to prevent a claim for a forfeiture. It is said that, if there is a claim for a forfeiture and damages and if the court decides not to order forfeiture, then the claim for damages cannot be pursued. Yet it is said that s. 146 of the Law of Property Act, 1925, is unaffected. It is not said that in a forfeiture action the right of the court to give relief is in any way affected by s. 57 of the Agricultural Holdings Act, 1948. Indeed, in the present case the tenants counterclaimed for relief from forfeiture on such terms as the court should think fit. The powers of the court under s. 146 (2) of the Law of Property Act, 1925, are to give relief

“... on such terms, if any, as to costs, expenses, damages, compensation, penalty, or otherwise, including the granting of an injunction to restrain any like breach in the future, as the court, in the circumstances of each case, thinks fit.”

Further, it is not said that the powers of the court in regard to the granting of injunctions are in any way affected.

The position is, therefore, that the tenants submit that, though in the present claim, if the claim for forfeiture had been established, the court might have required the tenants to pay compensation as a condition of having relief, and though, if forfeiture had been decreed, damages could have been awarded, yet,

though breaches of covenant were proved, inasmuch as a "reasonable time" had not elapsed between the notice under s. 146 and the issue of the writ, with the result that the claim for forfeiture was not established, no damages for the proved breaches of covenant could be awarded. It is to be noted that no question arises in this appeal as to the measure of the damages awarded or as to the method or basis adopted in assessing them. In my judgment, s. 57 (3) of the Agricultural Holdings Act, 1948, does not have the effect which the tenants suggest, that is, of taking away from the landlord all his rights to claim damages during the tenancy for breaches of covenant. The sub-section has a more limited application. If the construction of the sub-section admits of doubt, regard must be had to the principle that a statute is not to be so construed as to take away legal rights unless it is clear that such was its intention. This principle is referred to by LORD STERNDALÉ, M.R., in his judgment in *Re Arden & Rutter* (1) ([1923] 2 K.B. 872).

It is important to have in mind the general framework of the Act and of the part of it where s. 57 is found. Section 34 provides for compensation to a tenant for disturbance. Sections 35 to 55 relate to compensation to a tenant, on the termination of a tenancy, for improvements. Section 56 gives a right to compensation to a tenant on the termination of a tenancy where there has been continuous adoption of a special system of farming. Section 57 provides for compensation to a landlord on the termination of a tenancy for deterioration of particular parts of a holding. Section 58 provides for compensation to a landlord on the termination of a tenancy for general deterioration of the holding. Before dealing more specifically with the provisions of s. 57 it is helpful, for the purposes of the present case, to have in mind the relevant covenants in the lease. They are as follows:

"(3) To keep the erections and buildings on the land and the boundary wall and fences thereof and all future erections in good and in tenable repair except that the repairs to the said three green-houses shall be limited to keeping the same wind and water-tight . . . (5) to use the said demised land as a nursery and for no other purpose . . . (7) to keep the boiler repaired and working during the months of October to April, both months inclusive . . . (8) to keep in good order, topped, lopped, pruned and trained all fruit trees bushes and shrubs . . . (9) to allow the landlord his agents or others at any time to enter the buildings or erections standing on the land to inspect the condition of the same and to comply with any notice to repair within two months of the service of such notice."

The complaints made in the action relate to breaches of some only of these covenants. Paragraph 2 of the amended statement of claim is as follows:

"By the terms of the said lease the said lessees jointly and severally covenanted with the said landlord to keep the erection and buildings on the land and the boundary wall and fences thereof and all future erections in good and tenable repair (damage by accidental fire excepted) except that the repairs to the said three green-houses should be limited to keeping the same wind and water-tight, to use the said demised land as a nursery, to keep the boiler repaired and working during the months of October to April both months inclusive, to keep in good order topped lopped pruned and trained all fruit trees bushes and shrubs and not without the previous consent of the landlord to cut down any fruit trees or other trees provided that such consent should not be withheld if the lessees should plant a new fruit or other tree for each one cut down or removed, and to comply with any notice to repair within two months of the service of such notice."

Section 57 (3) enables a landlord "in lieu of claiming compensation under sub-s. (1)" to claim compensation "in respect of matters specified therein" under, and in accordance with, a written contract of tenancy. The "matters

specified therein" are, in my judgment, "the dilapidation or deterioration of, or damage to, any part of the holding or anything in or on the holding". Such matters must be viewed and assessed in relation to the time when a tenant quits a holding on the termination of a tenancy. It is important to note the words "in lieu of". The claim which may be made under sub-s. (3) is in lieu of the claim which may be made under sub-s. (1). The claim which may be made under sub-s. (1) relates to the time when the tenant quits on the termination of a tenancy, and relates also to the condition of parts of the holding at such time. The reasonable interpretation is that both sub-sections are dealing with the same matters and the same time. When the tenant quits a holding on the termination of his tenancy the landlord may either claim the compensation given to him by statute, that is, under sub-s. (1) for deterioration, or dilapidation, or damage to parts of the holding resulting from bad husbandry, or the landlord may elect (if the written contract of tenancy avails him) to claim compensation for deterioration, or dilapidation, or damage to parts of the holding resulting from breaches of contract. But the right of the landlord to sue for damages for breaches of covenant at any other time is not affected. If there were a long lease containing covenants to keep in repair and covenants at the end of the period to yield up in repair, a claim for damages during the early period of the lease for a failure to keep in repair, assuming that damages on a recoverable basis could be proved, would not be directly related to any possible claim at a much later date which might, or might not, arise according to whether or not the premises were, or were not, yielded up in repair. So, also, when considering s. 57, it would be unnatural to regard some claim during a tenancy for some breach of covenant as being "in lieu of" some claim which could only be considered or decided on when the date of quitting on termination was known and when the state of the premises at such time could be ascertained. A B C D

Section 65 (1) of the Act is in the following terms:

"Save as expressly provided in this Act, in any case for which apart from this section the provisions of this Act provide for compensation, a tenant or landlord shall be entitled to compensation in accordance with those provisions and not otherwise, and shall be so entitled notwithstanding any agreement to the contrary: Provided that where the landlord and tenant of an agricultural holding enter into an agreement in writing for any such variation of the terms of the contract of tenancy as could be made by direction or order under s. 10 of this Act, the agreement may provide for the exclusion of compensation in like manner as under s. 63 (1) of this Act." E F

If s. 57 (3) had not been enacted, it might have been considered that on a tenant's quitting a holding on the termination of a tenancy only the statutory compensation could be claimed. In my judgment, the effect of sub-s. (3) is to give to a landlord at such time the right to rely on his contractual rights if he so chooses. But the landlord cannot have both the statutory compensation and compensation according to the terms of his contract. That is made clear by para. (b). The purpose of para. (a) is less clear. The words are: G

"compensation shall be so claimed only on the tenant's quitting the holding on the termination of the tenancy."

The meaning of this is, in my judgment, that a claim under a contract referable to the state of any part of the holding at the time when the tenant quits on termination must only be brought at such time, that is, at the time when a claim for statutory compensation could be made. But this leaves unaffected any claims under contract referable to the state of any part of the building at any other time. It might be said that para. (a) was not on this basis a provision that need have been inserted, for a claim referable to the condition H

at the time of quitting on termination would not normally be presented until after such time. There is force in this, but, nevertheless, in my judgment, the effect of para. (a) is to make it plain that the alternatives (that is, either to claim statutory compensation in regard to the state of parts of the holding at the time of quitting due to bad husbandry, or to claim compensation under the terms of a contract in regard to the state of the holding at the time of quitting) must arise at the same time; that time would be when the tenant

A quitted on termination. The words of para. (a) are not apt to effect a fundamental variation of contract. It would be singular if a somewhat far-reaching change in the law were enacted in so indirect a manner. If the interpretation of the provision is not clear, then the intention to take away legal rights is not established.

In considering the problem which arises in this case I do not find any direct

B assistance in s. 65 of the Act. That section opens with the words "Save as expressly provided in this Act". Nor do I derive assistance from s. 101 of the Act which is made subject to other provisions in the Act. Nor can any clear conclusion result from bearing in mind that in legislation dealing with the user of agricultural land there are provisions by which security of tenure is given to the tenant and others by which protection is in various ways given

C to him. The problem has ultimately to be solved by considering the wording of s. 57. For the reasons which I have set out, I do not consider that the provisions of s. 57 were a bar to the successful presentation by the landlord of the claims which he put forward. I, therefore, consider that SLADE, J., was not debarred from awarding damages.

Appeal dismissed.

D Solicitors: *Rose, Johnson & Hicks* (for the tenants); *Woodroffes* (for the landlord).

[Reported by C. N. BEATTIE, ESQ., Barrister-at-Law.]

BIRCHALL v. J. BIBBY AND SONS, LTD.

E [LIVERPOOL ASSIZES (Jones, J.), November 20, 1952.]

Negligence—Res ipsa loquitur—Onus on defendant to disprove negligence—Evidence required to discharge onus—Plaintiff injured through breaking of hoist rope—Proof that rope had been cut maliciously.

On Sept. 13, 1951, the plaintiff, who was a carter, was loading bags of bran on a wagon at a warehouse, the property of the defendants. The

F bags were being moved from the second floor of the warehouse down a shaft to the wagon by means of a sling connected to a hoist, which was under the control of a servant of the defendants. During the course of the loading the control or "brake" rope of the hoist snapped, causing three

G bags in the sling to fall. The plaintiff was struck across the back by these bags and was injured. In an action for breach of statutory duty and/or negligence the judge found the following facts (i) that there had been no breach of statutory duty (under the Docks Regulations, 1934 (S.R. & O., 1934, No. 279), reg. 20 (a) (i)) to provide rope of suitable quality and free from patent defect, (ii) that the rope had been properly inspected, was of a reasonable breaking strain, and was not too old, and (iii) that

H the rope had been deliberately, and, by implication, maliciously, cut by some person or persons unknown.

HELD: (i) that the facts of the case were such that the maxim "*res ipsa loquitur*" applied, and that, therefore, the onus of proving that they were not negligent was on the defendants;

(ii) that in proving that the rope had been cut maliciously the defendants had discharged the onus on them, and that it was not necessary to prove positively that it had not been cut by one of their servants.

AS TO DOCTRINE OF RES IPSA LOQUITUR IN NEGLIGENCE, see HALSBURY, Hailsham Edn., Vol. 23, pp. 671-675, paras. 956-958; and FOR CASES, see DIGEST, Vol. 36, pp. 88-92, Nos. 589-607.

Rose Heilbron, Q.C., and *Pappworth* for the plaintiff.

S. Scholefield Allen, Q.C., and *Clover* for the defendants.

JONES, J. (in the course of his judgment) said: This is a case to which the maxim *res ipsa loquitur* applies. All the plaintiff has got to do was to prove that he was there, that the bags were lowered, and that one fell on him. That being established, as it has been established by him, the onus of proof is on the defendants to explain that what occurred was not due to their negligence, because, *prima facie*, the falling of a bag in circumstances where they had got complete control over the whole building and everything else puts the onus on them to prove that they are not liable. Counsel for the plaintiff said she was not prepared to argue that the rope had not been cut. She was satisfied that the defendants had discharged the onus of proving that the rope had been cut. She did not, however, abandon her contention that the defendants were liable, basing it on the argument that there was an obligation on them to prove that the rope was not cut by one of their servants. It is important to come to a conclusion whether the rope was cut maliciously or not. If it was cut negligently by one of the defendants' servants, the defendants would most certainly be liable, but if it was cut maliciously by one of their servants, it would hardly be an act within that servant's employment. But there was no evidence as to who cut it, merely evidence that it was cut. I am unable to accept the contention of counsel for the plaintiff that there was an obligation on the defendants to prove that the cutting was not done by one of their servants. The obligation on them was to prove that they were not negligent, and, if they call evidence and prove that the rope was cut by some person maliciously, it seems to me that they have discharged the onus on them to prove that they are not liable. I am satisfied that this rope was cut by some unknown mischievous person for whose act the defendants had no responsibility. Therefore, they have satisfied me that they were not guilty of any negligence or breach of statutory duty, and, therefore, there must be judgment for them.

Solicitors: *Silverman & Livermore*, Liverpool (for the plaintiff); *Dodds, Ashcroft & Cook*, Liverpool (for the defendants).

[Reported by MISS M. D. CHORLTON, *Barrister-at-Law*.]

CUTTRESS AND OTHERS v. SCAFFOLDING (GREAT BRITAIN), LTD. AND OTHERS.

[LIVERPOOL ASSIZES (Jones, J.), October 16, 17, 20, 21, November 3, 1952.]

Negligence—Child—Allurement—Scaffold—Erection for repair of house—Children injured by scaffold being pulled over by boys—Foreseeable danger of young persons interfering with scaffolding.

A The second defendants, a company, who were about to repair a bombed house, entered into a contract with the first defendants who erected a scaffold along a wall of the house on a piece of waste land which was accessible to the public and on which young children were often at play. At a time when the second defendants' employees were not at work some boys uncoiled a rope from the top of the scaffold and swung on it with the result that the scaffold was pulled over and injured the infant plaintiffs.

B HELD: (i) each of the defendants owed a duty to the infant plaintiffs to take all reasonable steps to prevent the scaffold falling on them, each of the defendants should have foreseen the probability of the scaffold being pulled over by children, and each of the defendants was liable to each of the plaintiffs for failure to do so.

C (ii) the second defendants should have realised that the scaffold was unstable and a danger to passers-by and they were negligent in not providing a watchman when the scaffold was left unattended.

AS TO ALLUREMENT OF CHILDREN, see HALSBURY, Hailsham Edn., Vol. 23, p. 584, para. 836; and FOR CASES, see DIGEST, Vol. 36, pp. 68-71, Nos. 433-462.

D Cases referred to:

(1) *Latham v. Johnson (R.) & Nephew, Ltd.*, [1913] 1 K.B. 398; 82 L.J.K.B. 258; 108 L.T. 4; 77 J.P. 137; 36 Digest 38, 223.

(2) *Donovan v. Union Cartage Co., Ltd.*, [1933] 2 K.B. 71; 102 L.J.K.B. 270; 148 L.T. 333; Digest Supp.

E (3) *Buckland v. Guildford Gas Light & Coke Co.*, [1948] 2 All E.R. 1086; [1949] 1 K.B. 410; 113 J.P. 44; 2nd Digest Supp.

(4) *Mumford v. Naylor*, [1951] W.N. 579; 2nd Digest Supp.

(5) *Bolton v. Stone*, [1951] 1 All E.R. 1078; [1951] A.C. 850; 2nd Digest Supp.

(6) *Haseldine v. Daw & Son, Ltd.*, [1941] 3 All E.R. 156; [1941] 2 K.B. 343; 111 L.J.K.B. 45; 165 L.T. 185; 2nd Digest Supp.

F ACTION for damages for negligence or nuisance.

In December, 1948, the second defendants, the Huntingdon Development Co., Ltd., were about to repair a bomb-damaged house. Part of the work to be done was the repair of a wall which had been an inner wall of the house, but had become exposed. The wall faced an open space which had been the site of buildings but had become a place where the public habitually walked and where children habitually played. The second defendants entered into a contract with the first defendants, Scaffolding (Great Britain), Ltd., who erected along the wall on the open space a scaffold which was not attached to the wall. On Jan. 9, 1949, at a time when the second defendants' employees were not at work, some boys uncoiled a rope which had been left at the top of the scaffold, swung on it, and pulled it with the result that the scaffold was pulled over in one piece, injuring in its fall the three infant plaintiffs who were playing nearby and now sued by their parents as next friends.

H *Wooll, Q.C.*, and *Youds* for the plaintiffs.

S. Scholefield Allen, Q.C., and *Clover* for the first defendants.

Crichton, Q.C., and *R. H. Forrest* for the second defendants.

Cur. adv. vult.

Nov. 3. **JONES, J.**, stated the facts, said that his attention had been drawn to a pamphlet entitled "Scaffolding" published by the Royal Society for the Prevention of Accidents, which contained much information as to scaffolds, and to reg. 12 of the Building (Safety, Health and Welfare) Regulations, 1948 (S.I., 1948, No. 1145), which contained useful information as to the construction of scaffolds in cases to which those regulations applied, and he continued: I find that the scaffold fell in one piece and that it fell because it was not properly constructed and was not sufficiently strutted. I find that the immediate cause of it falling was the interference with it and pressure put on it by some twelve to fifteen boys, aged about fifteen or sixteen. I find that these boys could not have pulled the scaffold over if it had been properly constructed and secured by struts in the nature of buttresses to prevent it from falling in the direction in which it fell. I think that the servants of the first defendants were probably wise in not attaching the scaffold to the wall and I am not convinced that it could have been safely tied to the building in any way, but I am satisfied that there should have been struts placed on the side of the scaffold away from the building to prevent it falling in that direction and that it was negligent of the first defendants not to provide such struts. I find that their negligence was a contributing cause of the fall of the scaffold. I find that the scaffold was liable to fall and was a danger to passers-by using this open space. I accept the proposition that an independent scaffold is recognised as a safe scaffold in certain conditions, though I believe that such a scaffold may be unsafe to passers-by if not tied or strutted. Having regard to the nature of the ground on which the scaffold rested and the number of persons frequenting the place where the scaffold was erected, it should, in my view, have been strutted to prevent it falling. I think, too, that sole plates such as are shown in the figures in the pamphlet, "Scaffolding", should have been provided as the foundation for the base plates on which the uprights rested as the ground on which the base plates rested was not sufficiently firm or level to afford a satisfactory foundation for the base plates, even though the uprights could be shortened or lengthened for the purpose of compensating for the unevenness of the ground.

I find that the servants of the second defendants should have realised that the scaffold was insufficiently secured and that children would probably interfere with it, that they were negligent in leaving a rope attached to the top of the scaffold when they left it unattended, and that their negligence was a contributing cause to the fall of the scaffold. I find that the injuries to the infant plaintiffs were caused by the fall of the scaffold, and, as I have found that the immediate cause of the fall of the scaffold was the interference with it by the boys and pressure put on it by them, it is necessary for me to consider if it was reasonably foreseeable by either of the defendants that such interference would probably occur and such pressure probably be applied and if the injuries sustained by the infant plaintiffs were circumstances which the defendants, or either of them, should have contemplated.

I was referred by counsel to the following authorities: *Latham v. R. Johnson & Nephew, Ltd.* (1); *Donovan v. Union Cartage Co., Ltd.* (2); *Buckland v. Guildford Gas Light & Coke Co.* (3); *Mumford v. Naylor* (4); and *Bolton v. Stone* (5). I find that it was obvious to the servants of both defendants that this open space was used by the public as a thoroughfare and by children as a playground and that the scaffold would be attractive and alluring to children, particularly to boys aged about fifteen and sixteen, as a place on which to climb and play, especially if so attractive and alluring a piece of equipment as a rope was left on it. In my opinion, the servants of both defendants should have realised that any reasonably active boy would be able to climb to the top of the scaffold and should have foreseen that, if the rope was left on the top, even though coiled up, it was probable that some boy or boys would climb

up and detach the loose end and that others would pull on it and pull the scaffold over and cause injury to passers-by.

- I find that the servants of the first defendants should have foreseen this probability as they knew that the scaffolding could be pulled over. Their Liverpool manager, Mr. Suckling, said in evidence that he would accept that youths of fifteen or sixteen could be expected to pull over an independent scaffold and that he was not surprised that this scaffold was pulled over.
- A These defendants provided the rope attached to a pulley at the top of the scaffold, but there was no evidence that they took any steps to warn the other defendants of the unsuitability of the scaffold if lateral pressure was applied to it or of the danger of leaving the rope attached to the pulley if unattended. I find the servants of the second defendants should have foreseen the probability of the scaffold being pulled over by children as their workmen saw
- B children playing near and taking an interest in, and interfering with, the work being done. I find that it should have been obvious to the workmen that, if they left this independent unattached scaffold unattended with a rope attached, even if coiled up at the top of the scaffold, it was probable that some boy would climb up and throw down the end of the rope and other boys pull on it, and that, if they did so, the scaffold would fall over in the absence of ties or struts
- C to prevent that happening. Counsel for the second defendants asked me to hold on the authority of *Haseldine v. Daw & Son, Ltd.* (6), that his clients should be absolved from liability because they employed competent scaffold constructors in the first defendants, but I am unable to take this view because, as I have found, the servants of the second defendants, who are experienced builders, should have realised that this scaffold was not sufficiently tied or
- D strutted to prevent it falling over in the probable event of boys playing with the rope attached to the top of it, and they went away and left it unattended. If the scaffold had been properly tied or strutted, I think it would have been unnecessary to provide a watchman to watch it while the workmen were away from it, but, in view of the facts that I have found the second defendants should have realised that the scaffold was unstable and a source
- E of danger to passers-by and that their workmen left a rope attached to the top of it when they left it unattended, I find that the second defendants were negligent in not providing a watchman when their workmen were not using the scaffold.

- For these reasons I have come to the conclusion that each of the defendants owed a duty to the infant plaintiffs to take all reasonable steps to prevent the
- F scaffold falling on them and failed to discharge this duty and that each of them is liable to each of the plaintiffs in damages for negligence, but I hold that the plaintiffs cannot succeed in their claim for damages for nuisance as the scaffold did not adjoin a highway and the infant plaintiffs were not using the highway when the scaffolding fell on them and caused them injury. [His LORDSHIP then dealt with the question of damages.]

Judgment for the plaintiffs.

Solicitors: *Silverman & Livermore*, Liverpool (for the plaintiffs); *Dodds, Ashcroft & Cook*, Liverpool (for the first defendants); *Barrell & Co.*, Liverpool (for the second defendants).

[Reported by MISS M. D. CHORLTON, Barrister-at-Law.]

OTTER v. CHURCH, ADAMS, TATHAM & CO. (a firm).

[CHANCERY DIVISION (Upjohn, J.), December 17, 18, 19, 1952.]

Solicitor—Negligence—Damages—Tenant in tail—Failure to advise disentailment—Death of tenant in tail—Diminution of estate—Damages recoverable by personal representative of tenant in tail.

In 1941 M., a minor, became tenant in tail in possession of settled property. On Sept. 18, 1944, M. attained his majority, and was then serving overseas in the Royal Air Force. In December, 1944, M.'s mother, as agent for M., consulted solicitors who, being under the misapprehension that M. was absolutely entitled, advised that no step need be taken to transfer the settled property to M. until he returned to England. In May, 1945, M. was killed in action. He was a bachelor and died intestate, without having disentailed the settled property, which, consequently, passed to an uncle of M. M.'s mother, as his personal representative, claimed damages from the solicitors for negligence and breach of contract. The court found as a fact that the solicitors were negligent and that the breach of contract was established. On the question of the measure of damages,

HELD: the damages should not be limited to the nominal amount which M. would have recovered in his lifetime, but should be ascertained in accordance with the principles relating to damages for breach of contract and extended to all damage which would naturally be expected to flow from the solicitors' breach of duty, and, in the circumstances, the failure to give proper advice might be expected to result in the loss to M.'s estate of the settled property.

AS TO NEGLIGENCE OF A SOLICITOR IN NON-CONTENTIOUS MATTERS, see HALSBURY, Halsham Edn., Vol. 31, p. 134, para. 181; and FOR CASES, see DIGEST, Vol. 42, pp. 100-107, Nos. 940-1012.

Cases referred to:

- (1) *Lockier v. Paterson*, (1844), 1 Car. & Kir. 271; 174 E.R. 807; 23 Digest 296, 3616.
- (2) *Valpy v. Oakeley*, (1851), 16 Q.B. 941; 20 L.J.Q.B. 380; 17 L.T.O.S. 124; 117 E.R. 1142; 12 Digest, Replacement, 532, 4015.
- (3) *Beckham v. Drake*, (1849), 2 H.L. Cas. 579; 9 E.R. 1213; 12 Digest, Replacement, 23, 14.
- (4) *Raymond v. Fitch*, (1835), 2 Cr. M. & R. 588; 5 L.J.Ex. 45; 150 E.R. 251; 23 Digest 291, 3570.
- (5) *Hadley v. Bazendale*, (1854), 9 Exch. 341; 23 L.J.Ex. 179; 23 L.T.O.S. 69; 156 E.R. 145; 17 Digest 93, 101.
- (6) *Victoria Laundry (Windsor), Ltd. v. Newman Industries, Ltd.*, [1949] 1 All E.R. 997; [1949] 2 K.B. 528; 2nd Digest Supp.
- (7) *Chaplin v. Hicks*, [1911] 2 K.B. 786; 80 L.J.K.B. 1292; 105 L.T. 285; 17 Digest 92, 98.
- (8) *Nocton v. Ashburton (Lord)*, [1914] A.C. 932; 83 L.J.Ch. 784; 111 L.T. 641; 42 Digest 107, 1017.

ACTION by Mrs. Joan Otter as the personal representative of her son, Robert Colin Michael Otter, deceased, against Church, Adams, Tatham & Co., a firm of solicitors, for damages for negligence while acting as solicitors to the deceased, and for damages for breach of their contract of employment as solicitors.

By her will, made in 1899, Catherine Elizabeth Younge, who died in 1901, devised freehold property ("the settled estates") to her trustees on trust inter alios for William Henry Otter for life and after his death on trust for his children in tail male, and subject thereto in trust for the first and every other son of Robert Henry Otter born during the lifetime of the testatrix and living at her death successively according to their seniority in tail male with remainders over. In 1914 Robert Henry Otter died leaving two sons, the elder

being Robert Edward Otter. In 1932 the said Robert Edward Otter died, leaving surviving his wife (the plaintiff), his son Michael, who was born on Sept. 18, 1923, and a daughter. In 1941 William Henry Otter died, a bachelor, and thereupon Michael became tenant in tail in possession of the settled estates, the value of which for the purposes of this action was agreed to be £7,132. After the death of the said William Henry Otter, the solicitors to the trustees of the settled estates communicated with the plaintiff and subsequently with the defendants. The defendants agreed with the view expressed by the solicitors to the trustees that Michael, who was then a minor, was absolutely entitled to the settled estates, and they so informed the plaintiff. It was arranged that, pending the attainment of his majority by Michael, the plaintiff should be paid £100 per annum out of the income of the settled estates for his maintenance. In September, 1944, Michael attained the age of twenty-one years, and was then serving overseas in the Royal Air Force. In December, 1944, the plaintiff, acting as Michael's agent, consulted the defendants, and they advised her that the transfer of the settled estates to Michael could well await his return to England. On May 14, 1945, Michael was killed in action. He was a bachelor and intestate, and the settled estates, not having been disentailed, passed under the will of the said Catherine Elizabeth Younge to Francis Otter, the younger brother of the said Robert Edward Otter.

C. Montgomery White, Q.C., and MacMaster for the plaintiff.

Bell, Q.C., and Lindner for the defendants.

UPJOHN, J. (having stated the facts): I am satisfied, and I find as a fact that Mr. Tatham, the partner dealing with the matter for the defendants, was grossly negligent in the advice he tendered to his client through his mother, the plaintiff, in 1944. In principle, therefore, the plaintiff has established a breach of contract by the defendants, and the question arises what is the measure of damages. Counsel for the defendants submitted that the personal representative can have no higher or better rights than the person whom he represents, and so the plaintiff can recover no greater damages than the deceased could have recovered in his lifetime. It is then truly pointed out that damages in the deceased's lifetime must necessarily have been nominal, because, the mistake having been discovered, it could have been rectified by a stroke of the pen. Counsel submits forcibly that the plaintiff is really trying to recover damages which result not from the solicitor's breach of duty, but from the death of the deceased.

The matter is free from authority, though counsel for the defendants cited three cases to me. *Lockier v. Paterson* (1) was a case dealing with the rights of a personal representative in an action of tort and does not really touch on this point. *Valpy v. Oakeley* (2) also does not deal with the point I have to consider. Finally, there was *Beckham v. Drake* (3), where there is a useful discussion of the general principles. Counsel for the plaintiff, on the other hand, submits that what vests in the personal representative is the right of action which was previously vested in the deceased, and he referred me to *Raymond v. Fitch* (4) where the judgment of LORD ABINGER, C.B., shows that as a matter of common law all choses in action which are not of a purely personal nature, such as an action for slander, survive and pass to the personal representative. Indeed, that is not disputed. Then, says counsel, the right of action being vested in the personal representative, what is the measure of damages? He points out that the measure of damages must be such as must be expected naturally to flow from the breach. He submits that that is the proper test and it is not true that the damages can be no greater than those which the deceased could have recovered in his lifetime. He puts his case, shortly, in this way: There is the right of action in the personal representative, and the damages must be ascertained in accordance with principles affecting damages for breach of contract at the time that the damage accrues. I accept that submission.

What, then, is the proper measure of damages in this case? I was referred by counsel for the defendants to the well-known rule in *Hadley v. Baxendale* (5) as expounded recently in *Victoria Laundry (Windsor), Ltd. v. Newman Industries, Ltd.* (6). Damages for breach of contract must be in respect of such damage as would naturally be expected to flow from the breach, or such as must have been in the contemplation of the parties. It seems to me impossible in this case to apply the latter test having regard to the nature of the breach of contract. Therefore, I have to consider what are the damages which may naturally be expected to flow from the breach. It is true that, if Michael had continued alive, damages would be nominal. Are they, however, to be limited to the damages which he could have recovered in his lifetime? In my judgment, no. It is contrary to common sense to suppose that the damages must only be nominal merely because, had the mistake been discovered in the lifetime of Michael, it could have been rectified. The true way of looking at it, in my judgment, is this. If the mistake had been discovered in Michael's lifetime it would have been his duty to mitigate the damages, i.e., to reduce them to a nominal sum by executing a disentailing deed, but, as the mistake was not discovered until after his death, Michael has been deprived of the opportunity of increasing his estate by executing a disentailing deed, and, therefore, on his death, his estate is diminished by that amount. To take one example only, suppose the mistake had been discovered in the lifetime of Michael. He is informed of the mistake, and told that he can do one of three things. He can let matters rest where they are, in which case on his death without male issue the fund will pass from him to another branch of the family, or, alternatively, he can execute a disentailing deed and the property will become his, or, in the further alternative, he can execute a will making the property his own on his death. Let us assume that, being so informed, he instantly sends an urgent message home: "Please send out for me a disentailing deed. I desire to reduce this property into my own ownership". A disentailing deed is produced, but, unfortunately, before he can sign it, he is killed. In those circumstances can it be seriously suggested that his executor is not entitled to sue for the diminution of his estate by reason of the solicitor's breach of duty? In my judgment, it cannot seriously be suggested that that is the law, and I am not bound to say that damages in this case are only nominal because Michael could only have recovered nominal damages in his lifetime.

What, then, is the true measure of damages? It was certainly more than a remote possibility that he would be killed while on active service. The result of this failure to give him proper advice might easily result in the loss of the settled estates and must be expected to flow from the breach of duty. Counsel for the defendants submitted that even on the footing that he was wrong on his first point, viz., that damages could not be greater than the deceased could have got in his lifetime, even so, damages are nominal. I reject that argument. In the circumstances of this case, there was a serious possibility that the failure to give Michael correct advice would lead to his estate losing the whole of the settled estates.

[HIS LORDSHIP referred, inter alia, to the fact that while the question whether Michael would have entailed was a matter of conjecture, the settled estates did not comprise the family mansion house so that there was no reason to think that Michael might, in any case, have wished the property to devolve on his male relations to the exclusion of his mother and sister. The settled estates would have borne income for the benefit of Michael's estate during the seven years which had elapsed since Michael's death. HIS LORDSHIP awarded the plaintiff, in her capacity as Michael's administratrix, £6,500.]

Judgment for the plaintiff.

Solicitors: *Steadman, Van Praagh & Gaylor* (for the plaintiff); *Hair & Co.* (for the defendants).

[Reported by R. D. H. OSBORNE, Esq., Barrister-at-Law.]

HINDE v. HINDE.

[COURT OF APPEAL (Birkett and Morris, L.J.J.), November 7, December 19, 1952.]

Divorce—Maintenance of wife—Recovery from husband's executors—Order by consent for monthly payments "until re-marriage"—Matrimonial Causes Act, 1950 (c. 25), s. 19 (3).

A On Mar. 23, 1936, the wife was granted a decree absolute of divorce on her petition against the husband. She applied for maintenance, and on Mar. 25, 1936, the registrar made an order in the following terms: "... by consent I do order that ... the respondent do pay or cause to be paid to ... the petitioner until re-marriage ... maintenance at and after the rate of £300 per annum gross ... payable monthly ...". On B Jan. 18, 1952, the husband died, and on June 21, 1952, probate of his will was granted to his executors. After the death of the husband, no maintenance was paid to the wife. On a summons by the wife for leave to issue execution against the husband's estate, or, alternatively, against the executors.

C HELD: under s. 190 (2) of the Supreme Court of Judicature (Consolidation) Act, 1925 (now s. 19 (3) of the Matrimonial Causes Act, 1950) the jurisdiction of the court to order maintenance by way of periodical payments was limited to an order for payments "during the joint lives" of the parties to the suit; parties could not by consent give the court a jurisdiction which it did not otherwise possess; while the court would D recognise a consensual arrangement between the parties, it would not lend its process to enforce as an order that which was drawn up in the form of an order, but which in reality was the statement of an agreement in terms which the court would have no jurisdiction to impose; in the absence of evidence that the order merely embodied or evidenced terms agreed between the parties, the order must be treated as having been made under E the powers conferred on the court by the statute; to have validity as such, it must be construed as an order made for joint lives; and, therefore, the summons must be dismissed.

AS TO MAINTENANCE OF WIFE IN DIVORCE PROCEEDINGS, see HALSBURY, Hailsham Edn., Vol. 10, pp. 785-795, paras. 1244-1262; and FOR CASES, see DIGEST, Replacement Vol. 27, pp. 610-634, Nos. 5727-5957.

Cases referred to:

- F (1) *Kirk v. Eustace*, [1937] 2 All E.R. 715; [1937] A.C. 491; 106 L.J.K.B. 617; 157 L.T. 171; 27 Digest, Replacement, 228, 1834.
- (2) *Langstone v. Hayes*, [1946] 1 All E.R. 114; [1946] K.B. 109; 115 L.J.K.B. 225; 175 L.T. 353; 27 Digest, Replacement, 228, 1835.
- (3) *Nicol v. Nicol*, (1886), 31 Ch.D. 524; 55 L.J.Ch. 437; 54 L.T. 470; 50 J.P. 468; 27 Digest, Replacement, 110, 816.
- G (4) *Re Aylmer. Ex p. Bischoffsheim*, (1887), 20 Q.B.D. 258; 57 L.J.Q.B. 168; 16 Digest 119, 169.
- (5) *British Wagon Co., Ltd. v. Gray*, [1896] 1 Q.B. 35; 65 L.J.Q.B. 75; 73 L.T. 498; 16 Digest 119, 172.
- (6) *Maidlow v. Maidlow*, [1914] P. 245; 84 L.J.P. 20; 112 L.T. 804; 27 Digest, Replacement, 622, 5813.
- H (7) *Mills v. Mills*, [1940] 2 All E.R. 254; [1940] P. 124; 109 L.J.P. 86; 163 L.T. 272; 27 Digest, Replacement, 615, 5759.
- (8) *Wentworth v. Bullen*, (1829), 9 B. & C. 840; 9 L.J.O.S.K.B. 33; 109 E.R. 313; 12 Digest, Replacement, 202, 1417.

APPEAL by the wife against a decision of BARNARD, J., in chambers on Oct. 14, 1952, dismissing her appeal against the dismissal by Mr. Registrar KINSLEY on Sept. 22, 1952, of her summons for leave to issue execution against

the estate of her deceased husband, or, alternatively, against the executors of his will.

On Mar. 23, 1936, the wife was granted a decree absolute of divorce on her petition against the husband. She applied for maintenance, and on Mar. 25, 1936, the registrar made an order by consent as follows:

"Upon hearing the solicitors for the parties and by consent I do order that Walter Stanley Hinde the respondent do pay or cause to be paid to Eunice Olwen Hinde the petitioner until re-marriage as from the date of the decree absolute herein to wit Mar. 23, 1936, maintenance at and after the rate of £300 per annum gross the said sum to be payable monthly and to pay maintenance for Eleanor Margaret Hinde the child of the marriage as follows:—(i) Payment of accounts as and when rendered up to the amount of £50 per annum. (ii) Payment of the whole of her educational expenses."

On Mar. 27, 1936, the husband re-married, and on Jan. 18, 1952, he died. At that date there were no arrears of maintenance, the wife had not re-married, and the child was over twenty-one years of age. On June 21, 1952, probate was granted to Lloyds Bank, Ltd., and Richard Trevis Scriven Hinde, as executors of the husband's will. After Jan. 18, 1952, the executors paid to the wife no maintenance, they taking the view that the order was to be construed as for joint lives, and, therefore, it ceased on the death of the husband. On Sept. 12, 1952, the wife issued a summons for an order that she might have leave to issue execution against the husband's estate, or, alternatively, against his executors, on the order dated Mar. 25, 1936, whereby it was ordered that the husband should pay the wife maintenance at the rate of £300 per annum payable monthly. On Sept. 22, 1952, Mr. Registrar KINSLEY dismissed the summons. The wife appealed, and on Oct. 14, 1952, BARNARD, J., dismissed the appeal.

Wien for the wife.

Fay for the husband's executors.

Cur. adv. vult.

Dec. 19. **BIRKETT, L.J.**, stated the facts and continued: The order of Mar. 25, 1936, is, of course, unusual in form, and the circumstances in which it came into being cannot now be accurately ascertained. Counsel who addressed us on the appeal spoke about the mechanics of the order and how orders of this kind possibly come to be made, but on that matter I think it enough to say that I think the exact circumstances in which this particular and rather unusual order came into being cannot now be accurately ascertained. The provisions of the Supreme Court of Judicature (Consolidation) Act, 1925, were then in force, but the order with which we have to deal did not follow either s. 190 (1) or (2) of that Act.

Section 190 (1) is in these terms:

"The court may, if it thinks fit, on any decree for divorce or nullity of marriage, order that the husband shall, to the satisfaction of the court, secure to the wife such gross sum of money or annual sum of money for any term, not exceeding her life, as having regard to her fortune, if any, to the ability of her husband and to the conduct of the parties, the court may deem to be reasonable, and the court may for that purpose order that it shall be referred to one of the conveyancing counsel of the court to settle and approve a proper deed or instrument, to be executed by all the necessary parties, and may, if it thinks fit, suspend the pronouncing of the decree until the deed or instrument has been duly executed."

It is obvious that the provisions of sub-s. (1) were not embodied in any form in the order with which we have to deal. Sub-section (2) provides:

"In any such case as aforesaid the court may, if it thinks fit, by order, either in addition to or instead of an order under sub-s. (1) of this section,

direct the husband to pay to the wife during the joint lives of the husband and wife such monthly or weekly sum for her maintenance and support as the court may think reasonable . . .”

There is no mention in the order of secured payments or any mention in terms of joint lives.

A Counsel for the wife suggested that the omission of the words “joint lives” was a deliberate omission, and that the reference to “until re-marriage” confirmed this view. He further said that the provisions relating to the maintenance of the child and her education supported the view that the order was not intended to be for joint lives, but was to continue after the death of the husband if the wife had not re-married. Counsel for the husband’s executors submitted that, the order being stated to have been made by consent, it would appear to have been drawn up by the solicitors on one side, agreed to by the B solicitors on the other side, and recorded as an order of the court, although the court would have had no jurisdiction to make an order extending beyond the joint lives. He submitted that, if this was to be regarded as an order of the court, which the court could enforce, it must necessarily be an order for joint lives and no more. Counsel for the executors submitted, further, that C on the true construction of the order it was not intended to outlast the husband’s life, and an examination of the wording of the order would support that view. He contended that, if the view of the wife that the order purported to extend beyond joint lives was right, there was no power in the court to enforce it as an order, and that, at the most, it was evidence of an agreement between the parties which might be enforced in other proceedings, but not in these. D He also submitted that the summons in the present case asked for leave to issue execution against the estate of the husband, and that was not permissible in these proceedings because, in any event, there was no power in the court to make an order extending beyond joint lives, and that the order should be construed by this court to give the order validity, and, if that were done, the contention of the wife must fail.

E In the last resort I think this appeal turns on the true construction of the order of Mar. 25, 1936. It is to be observed that the order directs “that Walter Stanley Hinde the respondent do pay or cause to be paid”. That would seem to indicate that the husband is alive to fulfil his obligation. Nothing is said that contemplates his death, or what is to happen to the provision for maintenance in that contingency. Nothing is said to indicate that the maintenance is to be paid “during the life of the wife” as in *Kirk v. Eustace* (1). It is true F that the order states that the husband do pay or cause to be paid to the wife “until re-marriage”, and the wife has never re-married, but I do not think that this provision is in any sense conclusive of the matter. In my view, it must be inread conjunction with the rest of the order and the event of re-marriage contemplated was re-marriage in the lifetime of the husband. I see G no ground for saying that by that provision the husband was binding his estate to pay maintenance after his death if the wife had not re-married. If the wife had re-married in the lifetime of the husband, the liability of the husband would have ceased, and that, I think, was the intent and meaning of the words.

H The provision for the child is made part of the order. The jurisdiction of the court to order such payments is contained in s. 193 (1) of the Supreme Court of Judicature (Consolidation) Act, 1925. The court cannot order payment after the child reaches the age of twenty-one. The provisions of the order relating to the child of the marriage would seem to have been framed on the view that the husband would be alive to meet them, and nothing is said about what is to occur if he dies before the educational expenses are complete or what is to happen to the payments of £50 per annum in the event of his death. All these matters seem to me to point to the conclusion that the order was made on the footing of joint lives.

In the course of the argument many cases were cited to us, but, with great respect, I do not think any of them was in any sense of decisive help in this case. In *Kirk v. Eustace* (1), by a deed made in 1922 providing for a separation between husband and wife, and containing mutual covenants to live separate and apart, the husband covenanted with his wife to pay her the weekly sum of £2 during her life for her maintenance and support, but determinable upon reconciliation. In 1936 the husband died. The widow claimed that his estate was liable to continue paying the maintenance during the rest of her life, but the executors contended that the liability had come to an end by the husband's death. It was held by the House of Lords that, as the deed provided that the weekly payment to the wife should continue during her life and as there was nothing in the language used to show an intention that the husband's obligation should continue only during his life, his estate remained liable to pay the weekly sum to the widow. It is to be observed that in the argument counsel for the wife said that the obligation undertaken by the husband was to pay that sum to the wife during her life, and it followed by virtue of s. 80 of the Law of Property Act, 1925, that it was binding on the husband's estate.

LORD ATKIN said ([1937] 2 All E.R. 718):

"Therefore, this contract, which is under seal, is to be read as if it were made by the husband for his executors and administrators, unless the contrary intention is found expressed in the covenant. So far, the matter seems to me to be beyond question, and the wife has the right expressed in the deed. From the judgment given by the late DEPUTY JUDGE OWEN—the judgment of a very careful, learned and experienced lawyer—the county court judge had apparently no doubt upon the matter, and he gave reasons, which appear to me to be convincing, for holding that the plaintiff was entitled to recover. On appeal . . . the majority of the Court of Appeal took a different view; SLESSER and SCOTT, L.JJ., differed from EVE, J., and the majority took the view that, in this particular covenant, there was a contrary intention expressed as to the covenant binding the estate of the testator, or in other words continuing after his death. The view that was taken was that, in a deed of this kind (I am now paraphrasing the grounds of the judgment, but I think I am expressing them accurately), the main object of the deed was to provide for the parties living apart; on the death of the husband, they could no longer live apart—I think that is true—and, inasmuch as they could no longer live apart, the whole basis of the contract had disappeared, and thereupon all the agreements came to an end."

That case was considered by the Court of Appeal in *Langstone v. Hayes* (2), which, I think, was the most helpful of the cases cited. It was there held by the Court of Appeal that there was no rule of law that a covenant in a separation deed by a husband to pay his wife an annuity is intended to bind the estate of the covenantor. Whether it did so or not depended on the construction of the provisions of the deed. By a deed of separation executed on June 10, 1926, by Cecil Joseph Langstone and his wife, it was provided by cl. 1 (i) that the wife might at all future times live apart from the husband and free from his control. By cl. 1 (iii):

"The husband will pay to the wife . . . for her separate use and for the maintenance and support of herself a clear annuity of £104 . . . payable by weekly payments of £2 cash . . . until determined as provided by cl. 3 (ii) ",

which was that:

"if, at any future time, the spouses shall with their mutual consent again cohabit as man and wife, or the wife shall not remain chaste, the

annuity . . . shall thereupon determine and the deed shall then become void."

There were various other clauses about non-molestation and the like. SCOTT, L.J., who read the judgment of the court, said ([1946] 1 All E.R. 115):

A "The main issue tried by the county court judge was whether, on its true construction, the covenant by the husband bound his personal representatives, or was limited to the joint lives of the spouses . . . Counsel for the wife, both below and before us, relied upon the decision of the House of Lords in *Kirk v. Eustace* (1); or alternatively, if that decision did not conclude the appeal in his favour, he submitted that his contention gave the proper meaning to the covenant and he further relied upon certain observations of LORD ATKIN, and possibly of LORD RUSSELL OF KILLOWEN, in that case. In our view, neither argument avails the wife. B Unless the deed or written contract under consideration is a matter of common form—at least, in respect of the particular provision which falls to be considered—it is dangerous to seek to apply to it the judicial interpretation of another document unless that other document is so similar in its terms as to be almost identical; a principle applied to a separation deed by BOWEN, L.J. (31 Ch.D. 524, at p. 529) in *Nicol v. Nicol* (3). In C *Kirk v. Eustace* (1) the deed of separation said expressly that the husband's obligation to pay was to endure 'during the life' of the wife. The majority of the Court of Appeal in that case (of which I was one, EVE, J., differing) thought that even that clear expression of intention ought to give way to other indications in the deed of an intention that it was only to operate D during the joint lives of the spouses. The instant deed, as the county court judge has pointed out, differs in an important respect from the deed in *Kirk v. Eustace* (1): viz., by the complete omission from the deed of the phrase 'during the life of the wife'. There were apparently no children of the marriage. [HIS LORDSHIP then read cls. 1 (i), 1 (iii) and 3 (ii) of the deed, and continued:] I can see nothing in these provisions to extend the husband's covenant beyond the term of their joint lives: E everything presumes the continuance of his life during performance of the covenant to pay. This view of the agreement is supported by other terms in the deed . . . Every one of these provisions seems to us in terms to assume that the husband is still alive and, therefore, to apply only to the period of their joint lives; thus distinguishing this deed of separation, on a radical point of its terms, from *Kirk v. Eustace* (1)."

F *Langstone v. Hayes* (2) seems to make it clear that the construction of the order in the present case is the all important thing and that the order must be read as a whole.

G The conclusions to which I come, therefore, are these: (i) If this order is to have validity as an order of the court, it must be construed as an order made for joint lives, and (ii) on the construction of the order, the use of the name of the husband simply, the absence of any reference to the life of the wife as the period for which maintenance is to be paid, the use of the words "until re-marriage" in the context of the order, the provisions for maintenance of the child of the marriage contained in the same order, all seem to me to point to the order being one in which the liabilities of the husband were limited H to the joint lives of the husband and wife. For these reasons, I think that the decision of BARNARD, J., was right and the order of Mar. 25, 1936, imposed liability on the husband for joint lives only. In my opinion, therefore, this appeal ought to be dismissed.

MORRIS, L.J., stated the facts and continued: In an affidavit in support of the application to the registrar it was deposed:

"As a result of the death of the above-named respondent no steps

have been taken to enforce the said order without leave under the provisions of r. 62 (1) of the Matrimonial Causes Rules, 1950."

Rule 62 (1) of those rules is in the following terms:

"In default of payment to any person of any sum of money at the time appointed by any order of the court for the payment thereof, a writ of fieri facias, sequestration, or elegit shall be sealed and issued as of course out of the divorce registry upon an affidavit of service of the order and of non-payment."

Leave was sought pursuant to the provisions of R.S.C., Ord. 42, r. 23 which are as follows:

"(a) Where six years have elapsed since the judgment or date of the order, or any change has taken place by death or otherwise in the parties entitled or liable to execution . . . the party alleging himself to be entitled to execution may apply to the court or a judge for leave to issue execution accordingly. And such court or judge may, if satisfied that the party so applying is entitled to issue execution, make an order to that effect, or may order that any issue or question necessary to determine the rights of the parties shall be tried in any of the ways in which any question in an action may be tried. And in either case such court or judge may impose such terms as to costs or otherwise as shall be just."

That order applies by reason of r. 80 of the Matrimonial Causes Rules, 1950.

The form of the proceedings makes it clear that the application to the court is for enforcement of an order of the court for the maintenance of the wife. It does not appear to be suggested that any order of the court for the maintenance or education of the child of the marriage still has effect. What is said, however, either expressly or by implication, is that by the order of Mar. 25, 1936, the court made an order binding the husband, or, after his death, his estate, to pay maintenance at the stated rate to the wife until her re-marriage. When the order was made the statutory provisions in force were those contained in s. 190 of the Supreme Court of Judicature (Consolidation) Act, 1925. Sub-section (1) of that section provided for secured payments. The opening words are as follows:

"The court may, if it thinks fit, on any decree for divorce or nullity of marriage, order that the husband shall, to the satisfaction of the court, secure to the wife such gross sum of money or annual sum of money . . ."

My Lord has already read s. 190 (2). Then s. 193 (1) provides:

"In any proceedings for divorce or nullity of marriage or judicial separation, the court may from time to time, either before or by or after the final decree, make such provision as appears just with respect to the custody, maintenance and education of the children, the marriage of whose parents is the subject of the proceedings or, if it thinks fit, direct proper proceedings to be taken for placing the children under the protection of the court."

It follows that the only jurisdiction which the court had to order the husband to pay £300 per annum to the wife was limited to the period of the joint lives. Though parties may agree on amounts or may make agreements as to payments, they cannot by consent confer on the court a jurisdiction which it does not possess. Thus, in *Re Aylmer. Ex p. Bischoffsheim* (4) LORD ESHER, M.R., in the course of his judgment (20 Q.B.D. 262), referred to the "well known rule" that

"the consent of parties cannot give the court a jurisdiction which it does not otherwise possess."

See also *British Wagon Co., Ltd. v. Gray* (5).

In *Maidlow v. Maidlow* (6) there was an agreed order for payment of maintenance to a wife "for her life". It was held in this court, affirming the decision of SIR SAMUEL EVANS, P., that the court could not accede to the husband's petition for a decrease of the amount of maintenance. It was said ([1914] P. 249) by SWINFEN EADY, L.J., that, if there had been an order by consent in the language of the statute for the payment of maintenance to the wife during the joint lives of the husband and wife, the mere fact that the parties had agreed the amount to be paid would not have prevented an application from being made for a modification of the order if the circumstances of the parties afterwards changed. But the order which was made by consent was for payment to the wife "for her life". In reference to it, SWINFEN EADY, L.J., said (*ibid.*):

- A parties had agreed the amount to be paid would not have prevented an application from being made for a modification of the order if the circumstances of the parties afterwards changed. But the order which was made by consent was for payment to the wife "for her life". In reference to it, SWINFEN EADY, L.J., said (*ibid.*):
- B "It is objected that, unless the parties consented to an order in that form, there was no jurisdiction in the judge to make such an order. He could order payment of maintenance during the joint lives under the statute [Matrimonial Causes Act, 1907], but there is no power under s. 1 (2), to order payment to the wife during her life. Under s. 1 (1), there is power to secure to the wife such gross sum of money or such annual sum of money for any term not exceeding her life as, having regard to the various circumstances, may be deemed reasonable, and under sub-s. (2) power to order payment to the wife during their joint lives of such monthly or weekly sum as may be reasonable. It is urged that there was a bargain between the husband and wife, which the court is not at liberty to vary, and that the wife accepted a less sum than she might otherwise have claimed, so that she might have the advantage of receiving it for her life.
- C
- D In my opinion an order so made cannot be subsequently varied."

That case shows that the court will recognise a consensual arrangement and will not interfere with it, but it does not establish that the court will lend its process to enforce as an order that which is drawn up in the form of an order, but which in reality is the statement of an agreement in terms which the court would have no jurisdiction to impose. It is to be pointed out that in the present case there are not the words "for her life", though there are the words "until her re-marriage".

- E In *Mills v. Mills* (7) a wife obtained a decree absolute of divorce on Nov. 21, 1932. An order by consent was made on Dec. 29, 1932, directing the husband to pay to the wife during their joint lives and until further order maintenance of £5 a week, "without prejudice to any further order". In 1933 payments fell into arrear, and the wife took out a judgment summons for £90. The parties then agreed that the husband should pay the wife a lump sum of £1,250 in full discharge of all claims by her to maintenance. On Oct. 9, 1933, an order was made embodying the agreement. The order also discharged the order of Dec. 29, 1932, and dismissed the maintenance petition and the judgment summons. On Jan. 31, 1940, the wife took out a summons calling on the husband to show cause why she should not have liberty to apply for maintenance in accordance with the provisions contained in the order of Oct. 9, 1933. It was held by the Court of Appeal that the application was not "on" a decree for divorce within the meaning of s. 190 of the Supreme Court of Judicature (Consolidation) Act, 1925, and that the court had no jurisdiction to grant it. In the course of his judgment, SIR WILFRID GREENE, M.R., said
- F
- G
- H ([1940] 2 All E.R. 258):

"The order on the face of it also purports to direct payment of a lump sum. That payment is something which the court had no jurisdiction in itself to order, because the jurisdiction of the court, so far as relevant, is confined to securing, under s. 190 (1), a gross or annual sum, or under s. 190 (2), ordering the payment of a periodical sum to the wife. It is settled that the court has not power to order payment to the wife out-

and-out of a lump sum, but it has also been held that the court has jurisdiction by consent to make an order of that character. The order, therefore, on the face of it, is an order by consent directing the husband to do something which the court, apart from consent, could never order him to do, and by consent it is discharging the original order, and dismissing the petition upon which it was made . . . There is one further point, before I leave this matter, on the form of order, on which I should like to comment. I have already said that there is no jurisdiction in the court to order payment to the wife of a lump sum. Such payment can only be consensual. That being so, I take the view that in such cases it is not desirable that the court should direct the payment of such a lump sum, which is merely consensual. There is no necessity for the court to be appearing by consent to be making an order which it has no jurisdiction to make at all. There are many other ways of providing for these matters. What the court has jurisdiction to do is, of course, to discharge its previous order. The sum can be paid first, in which case all that is required is a recital in the order that such-and-such an agreed sum has been paid in full satisfaction, and an order by consent that the existing maintenance order be discharged. If the sum has not been paid, I see no reason why the order should not take the form that, upon payment of the sum, the existing order should stand discharged, when the ordinary routine would be, as is the practice in another Division, that, upon the party producing before the registrar an affidavit verifying the payment . . . the existing maintenance order should be discharged."

But it may well happen that the parties who have made a contract cause a consent order to be drawn up, which in its effect is no more than evidence of their contract. Thus in *Wentworth v. Bullen* (8), PARKE, J., said (9 B. & C. 850):

"Now though there is no remedy for disobedience of a judge's order (as such) by one of the parties against another by action, but by attachment merely, yet if it be made by the consent of both, and is founded on a binding agreement, an action will not the less lie upon that agreement, though it have also the additional sanction of a judge's order. The contract of the parties is not the less a contract, and subject to the incidents of a contract, because there is superadded the command of the judge."

The words "by consent" in the order of Mar. 25, 1936, may denote that the parties agreed the amounts which the court, acting within its jurisdiction, could order the husband to pay, or they may denote that the parties agreed to the terms extending beyond those which the court, acting within its jurisdiction, could order. A consent order may amount to a contract, or may be evidence of, or corroboration of, some contract which has already been made, but, if the court is invited to make an order by consent and an order is then drawn up which, according to one construction, is within the powers of the court, while, according to another construction, it is not, the court will proceed on the basis that the order is made within the powers of the court until it is shown that the position was that the parties merely made a contract and that the consent order was intended to be the embodiment or the evidence of the terms agreed.

The application made in the present case was one to enforce in the Probate, Divorce and Admiralty Division an order made in that Division, that is, the order of Mar. 25, 1936. That order, if it was an order which was made within the power and jurisdiction of the court, must have been one to operate during the joint lives of the husband and wife, even though this is not expressly stated in the order. If, therefore, it was such an order, the application to enforce it after the death of the husband rightly failed. If it was not such an order,

but if it is contended that there was a contract imposing an obligation not affected by the death of the husband, then the existence of such a contract must be established before there could be leave to issue execution. The present proceedings which are brought against the executors are brought to enforce in the Probate, Divorce and Admiralty Division an order made in that Division and are not appropriate for advancing a contention that a purely contractual obligation has not been fulfilled. If it is sought to be said that the order of

- A Mar. 25, 1936, went beyond an order of the court made within its jurisdiction and was a contract in terms beyond the powers of the court, or was evidence of such a contract, this contention must be advanced in some proceedings raising it as an issue to be tried. It may be that there is no evidence of a contract other than such as is afforded by the circumstance that in the order of Mar. 25, 1936, which on this basis was not merely or strictly an order,
- B there is no stated overriding limitation referable to the continuance of the joint lives. Whether any other evidence exists is not known to the court. None has been mentioned. If the parties had wished to make provision extending beyond their joint lives they could have done so in some clear, formal document. The order of Mar. 25, 1936, does not, on its face or by its terms, contain any clear indication that it overran the statutory powers of
- C the court. Leave to issue execution on the order of Mar. 25, 1936, was rightly refused for the reason that, if it was an order of the Divorce Court, it was not made, and could not have been made, so as to operate beyond the period of the joint lives, and, therefore, this appeal must be dismissed. The possibility of asserting in an action and of seeking to prove and establish that there was a contract as alleged by the wife can neither be excluded nor encouraged.

D *Appeal dismissed.*

Solicitors: *Rhys Roberts & Co.*, agents for *C. James Hardwicke & Co.*, Cardiff (for the wife); *Watkins, Pulleyn & Ellison*, agents for *Hepherd, Winstanley & Pugh*, Southampton (for the husband's executors).

[*Reported by C. N. BEATTIE, Esq., Barrister-at-Law.*]

E

PRIDE OF DERBY AND DERBYSHIRE ANGLING ASSOCIATION, LTD. AND ANOTHER v. BRITISH CELANESE, LTD. AND OTHERS.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Denning and Romer, L.JJ.),
December 2, 3, 4, 8, 9, 10, 12, 15, 1952.]

F

Water and Watercourses—Pollution of river—Untreated sewage matter—Action by riparian owner and fishery owner against local authority—Rivers Pollution Prevention Act, 1876 (c. 75), s. 3—Derby Corporation Act, 1901 (c. cclxvii), s. 109 (1), s. 113.

G

Electricity Supply—Right to abstract water from river—Water returned in heated condition—Injury to fish—Rights of Earl of Harrington "as riparian owner . . . upon the river"—Derbyshire and Nottinghamshire Electric Power Act, 1929 (c. lxxxvi), s. 37 (1), s. 37 (2).

Injunction—Nuisance—Local authority—Licence needed for work necessary for compliance with injunction—Form of order.

H

The first plaintiff, an angling association, was the owner or occupier of a fishery on the rivers Derwent and Trent from below the confluence of the rivers to Borrowash Bridge on the Derwent, about seven miles above the confluence. The second plaintiff, the Earl of Harrington, was a riparian owner of a considerable stretch of both rivers. On the banks of the Derwent below Derby and above the plaintiffs' waters were works maintained by the defendants. Immediately after passing Derby the river was in a reasonably pure state and supported game fish, but before reaching

Borrowwash Bridge, owing to the activities of the defendants, it was polluted to such an extent that it was foul and black and contained little or no fish. The pollution was caused (a) by effluent consisting of sewage matter, insufficiently treated and discharged into the river from the sewage works of the second defendants, Derby Corporation, and (b) heated effluent, containing suspended organic matter, discharged into the river from the works of the first defendants, a company, which admitted liability. The damage and danger resulting from the pollution were aggravated by the rise in the temperature of the water caused by large quantities of heated effluent which were discharged into the river from the generating station of the third defendants, the British Electricity Authority, which had been set up and maintained under the powers conferred on their predecessor by the Derbyshire and Nottinghamshire Electric Power Acts, 1901 and 1929. The water which was discharged into the river from the works of the electricity authority had been extracted from the river. On Apr. 9, 1952, in an action by the plaintiffs, the judge granted a perpetual injunction restraining each of the defendants from causing or permitting any effluent to flow or pass from their respective premises into the river Derwent (a) so as sensibly to alter the quality (including the temperature) of the waters of the river Derwent or of the river Trent where they flow past or over any part of the plaintiffs' premises, or (b) so as to interfere with the enjoyment by the plaintiffs, or either of them, of the right of fishing in any part of their waters. He further ordered that the operation of the injunction be suspended until Apr. 30, 1954. On appeal, the corporation contended, *inter alia*, (a) that, as the sewage works were authorised by the Derby Corporation Act, 1901, were completed in accordance with the Act, and were satisfactory when completed, if at a later date, owing to an increase of population, over which the corporation had no control, they functioned so as to cause a nuisance, this was merely non-feasance on the part of the corporation and the plaintiffs had no right of action against them, or, at most, merely a right to compensation; and (b) that, in any event, an injunction should not be granted against a local authority. The electricity authority, while accepting an injunction against them, contended that the injunction granted by the judge was too wide in its terms.

HELD: (i) section 109 (1) of the Derby Corporation Act, 1901, which authorised the corporation to construct and maintain their sewage works, contained an express prohibition, which was of general application, against the corporation operating the works so as to cause a nuisance; although s. 113 of the Act of 1901 empowered the corporation to divert brooks and streams and to use them when diverted for carrying sewage, the first proviso to the section stated that the corporation were not authorised to do anything in contravention of the Rivers Pollution Prevention Act, 1876, and under s. 3 of the Act of 1876 it was an offence to cause any solid or liquid sewage matter to fall or flow into any stream; the second proviso to s. 113 of the Act of 1901, whereby the corporation were to pay compensation for damage sustained by reason of the exercise of the powers of the section, did not apply, as a contravention of the Rivers Pollution (Prevention) Act, 1876, was not something done under the powers of the section; and, therefore, the corporation had no statutory defence to the plaintiffs' action, and were liable to the plaintiffs for the nuisance; and in regard to nuisance, the question of non-feasance, as distinct from misfeasance, was irrelevant, the question being whether the thing complained of as a nuisance was expressly or impliedly authorised by the Act under which the works in question were constructed.

Glossop v. Heston & Isleworth Local Board (1879) (12 Ch.D. 102), and *A.-G. v. Dorking Guardians* (1882) (20 Ch.D. 595), distinguished.

(ii) where an actionable nuisance had been created, the court would prima facie restrain the wrongdoer from persisting in his activities, and, although the court might, in special circumstances, leave the injured party to his remedy in damages, the mere fact that the wrongdoer was a local authority was not a circumstance of that character; the fact that, under the Defence (General) Regulations, 1939 (S.R. & O., 1939, No. 927, as amended), reg. 56A, the corporation would be unable to do the necessary work without a licence from the Minister of Works was not a sufficient reason why the ordinary practice should not be followed; the court, however, would not impose on a local authority, or on anyone, an obligation to do something which was impossible; and, therefore, the judge had rightly ordered the operation of the injunction to be suspended for a time.

(iii) the protection given by s. 37 (2) of the Derbyshire and Nottinghamshire Electric Power Act, 1929, to the Earl of Harrington's rights "as riparian owner . . . upon the river" was, on the face of it, more extensive than the general protection of fishing rights given by the proviso to s. 37 (1), but, as it was not suggested that the earl was at present suffering from, or likely to suffer from, any damage to his riparian rights apart from anything that might be done to the fishery, and as the plaintiff association was entitled, under the proviso to s. 37 (1), merely to a protection of its fishery rights, the injunction against the electricity authority should be limited so as only to restrain them from returning the water, after using it, in such a condition as to cause injury to fish, and the earl should be given liberty to apply for a further injunction if he could show that some other of his riparian rights were being injuriously affected by the authority's activities.

Decision of *HARMAN, J.* ([1952] 1 All E.R. 1326), generally affirmed.

AS TO REMEDIES FOR POLLUTION, see *HALSBURY*, Hailsham Edn., Vol. 33, pp. 609-612, paras. 1072-1078; and *FOR CASES*, see *DIGEST*, Vol. 44, pp. 45-50, Nos. 321-355.

Cases referred to:

- (1) *Metropolitan Asylum District v. Hill*, (1881), 6 App. Cas. 193; 50 L.J.Q.B. 353; 44 L.T. 653; 45 J.P. 664; 38 Digest 44, 256.
- (2) *Glossop v. Heston & Isleworth Local Board*, (1879), 12 Ch.D. 102; 49 L.J.Ch. 89; 40 L.T. 736; 44 J.P. 36; 38 Digest 42, 249.
- (3) *A.-G. & Dommes v. Basingstoke Corpn.*, (1876), 45 L.J.Ch. 726; 24 W.R. 817; 44 Digest 57, 415.
- (4) *A.-G. v. Dorking Guardians*, (1882), 20 Ch.D. 595; 51 L.J.Ch. 585; 46 L.T. 573; 38 Digest 54, 310.
- (5) *Jones v. Llanrwst Urban Council*, [1911] 1 Ch. 393; 80 L.J.Ch. 145; 103 L.T. 751; 75 J.P. 68; 38 Digest 45, 263.
- (6) *Rylands v. Fletcher*, (1868), L.R. 3 H.L. 330; 37 L.J.Ex. 161; 19 L.T. 220; 33 J.P. 70; 34 Digest 727, 1089.
- (7) *Firth v. Bowling Iron Co.*, (1878), 3 C.P.D. 254; 47 L.J.Q.B. 358; 38 L.T. 568; 42 J.P. 470; 7 Digest 289, 169.
- (8) *Foster v. Warblington Urban Council*, [1906] 1 K.B. 648; 75 L.J.K.B. 514; 94 L.T. 876; 70 J.P. 233; 44 Digest 75, 561.
- (9) *Robinson v. Workington Corpn.*, [1897] 1 Q.B. 619; 66 L.J.Q.B. 388; 75 L.T. 674; 61 J.P. 164; 38 Digest 55, 318.
- (10) *Hesketh v. Birmingham Corpn.*, [1924] 1 K.B. 260; 93 L.J.K.B. 461; 130 L.T. 476; 88 J.P. 77; 38 Digest 48, 280.
- (11) *Durrant v. Branksome Urban Council*, [1897] 2 Ch. 291; 66 L.J.Ch. 653; 76 L.T. 739; 61 J.P. 472; 38 Digest 56, 327.
- (12) *A.-G. v. Birmingham Borough Council*, (1858), 4 K. & J. 528; 22 J.P. 561; 70 E.R. 220; 38 Digest 41, 244.

- (13) *Young (John) & Co. v. Bankier Distillery Co.*, [1893] A.C. 691; 69 L.T. 838; 58 J.P. 100; 44 Digest 13, 54.
- (14) *Swain v. Southern Ry. Co.*, [1939] 2 All E.R. 794; [1939] 2 K.B. 560; 108 L.J.K.B. 827; 160 L.T. 606; Digest Supp.
- (15) *Boorman v. Brown*, (1842), 3 Q.B. 511; 11 L.J.Ex. 437; 114 E.R. 603; *affd.* H.L., (1844), 11 Cl. & Fin. 1; 8 E.R. 1003; 36 Digest 22, 107.
- (16) *Yielding v. Fay*, (1594), Cro. Eliz. 569; 78 E.R. 813.
- (17) *Henly v. Lyme Corpn.*, (1828), 5 Bing. 91; 6 L.J.O.S.C.P. 222; 130 A E.R. 995; *on appeal, sub nom. Lyme Regis Corpn. v. Henley*, (1834), 1 Bing. N.C. 222; 131 E.R. 1103; 38 Digest 61, 367.
- (18) *Baron v. Portslade Urban Council*, [1900] 2 Q.B. 588; 69 L.J.Q.B. 899; 83 L.T. 363; 64 J.P. 675; 38 Digest 153, 27.
- (19) *Simon v. Islington Borough Council*, [1943] 1 All E.R. 41; [1943] K.B. 188; 112 L.J.K.B. 337; 168 L.T. 65; 107 J.P. 59; 2nd Digest Supp. B
- (20) *Rickards v. Lothian*, [1913] A.C. 263; 82 L.J.P.C. 42; 108 L.T. 225; 36 Digest 28, 143.
- (21) *Read v. Lyons (J.) & Co., Ltd.*, [1946] 2 All E.R. 471; [1947] A.C. 156; [1947] L.J.R. 39; 175 L.T. 413; 2nd Digest Supp.
- (22) *Hammond v. St. Pancras Vestry*, (1874), L.R. 9 C.P. 316; 43 L.J.C.P. 157; 30 L.T. 296; 38 J.P. 456; 38 Digest 25, 135.
- (23) *Sedleigh-Denfield v. O'Callaghan*, [1940] 3 All E.R. 349; [1940] A.C. 880; 164 L.T. 72; *sub nom. Sedleigh-Denfield v. St. Joseph's Society for Foreign Missions*, 109 L.J.K.B. 893; 2nd Digest Supp. C
- (24) *Hawthorn Corpn. v. Kannuluik*, [1906] A.C. 105; 75 L.J.P.C. 7; 93 L.T. 644; 41 Digest 25, 194.
- (25) *Hanley v. Edinburgh Corpn.*, [1913] A.C. 488; 77 J.P. 233; 44 Digest D 62, 448.
- (26) *Midwood & Co. v. Manchester Corpn.*, [1905] 2 K.B. 597; 74 L.J.K.B. 884; 93 L.T. 525; 69 J.P. 348; 38 Digest 50, 288.
- (27) *Mill v. Hawker*, (1875), L.R. 10 Exch. 92; 44 L.J.Exch. 49; 33 L.T. 177; 39 J.P. 181; 26 Digest 450, 1659; *affg.*, (1874), L.R. 9 Exch. 309; 43 L.J.Ex. 129; 30 L.T. 894; 34 Digest 186, 1522. E

APPEAL by the second defendants, Derby Corporation, and the third defendants, British Electricity Authority (East Midlands Division), from an order of HARMAN, J., dated Apr. 9, 1952, and reported [1952] 1 All E.R. 1326, in an action for damages and injunctions in respect of the pollution of certain stretches of the river Derwent and the river Trent.

The first plaintiff, the Pride of Derby and Derbyshire Angling Association, Ltd., was the owner or occupier of a fishery on the rivers Trent and Derwent at a point round about their confluence and running up the latter river about six miles, and it also had fishing rights at two points on the south bank of the river Derwent. The second plaintiff, the Earl of Harrington, was riparian owner of a considerable stretch of both rivers, the material part consisting of about seven miles of water beginning slightly below their confluence and running up the Derwent to a bridge known as Borrowash Bridge. In an action against British Celanese, Ltd., Derby Corporation and the British Electricity Authority, the plaintiffs claimed *inter alia* (i) an injunction restraining each of the defendants from causing or permitting any effluent to flow or pass from the premises of such defendant at Spondon, in the county of Derby, into the river Derwent so as to pollute (either by itself or in combination with any effluent discharged into such river by any of the other defendants or any other persons) the waters of (a) the river Derwent where they flowed past or over the lands below Borrowash Bridge and above the confluence of that river with the river Trent where the first plaintiff was owner of the bed thereof or of a several fishery therein, and the second plaintiff was owner of the banks or bank thereof, or (b) of the river Trent immediately F
G
H

below its confluence with the river Derwent where the first plaintiff was owner of a several fishery therein, or entitled as tenant to a right of fishing, and the second plaintiff was owner of the banks or bank thereof; (ii) an injunction restraining the first defendant, British Celanese, Ltd., or the third defendants, the British Electricity Authority, from causing or permitting any effluent to flow or pass from their respective premises at Spondon into the river Derwent so as perceptibly to alter (either by itself or in combination with any other effluents discharged into such river by any of the other defendants or any other person) the temperature of the waters of the river where they flowed past or over any of the plaintiffs' premises; (iii) damages in trespass and nuisance against all the defendants.

Each of the defendants maintained works on or near the banks of the river Derwent near Spondon, up-stream of the plaintiffs' waters and below Derby.

B After leaving Derby and immediately below Raynesway Bridge, the river took three loops to the north. On the north bank of the first loop, the corporation had constructed sewage works under powers conferred on them by the Derby Corporation Act, 1901. The works had been extended under the Derby Corporation Act, 1930, but, owing to the increase of the population of Derby, they were now inadequate, and sewage matter which was insufficiently treated

C was discharged into the river from the sewage works by means of a pipe or drain. On the second loop of the river were the first defendant's works. About fifty-four million gallons of water were taken daily into the first defendant's lagoons and some of this water was returned to the river in a heated and extremely foul condition. On the third loop (and nearest to the plaintiffs' waters) were an electric generating station and works, which were

D constructed under the Derbyshire and Nottinghamshire Electric Power Acts, 1901 and 1929, and were now vested in and maintained by the third defendants, British Electricity Authority, under the Electricity Act, 1947. To cool their condensers, the electricity authority took about a hundred and twenty million gallons of water daily from the river, and, as the water was already foul when it reached the generating station, a small quantity of chlorine was infused

E into it at the intake to neutralise the damage which it would otherwise do to the machinery. After use, the greater part of this water was returned to the river at a greatly increased temperature. Immediately after leaving Derby the river was in a reasonably clean condition, but by the time it reached the plaintiffs' waters, it was heated and extremely foul and could not sustain fish life. Shortly before the hearing of the action, the first defendant admitted

F that its activities polluted the stream to the detriment of the plaintiffs and submitted to some form of relief by way of injunction. The corporation and the electricity authority each denied liability and each contended that their own activities were not sufficient to cause a nuisance. The corporation further contended, inter alia, that, if a nuisance arose from their works, they were absolved as they were under a statutory duty to do the things which created

G a nuisance. The electricity authority contended, inter alia, that they were empowered by s. 37 (1) of the Derbyshire and Nottinghamshire Electric Power Act, 1929, to abstract water from the river and use it in the way in which they did.

HARMAN, J., held that the plaintiffs had established a good cause of action against all three defendants and granted an injunction against them. Having

H ordered an inquiry as to damages, the learned judge apportioned the damage between the defendants at their request. The corporation appealed from the decision of HARMAN, J., on the ground, inter alia, that they were under a statutory duty to provide a sewage system for Derby, and, therefore, in the absence of negligence on their part, the plaintiffs had no cause of action against them. The electricity authority, while accepting that an injunction should be granted against them, appealed against the form of the injunction on the

ground that it was too wide. In the event of both or either of these appeals being successful, the plaintiffs appealed against the apportionment of damage.

Sir Andrew Clark, Q.C., and *Hesketh* for the second defendants, Derby Corporation.

Salt, Q.C., *Willis, Q.C.*, and *S. I. Levy* for the third defendants, British Electricity Authority.

Russell, Q.C., *Newsom* and *J. A. Gibson* for the plaintiffs.

Teague for the first defendant, British Celanese, Ltd.

SIR RAYMOND EVERSLED, M.R.: This is an action for pollution of the River Derwent east of Borrowash Bridge and up to the point of its confluence with the River Trent. The claim also extended to some pollution of the River Trent itself. The plaintiffs in the action are the Pride of Derby and Derbyshire Angling Association, Ltd., which is concerned with the state of the fishing in the stretch of the rivers in question, and the Earl of Harrington, who is a riparian owner on a considerable part of the rivers concerned. As such riparian owner, his common law rights in certain respects are more extensive than the rights of the plaintiff association, a point which is relevant to the appeal of the British Electricity Authority, and to which I shall in due course return. There were originally four defendants to the action: British Celanese, Ltd., Derby Corporation, the British Electricity Authority (East Midlands Division) and Midland Tar Distilleries, Ltd. The last-named defendants discontinued operations in this neighbourhood at an early stage, and the proceedings were, accordingly, stayed against them. The action proceeded to trial against the first three defendants. A large part of the judgment of *HARMAN, J.*, is concerned with proof of the pollution on the part of each of the three defendants. He concluded that the material stretch of the river was very gravely polluted and was in a state such as extinguished therein all fish life and also all fish food. He also concluded that, although the first defendant, British Celanese, Ltd., was the most serious offender, the second and third defendants substantially contributed to the pollution, and, accordingly, that all three defendants were liable to the plaintiffs. He rejected the proposition that, since all defendants were individually polluting, none could be made liable, a proposition which seems to bear some analogy to the principle that a man armed with several umbrellas must be taken to have no umbrella at all. We are not concerned with these matters because there is no appeal in respect of any of them. As to the second defendants, Derby Corporation, the learned judge said:

"I cannot doubt, having heard the evidence, that the solids put into the stream by the corporation are a substantial contribution to the state of things existing in the plaintiffs' waters."

As to the third defendants, the electricity authority, he said:

"I find, therefore, that the power company's activities in the present state of the river sensibly contribute to the harm that is being done to the plaintiffs. Moreover, I accept the evidence of Dr. Steven, another scientist called by the plaintiffs, that, even if this were a clean stream, these activities, though perhaps not harmful to the plaintiffs in the winter months, would be harmful in the summer when the natural temperatures are higher."

Finally, at the end of his judgment, he said ([1952] 1 All E.R. 1340):

"In the upshot, therefore, I hold that the plaintiffs have established a good cause of action against both the corporation and the power company, as they admittedly have against the first defendant."

The learned judge made the following order:

"This court doth order that each of them [British Celanese, Ltd.,

Derby Corporation and British Electricity Authority] (which defendants are in this order collectively referred to as the said defendants) be perpetually restrained from causing or permitting (whether by their respective servants or agents or workmen or otherwise howsoever) any effluent to flow or pass from their respective premises in the county of Derby in the pleadings mentioned into the river Derwent (a) so as sensibly to alter (either by itself or in combination with any effluent discharged into the said river by any of the said defendants or any other person) the quality (including the temperature) of the waters of the said river Derwent or the waters of the river Trent where the same flow past or over any part of the plaintiffs' premises as mentioned and defined in the statement of claim to the injury of the plaintiffs or either of them or their respective sequels in title or of any person or persons claiming under or through them or any of them in respect of the plaintiffs' said premises or any part thereof, or (b) so as to interfere (either by itself or in combination as aforesaid) with the enjoyment by the plaintiffs or either of them or their respective sequels in title or any person or persons claiming under or through them or any of them of the right of fishing in any part of the plaintiffs' waters as mentioned and defined in the statement of claim."

C Then, after a reference to certain undertakings, it was ordered:

"That the operation of the foregoing injunction be suspended until Apr. 30, 1954,"

i.e., approximately two years from the date of the order. The learned judge ordered an inquiry as to damages. The order proceeds:

D "And the said defendants by their counsel consenting to this apportionment it is ordered that the damages which upon the taking of such inquiry shall be certified as aforesaid be paid by the said defendants in the following proportions, namely: the defendant company [British Celanese, Ltd.] one half, the defendant corporation one quarter, the defendant authority one quarter."

E I need not refer to the rest of the order, which related to costs and matters of that kind, save to note that at the end of it there was included a direction: "And the parties are to be at liberty to apply as they may be advised". The apportionment of the obligation to pay damages will be noted. As each of the three remaining defendants are substantial, the plaintiffs are content with the result so long as neither of the appeals now before us succeeds. If either or both should succeed, then the plaintiffs have appealed, but their appeal has not yet been called on.

[HIS LORDSHIP summarised the facts, and continued:] The first appeal, that of Derby Corporation, raises two points, one being of a secondary character, and arising only if the corporation fail on the first. Their first and main contention is of this nature. They say (a) that they are a local authority charged by legislation (in their case, special legislation) with the duty of providing a sewerage system for the county borough of Derby; (b) that the present sewerage system, including the sewage disposal works, were originally constructed by them strictly in accordance with, and as contemplated by, their special legislation, viz., the Derby Corporation Act, 1901, and that at the time when they were first constructed, these works were effective to deal with the sewage of Derby without polluting the river Derwent; (c) that, after the sewerage works were enlarged, pursuant to and as contemplated by the Derby Corporation Act, 1930, they were again effective to deal with all the sewage of Derby without polluting the river Derwent; (d) that at no time has it been shown that the corporation have been guilty of any fault, such, for example, as failure to keep their system in a proper state of repair; and (e) that the pollution is the result of the fact that the system, which had become inadequate

before 1930 through (and solely through) the increase of the population of Derby, has again become inadequate from similar causes, those causes being wholly beyond the control of the corporation. On those premises, the corporation say that the plaintiffs have no cause of action against them. The plaintiffs' remedy, they say, is solely by way of application to the Minister of Local Government and Planning under the Public Health Acts, calling on him to take, if he thinks fit, such steps as may be required to compel the corporation once more to enlarge their sewerage system. At most, say the corporation, the remedy of the plaintiffs is to obtain, under the Acts, compensation as therein provided for the damage that they have suffered: see Public Health Act, 1936. Counsel for the Derby Corporation contended, in brief, that, once it is established that the work, being work of a local authority duly authorised by Act of Parliament, was completed in accordance with the Act, and was satisfactory at the time when it was completed, then if at a later date, owing to circumstances beyond the control of the local authority (and in the absence of any negligence on their part), the system so functions as to cause a nuisance, that is a mere non-feasance, and the only remedy of anyone damaged is, as I have indicated, under the Public Health Acts. There is no dispute about the premises as I have stated them. The question is in regard to the validity of the conclusion. A

The secondary argument of the corporation was that if the plaintiffs had a cause of action, the judge ought not to have granted an injunction, but should have left them to their remedy in damages. That argument was based, primarily, on the peculiar difficulties of the corporation, having regard, among other things, to the necessity of licences for building operations, under the Defence (General) Regulations, 1939 (S.R. & O., 1939, No. 927, as amended), reg. 56A, and also to the fact that any money required for undertaking works of reconstructing the sewerage system could be borrowed only with the consent of the Minister of Health. Counsel for the corporation contended that an injunction should never be granted against a local authority, at any rate in regard to its sewerage works, since an injunction, though negative in form, was mandatory in substance and would be a means of bringing improper pressure to bear on the Minister of Works in the exercise of his duties in granting licences. He further contended that it was a wrong interference with the corporation's right to deal with their problems in such order as they thought fit. B

I can dispose summarily of the corporation's submission that the injunction would operate in some way as bringing pressure on the Minister of Works. I have no doubt whatever that the Minister will perform his duty of granting licences and priorities in respect of licences with impartiality, and with the single aim of faithfully performing his duty to the national benefit. The existence of the injunction will, no doubt, make clear to him that the pollution of the river by the Derby Corporation is serious (as the corporation now admit that it is) and that ameliorative measures in respect thereof are urgent. As for the point that the injunction constitutes, as it were, an invasion of the sovereign authority of the corporation to decide as they choose what operations to perform and when, I say no more than that, in my judgment, such a submission is without warrant or foundation. C

It is clear that, if a public authority so exercise any of their functions as to cause a private nuisance to any person, the authority, like any other subject, are liable in consequence to be sued in these courts, unless they can rely on some statute as providing, by express language or necessary or proper inference, a defence to such an action. So much appears, for example, from *Metropolitan Asylum District v. Hill* (1). In the present case, the corporation have set up the Derby Corporation Act, 1901, as their defence. The Derby Corporation Act, 1930, for present purposes adds nothing to what may be extracted from the Act of 1901. The first and principal question, therefore, is the construction D

and effect of the Derby Corporation Act, 1901. That Act made provision in Part V, s. 105 to s. 117, for the "Sewerage and sewage disposal works" with which we are concerned. Section 105 provided that:

"The corporation may appropriate and utilise for the treatment and disposal of sewage the lands described in sched. V to this Act . . ."

The lands so described are those shown on the sketch plan which was used by both sides in this case. Section 106 reads:

"Subject to the provisions of this Act the corporation may make and maintain in and according to the lines situations and levels shown on the deposited plans and sections the sewerage works hereinafter described together with all necessary and proper intakes outfalls overflows sewers drains channels weirs sluices junctions syphons engines pumps boilers machinery culverts shafts tanks manholes filters contact beds works buildings and conveniences connected therewith and may enter upon take and use such of the lands delineated upon the deposited plans and described in the deposited books of reference as may be required for that purpose."

Although that section is in terms permissive, I assume in the corporation's favour (and I think that the assumption is well-founded) that the effect of s. 112 and s. 117 is that these works were not only permissive, but were, in fact, directed and certainly contemplated. There then follows in s. 106 a short description of the various works which were to be undertaken, a total altogether of twenty-three. The works particularly connected with the sewage disposal works are Nos. 15, 16, 17, 18 and 19. The Act then contains a number of sections, familiar in legislation of this kind, for the protection of various bodies of persons or corporations. Thus s. 107, according to the marginal note is: "For protection of Midland Railway Company as to sewage works". Section 108, again, according to the marginal note, is: "For protection of Derbyshire County Council". The most important section for our purpose is s. 109, which has the marginal note: "For protection of the parish of Spondon". Section 109 is as follows:

"(1) The sewage disposal works constructed on the lands acquired under the powers of this Act shall at all times hereafter be conducted so that the same shall not be a nuisance and in particular the corporation shall not allow any noxious or offensive effluvia to escape therefrom or do or permit or suffer any other act which shall be a nuisance or injurious to the health or reasonable comfort of the inhabitants of Spondon and this Act shall not exempt or be deemed to exempt the corporation from any liability for any nuisance arising from such sewage disposal works or from any proceedings which might but for this Act be taken against them under the provisions of the Public Health Acts or otherwise and the county council may take any proceedings they may think fit for the purpose of enforcing or giving effect to these provisions. (2) The corporation shall within six months after they have acquired under the provisions of this Act the lands described in sched. V hereto reserve out of the same a strip of land ten yards in width along the northern boundary of such lands and shall forthwith plant the said strip with trees and evergreen shrubs so as to form an effectual screen in front of the rest of the lands and shall for ever afterwards maintain the same so planted. The rural district council may take such proceedings as they think fit for the purpose of enforcing or giving effect to the provisions of this sub-section."

"The rural district council" there must mean the rural district council of Spondon. Section 110 is described in the marginal note as:

"For protection of Great Northern Railway Company as to sewage works."

Before passing from that group of sections, it is to be noted that, except in the case of s. 109, each of the other sections begins in effect by specifically stating that the provisions are for the protection of the named persons or corporations. In the case of s. 107, it is not quite so clear. The language begins:

"In executing the works by this Part of this Act authorised where the same will affect any railway . . . of the Midland Railway Company . . . the following provisions shall unless with the previous consent of the Midland Company . . . apply and have effect . . ."

A

But s. 108 opens: "For the protection of the county council", and, similarly, s. 110 opens: "The following provisions for the protection of the Great Northern Railway Company".

Section 113 is of some importance, and is as follows:

B

"The corporation may divert all brooks streams and waters which can or may be intercepted or taken by the sewers authorised by this Part of this Act and the corporation may by means of such sewers discharge or permit to flow into the river Derwent the waters so intercepted or taken together with any effluent and other waters passing over or through or discharged from the sewage disposal works of the corporation: Provided that nothing in this Part of this Act contained shall authorise the corporation to construct any works or do any other thing in contravention of the Rivers Pollution Prevention Act, 1876, or s. 17 of the Public Health Act, 1875: Provided also that the corporation shall pay compensation to any person for any damage sustained by reason of the exercise of the powers of this section the amount of such compensation failing agreement to be settled by arbitration under the Arbitration Act, 1889."

C

D

Section 115 contains divers provisions as to the main drainage area. Section 115 (15) deals with the obligations of local authorities having branch sewers which they are to connect with the main sewers of the corporation constructed under the Act, and at the end of the sub-section is a proviso in these terms:

E

"Provided that the corporation shall keep the local authorities respectively indemnified against any breach of the Rivers Pollution Prevention Acts, 1876 and 1893, or the general law which may be committed by the corporation in reference to the treatment and disposal by the corporation of the sewage of the local authorities respectively and not arising through any neglect or default on the part of the local authorities respectively."

F

The first matter to consider is the effect of s. 109. It was contended on behalf of the corporation that this section was solely for the protection of the parish of Spondon, or, alternatively, that it was a further section for the protection of the Derbyshire County Council. For the proposition that it was exclusively for the protection of the parish of Spondon counsel for the corporation relied on the marginal note, which so states. I assume in this case that it is permissible to have regard to these marginal notes, for it appears that they formed part of the Act when it was passed. If, therefore, there should arise an ambiguity in the meaning of the section, it would be permissible to see whether the marginal note offered any solution for the ambiguity. In my judgment, however, there is no ambiguity whatever in this section. If any ambiguity arises at all, it is solely injected by the marginal note itself, and I cannot accept the argument that the marginal note should then have the effect of resolving in a particular way an ambiguity for which it is itself wholly responsible. The language of the section seems to me to be almost too plain for argument. Section 109 (1) reads:

G

H

"The sewage disposal works . . . shall at all times thereafter be conducted so that the same shall not be a nuisance . . ."

That is perfectly general. But the sub-section then goes on to give a particular illustration of the general:

“ . . . and in particular the corporation shall not . . . do or permit or suffer any . . . act which shall be a nuisance or injurious to . . . the inhabitants of Spondon . . . ”

If the argument is right that this section operates solely for the protection of the parish of Spondon, the generality at the beginning “ so that the same shall not be a nuisance ” must be treated as wholly otiose or meaningless. But that is not the end. The sub-section continues, after the copulative “ and ”:

“ . . . and this Act shall not exempt or be deemed to exempt the corporation from any liability for any nuisance arising from such sewage disposal works or from any proceedings which might but for this Act be taken against them . . . ”

Pausing there again, it is to be observed that those words are wholly general, and are not confined to the parish of Spondon. The sub-section then goes on: “ under the provisions of the Public Health Acts or otherwise ”. “ Or otherwise ” again seems to me to mean exactly what it says. It means that this

Act is not to exempt the corporation from liability for nuisance, or from proceedings for nuisance which might be taken against them either under the Public Health Acts or otherwise—e.g., under the general law. Nor can I read the final words of the sub-section, giving liberty to the county council to take any proceedings which they may think fit, as excluding the rights of other persons to take proceedings which they may be entitled to take. It is true that s. 109 (2), relating to the planting of the ten yards of trees and evergreen shrubs, is exclusively for the benefit of the parish of Spondon which lies to the north, or on the left bank of the river, but it appears to me impossible to hold, on the ordinary meaning of the words of s. 109, that the only persons to whom protection was given by the section were the parishioners or rural district council of Spondon. There remains the use of the word “ conducted ” in the opening phrase of s. 109 (1): “ The sewage disposal works . . . shall at all times hereafter be conducted ”. Counsel for the corporation tried to persuade the court that the word “ conducted ” was one of narrow significance—narrower, for example, than the words “ use and keep ” in the Public Health Acts. I cannot so construe it. The word “ conduct ” seems to me to mean “ manage ” or “ operate ”. Section 109 (1), therefore, is, in my judgment, a prohibition against the corporation managing or operating their disposal works so as to cause a nuisance.

I hope I shall be forgiven for dealing only in a sentence with the alternative submission that s. 109 is solely for the protection of the Derbyshire County Council. I do so because, quite frankly, I have been unable to comprehend it. The submission rests, I gather, on the circumstance that at the end of s. 109 (1) there is the reference to the fact that the county council may take any proceedings they may think fit. Such a submission is obviously in direct conflict with s. 109 (2) and with the marginal note on which counsel for the corporation based his first contention. I can see no foundation for the argument. Section 109 seems to me not only to forbear from giving permission, express or by implication, to operate the sewage works so as to cause any other person a nuisance, but expressly to forbid it.

I agree with the learned judge that s. 113, from which counsel for the corporation sought to derive some support, is directed merely to giving power to the corporation to divert brooks or streams and to use them when diverted for carrying sewage. But that permission, however far it may extend, is subject to the first proviso to the section, viz., that:

“ . . . nothing in this Part of this Act shall authorise the corporation

to construct any works or do any other thing in contravention of the Rivers Pollution Prevention Act, 1876, or s. 17 of the Public Health Act."

I agree that the words "in contravention of" are not very apt. The reference to the Rivers Pollution Prevention Act, 1876, is, undoubtedly, to s. 3 of that Act, which provides:

"Every person who causes to fall or flow or knowingly permits to fall or flow or to be carried into any stream any solid or liquid sewage matter, shall (subject as in this Act mentioned) be deemed to have committed an offence against this Act . . ."

Those words indicate that a form of penal proceeding is provided under the Act for commission of the offence created. The Public Health Act, 1875, s. 17, provides:

"Nothing in this Act shall authorise any local authority to make or use any sewer drain or outfall for the purpose of conveying sewage or filthy water into any natural stream or watercourse, or into any canal pond or lake until such sewage or filthy water is freed from all excrementitious or other foul or noxious matter such as would affect or deteriorate the purity and quality of the water in such stream or watercourse or in such canal pond or lake."

That section is, in part, a proviso to the powers which precede it, and, in part, an implied authority. Counsel for the corporation contends that the use of the phrase "in contravention of", in s. 113 of the Act of 1901, means that, if proceedings are started against the corporation under the Rivers Pollution Prevention Act, 1876, or under the Public Health Acts, then the Act of 1901 cannot be set up as a defence. I cannot agree with that contention. It appears to me that, though the phrasing is not entirely happy, the meaning is tolerably clear. It is to the effect that nothing in the Act of 1901 is to be taken to authorise the corporation to do anything which would or might cause the corporation to be proceeded against under either of the Acts mentioned. That in no way qualifies or affects their liability (in the event of their so doing) to other persons who may be damaged in consequence. It follows, therefore, that the power to divert streams, and the consequential power to carry the diverted streams laden with sewage into the Derwent, is subject to the limitation which the first proviso to s. 113 puts on it, and, unless the condition of that proviso is satisfied, then there is no power whatever under s. 113 to do what the section otherwise authorises. That result must be borne in mind when dealing with the second proviso to s. 113.

The second proviso to s. 113 is that the corporation are to pay compensation for damage sustained by reason of the exercise of the powers "of this section". If, therefore, what is done is a "contravention" of the Rivers Pollution Prevention Act, 1876, or the Public Health Act, 1875, then the thing done is not something done under the powers of the section, and the second proviso, accordingly, has no application. I, therefore, think that s. 113 reinforces the view which I have expressed on s. 109. Certainly it is, in my judgment, of no assistance to support the main contention of the corporation. I agree with the learned judge that s. 115 (15), with its reference to proceedings under the general law, also tends to support (and to support not negligibly) the view which I have formed on the meaning of s. 109. I, therefore, agree with HARMAN, J., that the discharge through this pipe of the effluent from the sewage disposal works is not only something not expressly or impliedly permitted under this Act, but is, in terms, expressly prohibited by it. If that view is right, it is, as counsel for the corporation frankly admits, the end of the appeal by the corporation on their main point. But, as we have heard a very full argument on a number of cases relating to the Public Health Acts, starting with the well-known case of *Glossop v. Heston and Isleworth Local Board* (2),

and in case I am wrong in my construction of the Act of 1901, it is, perhaps, useful and proper that I should make some observations, so far as they are relevant to the present case, on these more general matters.

A In *Glossop v. Heston and Isleworth Local Board* (2) the plaintiff, who was the owner of a house and pleasure-grounds within the district of the defendant local board, claimed an injunction restraining the local board from permitting sewage, or water polluted by sewage or other offensive matter, to pass through the drains or channels under their control into the river Crane in such a manner as to render the water of the river unfit for use by the plaintiff. The river was stated to be

“ . . . an ancient watercourse passing through the plaintiff's pleasure-grounds, and at a distance of about thirty yards from his house.”

B In November, 1875, by virtue of the Public Health Act, 1875, the channels and drains, which were the sewerage system of the neighbourhood, and which had been made by the predecessors of the defendant board, were vested in the board. The plaintiff complained to the board that the river was polluted with sewage poured into it from the drains and sewers, and, nothing having been done to abate the nuisance, he commenced the action in July, 1876, within a matter of months after the vesting had taken place. The defendants, in their
C defence, denied the existence of the nuisance, and alleged that the state of the river Crane was the same as it had been for more than twenty years and that it had received a considerable amount of sewage for many generations. They stated that they had not had time to provide a proper system of sewers for their district, but intended as speedily as possible to provide a proper system of sewers and proper sewage works. The plaintiff moved for an injunction in the terms of his claim, and by consent that was turned into the trial of the
D action, and both parties gave evidence. It is, I think, important to bear those facts in mind, as *MALINS, V.-C.*, granted the relief which the plaintiff sought, but his decision was reversed by the Court of Appeal. *JAMES, L.J.*, clearly formed the view that, whatever might on the face of the pleadings have been the nature of the plaintiff's complaint and of his cause of action, he was seeking, by a mandatory order of the courts, to compel the defendant board to expedite the intention which they had expressed of providing a proper system of sewage for their district. *JAMES, L.J.*, said (12 Ch.D. 109):

“ It is quite manifest, from the form of the claim and the evidence, that the action was not based upon any act whatever done by the defendants. It is based entirely upon their alleged neglect to perform the Parliamentary duty cast upon them as the sanitary authority of a particular district. It is said that this is a very serious matter to the plaintiff and to the public generally. It appears to me that if this action could be sustained, it would be a very serious matter indeed for every ratepayer in England in any district in which there is any local authority upon which duties are cast for the benefit of the locality. If this action could be maintained, I do not see why it could not in a similar manner be maintained by every owner of land in that district who could allege that if there had been a proper system of sewage his property would be very much improved. I do not see why, if that is so, every owner of property in London which has not received the benefits it ought to have received from a complete system of sewage carried out by the Metropolitan Board of Works might not say, ‘ My court or alley is not properly cared for ’, and who might not bring an action against the Metropolitan Board of Works or any local board having duties in the district, and why he would not be entitled to bring it on the very day the board was constituted and the duties cast upon it. According to my view there is no sufficient principle to sustain that, and no authority really which comes near it, except the authority of the case before *HALL, V.-C.*, which I will refer to.”

After a reference to s. 13 of the Public Health Act, 1875, JAMES, L.J., continued (*ibid.*, 110):

"If the sewer, being in the state in which it was transferred to [the defendants], would, independently of the Act of Parliament, give to any landowner or any riparian proprietor a right to an injunction to restrain the use of that sewer, or the abuse of that sewer, it appears to me they would be in the same position as any other owner of a sewer would be. But the case here is not based upon any common law nuisance, or any nuisance existing, or any damage existing irrespective of the neglect of the Act, but upon the alleged neglect to comply with the provisions of the Act of Parliament."

At the end of his judgment, after referring to certain cases, JAMES, L.J., said (*ibid.*, 117):

"But those cases have no application to this case, where all that can be alleged against the defendants, even if the allegation were sustained, which does not appear to me to be the case, is, that they have not, within a reasonable time, performed the public duty which they owed, not to the plaintiff, but to the district in which the plaintiff is one of the inhabitant landowners. The only case the plaintiff has alleged or attempted to prove is that he has not been relieved from a damage to which he was subject before this body were called into existence in the way he hoped to be, and as he would be if they had done their work in draining this district."

Whether JAMES, L.J., did full justice to the nature of the plaintiff's claim as pleaded is, perhaps, open to some doubt. BRETT, L.J., and COTTON, L.J., expressed themselves somewhat differently. BRETT, L.J., opened his judgment thus (*ibid.*):

"It seems to me in this case that the defendants have not been guilty of any wrongful act, and they have not been guilty of any neglect which gives the plaintiff a right to any remedy of any kind. But if they have been guilty of any neglect, the proper remedy has not been asked for, neither has the proper court been applied to."

Later, he posed this question (*ibid.*, 119):

"Under those circumstances what is their position with regard to the law? They have done no act. It is suggested it might have been proved they had done some act, and it was said the plaintiff was taken by surprise. I cannot accede to that argument."

After referring to *A.-G. and Dommes v. Basingstoke Corpn.* (3), a decision of of SIR CHARLES HALL, V.-C., BRETT, L.J., said (*ibid.*, 121):

"So, indeed, I am inclined to think that in the present case, under this statute [the Public Health Act, 1875], if the former board had done an act that would have given the plaintiff a right to damages or to some other remedy, and the effect of that act continued in the defendants' time, the defendants would have been liable for the continuance of the consequences of that act, and would have been liable to an injunction."

COTTON, L.J., said (*ibid.*, 123):

"I agree with BRETT, L.J., that, as regards the question of fact, if the right of the plaintiff would follow our decision on that, he has made out his case; that is to say, he has shown, in my opinion, that the water in this stream is in such a state that if that were the result of an action of an individual or a body not having Parliamentary authority to put the stream into such a state, or to do acts which necessarily brought the stream into that state, he would have a ground of action against them. But although that is established, it is a very different thing and a very

different consideration whether as against these defendants he is entitled either to the decree granted by the Vice-Chancellor or to any decree in this action . . . it must not be supposed, although I concur in thinking that the plaintiff is not entitled to any decree, that I am of opinion (or that the rest of the court are of opinion) that the defendants have a right under this Act of Parliament to make any new sewer, and thereby to conduct any fresh sewage matter into the river Crane. In my opinion, if they were intending to do so, or had done so, there would be a clear case on the part of the plaintiff for an injunction against the defendants, because that would be within the clear prohibition of the Act of Parliament [s. 17 of the Public Health Act, 1875]. The decree against them in substance, no doubt, was intended to be a decree against them to restrain them from permitting any sewage to go into the river Crane. It is not said they have done any act the consequence of which has been to bring the sewage down to the river Crane. If that were so, unless they could show that in doing that act, and so causing a nuisance to the plaintiff, they are protected by the Act of Parliament, it would be the duty of this court, as it has done in many cases already, to restrain the defendants from creating a nuisance, and although they are a public body, having public duties and powers to perform those duties, that would not exempt them from legal liability in consequence of a nuisance caused by them. On the evidence there is no ground for saying they have done that. I shall have to refer to the cases on the point on another part of the case, but it is sufficient to say here that those cases for the present purpose may be disregarded. It is not the act of the defendants that has caused any nuisance to the plaintiff."

That decision was followed in *A.-G. v. Dorking Guardians* (4). I need not refer in detail to that case, but I observe that COTTON, L.J., was also a member of the Court of Appeal which decided it. I share in some degree the difficulty which PARKER, J., felt, in *Jones v. Llanrwst Urban Council* (5), in regard to the ratio decidendi, on the one hand, of JAMES, L.J., and that of BRETT, L.J., and COTTON, L.J., on the other. PARKER, J., used this language ([1911] 1 Ch. 405):

"I think it clear that the principle of *Rylands v. Fletcher* (6) would apply to the owner of a sewer, whether he made the sewer or not: see *Firth v. Bowling Iron Co.* (7). His duty at common law would be to see that the sewage in his sewer did not escape to the injury of others, and mere neglect of this duty would give any person injured a good cause of action. JAMES, L.J., evidently thought there was no common law nuisance, or at any rate that the action was not a bona fide action to remedy a private wrong. On the other hand, BRETT, L.J., and COTTON, L.J., while holding that the plaintiff would have had a cause of action for what was being done if the sewers in question had belonged to a private person, held that the defendants were not liable because they were a statutory body with only a limited property in, and with only limited powers, and therefore limited duties, with respect to, the sewers transferred to them by the Act. They would be liable for nuisance caused by the exercise of any power vested in them, but not liable, except upon prerogative writ of mandamus, for neglect to perform their statutory duty. In other words, supposing the case put by JAMES, L.J., of an existing nuisance at the time of the transfer, the plaintiff's remedy had, in their opinion, gone altogether, and, so far as I can see, without compensation. In *Foster v. Warblington Urban Council* (8) STIRLING, L.J., seems to have thought that the ratio decidendi of *Glossop v. Heston & Isleworth Local Board* (2) was to be found in the judgments of BRETT, L.J., and COTTON, L.J., and certainly those lords justices constituted the majority of the court. If the explanation of VAUGHAN WILLIAMS, L.J.

[in *Foster v. Warblington Urban Council* (8)] is to prevail, I am of opinion that *Glossop v. Heston & Isleworth Local Board* (2) has no application to the present case. I am satisfied that the plaintiff is bona fide complaining of a private wrong, and that he is not, under colour of such a wrong, merely attempting to compel the defendants to fulfil their statutory duty. If, on the other hand, the explanation of STIRLING, L.J., is to prevail, it is impossible to say whether the case applies without tracing the history of the sewerage system of Llanrwst."

But, whatever may be the true ratio decidendi of the judgments in the *Isleworth* case (2) and the *Dorking* case (4) which followed, they must, I think, clearly be taken as deciding that, where a local authority has inherited drains or sewers under the Public Health Act, and those drains or sewers constitute a nuisance by reason only that they have ceased to deal adequately with the sewage of the authority's district, then the local authority, not having themselves been at fault save that they have not used the powers vested in them to enlarge the sewerage system, are not liable to be sued in the courts, for such an action would be, in effect, an action to compel them to exercise their statutory powers or perform their statutory duty. Further, it must, I think, be taken from these cases as established that the word "use", in s. 17 of the Public Health Act, 1875, does not involve a prohibition against the local authority permitting the inhabitants of their district (in exercise of statutory or other power or right authorising them so to do) to put sewage in the local authority's drains or sewers. Similarly, the word "kept" in s. 19 of the Act of 1875 must be construed by reference to its associated words "constructed", "covered" and "ventilated", and does not constitute an obligation to enlarge or re-construct if the drains or sewers have become, in the course of time, inadequate for the quantity of the sewage of the district. But the decisions in the *Isleworth* case (2) and the *Dorking* case (4) are themselves limited to cases where the local authority have, to use the word which I have already used, "inherited" the drains and sewers from some predecessor. They do not in terms cover the case where the local authority have themselves constructed the sewerage system. Indeed, some of the language of BRETT, L.J., and COTTON, L.J., seems to indicate a distinction in that respect vital to the question of liability.

Counsel for the corporation, however, contended that, since the later decisions in *Robinson v. Workington Corpn.* (9) and, more particularly, in *Hesketh v. Birmingham Corpn.* (10), that distinction is no longer valid or maintainable. He said that, if the local authority itself had constructed the drains and sewers pursuant to the Public Health Act, and the drains and sewers were satisfactory at the time of their completion, then no cause of action would arise against the local authority from mere passive conduct, though the drains and sewers had later become inadequate owing to increase of population. Before passing to the two cases which I have just mentioned, I venture to make one or two observations on non-feasance, to which JESSEL, M.R., and COTTON, L.J., referred in the *Dorking* case (4). The proposition that a local authority is not liable for non-feasance in regard to highways rests, I understand, on particular historical grounds, and it may lead to error or confusion if it is assumed that a similar proposition can be necessarily applied in the case of sewers and drains. As regards sewers and drains, it is, in my judgment, necessary to keep clearly in mind the possibility of two distinct causes of action, namely, (i) for nuisance, and (ii) for negligence. I venture to think that the distinction may not always have been clearly observed in certain of the earlier cases. As regards negligence (and I may say that we are not in this case concerned with negligence, there being no claim for negligence in the statement of claim), it may well be that non-feasance in the sense of failing to perform some positive statutory duty does not give rise to a cause of action

for negligence against the local authority in respect of its sewerage system. In regard to nuisance, however, I think that the question of non-feasance, as distinct from misfeasance, has no real relevance. As regards nuisance, the question is whether the thing complained of as a nuisance is expressly or impliedly authorised by the Act of Parliament in accordance with which the works were constructed, or whether (and this is, perhaps, the same thing) the nuisance complained of is the inevitable consequence of that which the Act both authorised and contemplated. On this question, it seems to me that whether the thing complained of can be described as non-feasance or misfeasance is wholly beside the point.

I refer also to one other general matter. It was suggested that local authorities have a special immunity from the so-called rule in *Rylands v. Fletcher* (6). I am not, as at present advised, satisfied that that is so. PARKER, J., clearly applied the rule in *Jones v. Llanrwst Urban Council* (5). So far as relevant to the facts as they are in the present case, I think that the result is the same whether that which is complained of would render the doer of the act liable on the grounds of nuisance or on the grounds of the rule in *Rylands v. Fletcher* (6), if applicable. In either case the question depends on whether the Public Health Act or the special Act, as the case may be, provides, on the principles stated, a defence to the claim which otherwise would lie.

I now come to *Robinson v. Workington Corpn.* (9) and *Hesketh v. Birmingham Corpn.* (10). I need not pause, save for a brief time, on the former. It does not clearly appear from the LAW REPORTS that the sewers which were there in question had been made by the corporation sued, but my brother DENNING, L.J., having referred to the report of the case in the TIMES LAW REPORTS, has noted that they were so constructed. On the facts of that case, however, it is quite plain that the cause of action was neither more nor less than an attempt to compel performance, for the benefit of the plaintiff and his business, of the statutory duty which was laid on the corporation, under the Public Health Act, 1875, s. 15, to make or provide a proper drainage system. With *Hesketh v. Birmingham Corpn.* (10) I would like to deal in more detail. It is, however, to be noted that that was not a case in which the plaintiff's complaint related to pollution. The nuisance alleged arose from the discharge of excessive quantities of water from a sewer into a brook, and the overflow of the brook. The first contention of the plaintiff was that the defendant corporation had damaged him by a nuisance arising from the largely increased quantity of water passing into the brook. The answer of the corporation to that contention was that the passing of that quantity of water into the brook was authorised expressly, or by necessary implication, by statute. The plaintiff then fell back on a second and alternative point. He contended that, even if the corporation were authorised to pass the water from the sewer into the brook, they were negligent in that they had not done what they could to minimise the damage which he suffered in consequence. The answer to that contention was that it was not negligent for a local authority merely to fail to exercise statutory powers, especially since the Public Health Act, 1875, s. 299, provided a specific remedy for such failure. BANKES, L.J., said ([1924] 1 K.B. 266):

"The plaintiff's case was that the acts of the defendants in discharging the overflow of the sewers into the brook without any statutory authority in that behalf amounted to a nuisance, or that the defendants were guilty of negligence in continuing to discharge the sewage into the brook after it had become of insufficient capacity to carry it in consequence of the growth of the population. No reference appears to have been made at the trial to the provisions of the Public Health Act, but after Mr. Upjohn's argument [for the defendants] it seems plain that it is impossible to adjust the rights of these parties without reference to the provisions of that Act

which are to be found in s. 15, s. 16 and s. 17. Mr. Hurst [for the plaintiff] very frankly told us that those sections were not present to his mind at the time of the trial."

After reading those sections the learned lord justice said (*ibid.*, 267):

"The effect of [s. 17] has been considered in . . . *Durrant v. Branksome Urban Council* (11). There NORTH, J., said ([1897] 2 Ch. 295): 'I think that section recognises in the clearest way that, subject to complying with the provisions of that section, the local authority have a right to empty their drains into a natural stream or canal, pond and so on, observing, of course, the provisions of that section. It is clear from that to my mind that they may turn clean water into a stream, or what I may call cleaned water into a stream. They may even turn water that is sewage or filth into a stream if they free it from such noxious matters as would deteriorate the stream itself'. And CHITTY, L.J., says (*ibid.*, 305): 'The first part of [s. 17] is prohibitory, and it is by way of proviso on something that has gone before. The second part is explanatory. I do not say that by itself it confers a power. I think the better reading is that the power is conferred by s. 16, and in this portion of the section, which says that the sewage is not to be poured in until it is freed from foul or noxious matter, the legislature assumes it had already said something that would justify the pouring of pure water or water not fouled or noxious into the stream or canal'. Therefore you find in the combination of those passages statutory authority for discharging clean or cleaned water into a stream, and if the stream itself is of such a character that the discharge of foul water into it would not affect or deteriorate the purity and quality of the water, you find statutory authority for discharging foul water. Some day an allegation that foul water has been discharged into a stream in such a way as to materially affect its quality may give rise to a serious question as to the party on whom the onus lies of showing that the case does or does not fall within the section."

SCRUTTON, L.J., undoubtedly, used language of a more general character (see, in particular, [1924] 1 K.B. 271), but, in so far as his language supports the broad contention of counsel for the corporation in the present case, it must, I think, be treated as obiter. BANKES, L.J., indeed, seemed to indicate that, in a case where the nuisance complained of was pollution, the fact that the authority had themselves made the sewer would *prima facie* render them liable. If that is right, the case would, on that ground, be distinguishable from the *Isleworth* case (2), even though the nuisance arose merely from subsequent inadequacy of the sewer.

It seems to me, therefore, that the question whether the principle of the *Isleworth* case (2) is applicable only where the authority sued has not itself constructed the sewers complained of as creating a nuisance by pollution has not yet been actually decided. For my part, I see great force in the argument of counsel for the corporation that there is no logical or valid distinction between the case where a local authority have inherited, say, half a century ago, sewers and drains made (and at the time of their construction adequately made) by some predecessor, and a case in which a local authority themselves made, half a century ago, some sewers and drains which, when they were made, were similarly adequate properly to drain the city or town without causing pollution. But I think that it is unnecessary that I should express a concluded view on the point, because, on the facts, I think that the present case is clearly distinguishable from the type of case considered in the earlier authorities. We are here concerned, not with a drain or a sewer down which local inhabitants (having the right so to do) send sewage matter which passes, accordingly, into a river, but with sewage disposal works built on the Derby Corporation's own

land. We have not seen the plans which are referred to in s. 106 of the Act of 1901 for those sewage disposal works. We are told that the plans did not contain any drawing of an effluent pipe leading from the sewage disposal works to the river, though, no doubt, some such discharge pipe must have been contemplated. But what the corporation are doing, as I follow it, is pumping or otherwise diverting into the river, by such mechanical or other means as may be there, the effluent after treatment in the beds and tanks of the disposal works on their own land. In my judgment, therefore, as at present advised, if the Public Health Acts applied to this case, or if, contrary to the view which I have expressed, the Act of 1901 ought to be construed as equivalent, in effect, to the Public Health Act, there would be no statutory defence available to the corporation for what they are doing in discharging effluent through this pipe into the Derwent river. And this also, I think, may fairly be noted. This case cannot be called an action obliquely directed to commanding a local authority to perform a public duty. The plaintiffs are claiming damages in respect of injury suffered to their property some miles from the county borough of Derby. They are not concerned with, nor are they complaining about, the method by which the citizens of Derby are provided with a sewerage system. Indeed, if the sewage disposal works were shut down, the inhabitants of Derby, so far as I understand, would not in the least degree be affected. No such frightful results would occur in Derby as would occur if the sewers and drains themselves were stopped up. The result would be that all the sewage treated with storm water would, presumably, be extruded from the storm water overflows direct into the River Derwent. That, of course, would not in the least help the plaintiffs, but the point is made to demonstrate the true character of the action which the plaintiffs are bringing. The point is one which the learned judge noted (and I think it was a legitimate consideration on his part) where he said ([1952] 1 All E.R. 1337):

“The plaintiffs’ claim here is not that the corporation have neglected to provide further sewers, although it may be that the remedy for that of which they complain will be the construction of further sewers. They are not ratepayers of Derby who complain of the insufficiency of the drainage of the city. Their complaint is the converse, namely, that the city is so drained that their property outside it is damaged.” ~

It follows that many of the observations which JAMES, L.J., directed to the plaintiff in the *Isleworth* case (2) would, on any view, be quite inapplicable to the present case.

So much for the main point raised by the Derby Corporation. I can deal more briefly with the question of the appropriate remedy, assuming that they are wrong (as I think they are) on their main submission. With some aspects of this matter I have already dealt. I venture to think that the fallacy which underlies this part of the corporation’s argument is based on the statement made on their part that an injunction is purely discretionary—if by that is meant that, in a case where a person’s rights, such as the plaintiffs’ rights, are being damaged and there is a threat of continuing damage, the question whether an injunction will be granted is determined by the court on the balance of convenience on one side or the other. In my judgment, that is not a correct statement of the position. It is, I think, well settled that, if A. proves that his proprietary rights are being wrongfully interfered with by B., and that B. intends to continue his wrong, then A. is *prima facie* entitled to an injunction, and he will be deprived of that remedy only if special circumstances exist, including the circumstance that damages are an adequate remedy for the wrong that he has suffered. In the present case, it is quite plain that damages would be a wholly inadequate remedy for the plaintiff association. The general rule which I have stated applies, in my opinion, to local authorities as well as to other citizens. Equally, of course, the court will not impose on

a local authority, or on anyone else, an obligation to do something which is impossible, or which cannot be enforced, or which is unlawful. Therefore, the practice is adopted in the case of local authorities of granting injunctions, and then suspending their operation for a time, long or short. Such a practice has been long established—at least since *A.-G. v. Birmingham Borough Council* (12)—and, frequently applied: see, again, for example, the decision of PARKER, J., in *Jones v. Llanrwst Urban Council* (5). The Defence General Regulations, 1939, reg. 56A, is, beyond doubt, a matter proper to be considered, but the mere fact that, without obtaining a licence, the authority would be unable in any case to do the work is not, in my judgment, a sufficient reason why the ordinary procedure should not be followed. A

What, after all, are the alternatives? It is suggested by counsel for the corporation that the plaintiffs should be left to bring a series of actions for damages. In every such action the plaintiffs would have again to prove their case, for the corporation could put them to such proof by a mere traverse of the facts alleged. The result would, obviously, be a vast expenditure of costs, a matter on which, I understand, the corporation are themselves particularly tender. I think that much the same result would follow if the plaintiffs were merely given liberty to apply for an injunction, for they would then, presumably, have to establish as a matter of fact that some circumstances had arisen which then justified the granting of an injunction which had not been granted at the time of the trial. Nor, in my judgment, would the matter be materially affected even if the corporation were to give some kind of undertaking to get on with the work when it was possible or convenient to do so in the ordinary way. It appears to me that, the corporation having been proved to be wrongdoers (and not disputing that they are wrongdoers), the onus should be on them, if they want a further suspension, to satisfy the court that justice requires that a further suspension should be granted. If the corporation show that they are unable to do more than they are doing, or that they cannot get any licences under reg. 56A, then I have no doubt that a further suspension will be granted until such time as this urgent matter can be put in hand. Finally, the objection that the injunction is permanent in form seems to me to be entirely unsubstantial. In any event, there is, at the end of the order, liberty to apply, and, when all the matters of which the plaintiffs complain have been put right, the court will, no doubt, be ready to hear any application which the corporation might be minded to make to discharge the injunction. As a matter, therefore, of jurisdiction and general principle, I see no ground whatever why the injunction which was granted should not be granted. Still less do I see any ground on which this court could be invited to interfere with the discretion exercised by the learned judge. The result, therefore, as regards the Derby Corporation's appeal, is that, in my opinion, the judgment of HARMAN, J., is correct in every particular, and the appeal wholly fails. D E F

I now come to the second appeal, that of the British Electricity Authority. These defendants are not suffering from what I venture to call the complexes about immunity of public corporations from which the Derby Corporation appear to suffer. Like the corporation, the electricity authority accept the findings of fact on the part of the learned judge, and they accept, therefore, the finding that they are substantially contributing—in this case, as I have said, by temperature only—to the pollution of this river. But they also accept that an injunction should go against them. They contend only that the form of that injunction should be qualified, having regard to the language of certain statutory provisions which are applicable to them. The nature of the authority's appeal is sufficiently indicated by their notice of appeal. I have read the injunction granted by the learned judge, and the proposed form of injunction which they seek is this: G H

"That the order in this action made by HARMAN, J., on Apr. 9 and

entered on May 7, 1952, may be varied by inserting after the injunction therein lettered (b) the words: 'Provided that (so far as concerns any alteration in the temperature of the waters of the said rivers caused by any effluent from the said premises of the defendant authority) the foregoing injunctions lettered (a) and (b) shall not enure to [the plaintiffs] or to either of them or to the sequels in title to either of them against the defendant authority so long as the defendant authority shall comply with the proviso to s. 37 (1) of the Derbyshire and Nottinghamshire Electric Power Act, 1929, that is to say, shall return water abstracted from the river Derwent pursuant to the said sub-section (except that unavoidably lost by evaporation) in such a condition as not to cause (in the waters of the said river where the same flow below and after receiving such effluent) injury to fish'."

The power station in question was vested in the British Electricity Authority under the Electricity Act, 1947, on Apr. 1, 1948. The history of the previous legislation, including the Derbyshire and Nottinghamshire Electric Power Act, 1929, referred to in the notice of appeal, is carefully traced by the learned judge, and I need not read it. It is admitted by the plaintiffs that the Act of 1929, and, particularly, s. 36 and s. 37, continue to apply, and are, therefore, available to the defendant authority. The question under appeal turns exclusively on the effect of those two sections. Section 36 provides:

"The company [i.e., the power company, which was the predecessor in title of the authority] may upon the lands described in sched. I to this Act maintain carry on work and use and from time to time extend alter and renew the generating station and works of the company situate upon the said lands and they may on such lands exercise in relation to the said station and works the powers conferred by the Act of 1901 in relation to the generating stations and works by that Act authorised and the powers conferred by the Electricity (Supply) Acts, 1882 to 1928."

Section 37 provides:

"(1) The company may abstract water from the river Derwent and may utilise the same for condensing and other purposes of the generating station situate upon the lands described in sched. I to this Act: Provided that all water so abstracted except that unavoidably lost by evaporation shall be returned to the river above Borrowash Weir in such a condition as not to cause injury to fish. (2) Nothing in this section or in the section of this Act of which the marginal note is 'Maintenance and use of generating station'—[s. 36]—shall authorise the company to abstract water from or return water to the river Derwent in any manner contrary to or inconsistent with the provisions of the deed set forth in sched. II to this Act or in any manner prejudice diminish alter or take away any of the rights privileges powers or authorities vested in or enjoyed by Charles Joseph Leicester Earl of Harrington or his heirs or successors in estate or any person in trust for him or them as owner or owners of Borrowash Mill and the weirs and sluices referred to in the said deed or as riparian owner or owners upon the river except so far as may be provided by the said deed."

The first point raised in the appeal is a brief one, and is to this effect. Counsel for the authority seeks to incorporate into the injunction by means of his proviso words operating to construe the proviso of s. 37 (1). In general, it is not, I think, the practice of the court, when granting an injunction, to construe the language of the restriction in the statute or contract which has been broken, and which the defendant is restrained from breaking again. But in this case the learned judge used language in the course of his judgment

which has led the authority to make this application. HARMAN, J., said ([1952] 1 All E.R. 1340):

"It was further argued on the plaintiffs' behalf that the quantity of chlorine found in the effluent itself was injurious to fish, and that the proviso [to s. 37 (1)] does not mean that the river, after the effluent has mingled with it, shall not be injurious, but that the effluent itself shall not be injurious. In my judgment, the right answer is the latter, and, if so, there is evidence that on some occasions a quantity of free chlorine is emitted, which may cause injury to fish . . ."

I am not sure whether the learned judge meant that the effluent itself, before it enters the river, must be of such a temperature, and of such a character, as not to be liable to cause injury to fish. I am not suggesting that he did, but, if he did, I think, with all respect, that he would not be right. I think that the construction of this proviso is tolerably clear. During the course of the argument I suggested that what it meant was "that the water so abstracted shall be returned to the river in such a condition as not to cause *by its presence in the river* injury to fish", and that view was accepted both by counsel for the plaintiff and counsel for the authority. Having expressed that view of the meaning of the proviso, which is recorded, and having also mentioned the agreement of counsel, which is also recorded, I think it is unnecessary to do more. I, therefore, do not think that any qualification to the form of the injunction should be made to give effect to that view of construction.

The defendant authority's second point is much more difficult. I have observed already that the rights of the second plaintiff, the earl, as riparian owner, may be much more extensive than those of the plaintiff association. The earl's right is, in my view, correctly taken by the learned judge from his reference to *John Young & Co. v. Bankier Distillery Co.* (13). HARMAN, J., said ([1952] 1 All E.R. 1330): "The law is stated in much the same way in *John Young & Co. v. Bankier Distillery Co.* (13)". After reading the head-note of that case, HARMAN, J., continued (*ibid.*):

"LORD MACNAGHTEN said ([1893] A.C. 698): 'The law relating to the rights of riparian proprietors is well settled. A riparian proprietor is entitled to have the water of the stream, on the banks of which his property lies, flow down as it has been accustomed to flow down to his property, subject to the ordinary use of the flowing water by upper proprietors, and to such further use, if any, on their part in connection with their property as may be reasonable under the circumstances. Every riparian proprietor is thus entitled to the water of his stream, in its natural flow, without sensible diminution or increase and without sensible alteration in its character or quality. Any invasion of this right causing actual damage or calculated to found a claim which may ripen into an adverse right entitles the party injured to the intervention of the court'."

It is obvious that a prohibition against making a "sensible alteration" in the character or quality of the water may impose a much greater burden on the electricity authority than an alteration which is liable merely to cause injury to fish. The plaintiff association is, in any case, not entitled to anything more than a protection of its rights to fish, a point, distinguishing its rights from those of the earl, which was, apparently, overlooked when the matter of the form of the injunction was discussed and settled. But counsel for the authority contended that, by reason of s. 36 and s. 37 of the Act of 1929 and the scheduled agreement which is there referred to, the earl has lost any riparian rights greater than the plaintiff association's rights to protect fishing. The scheduled agreement, which was also confirmed in s. 38 of the Act of 1929 was an agreement giving effect to an arrangement of this character, put briefly, that the power company, the predecessors of the authority, should be entitled to operate certain weirs and sluices, the property of the earl, in such a way that in dry weather they

would cause the banking up of a sufficient head of water to supply the requirements of the power company for their power station, and for that advantage they paid the earl a substantial sum of money. Counsel for the authority says, therefore, that, if the last words of s. 37 (2), "or as riparian owner or owners upon the river", mean what they appear to mean, then the proviso to s. 37 (1) becomes a complete nullity, because there would be no point in providing that the water should not be returned in such a condition as to injure fish. He also contended that the power to carry on the power station which formed the basis of the agreement (and which is expressly referred to in s. 36) necessarily involved some interference with the rights of the earl as riparian owner. On the other hand, counsel for the plaintiffs contended that the proviso to s. 37 (1) was for the protection of people who might have fishing rights, whatever might happen thereafter to the riparian rights owned by the earl. He further says that s. 37 (2) applies no less to s. 36 than to s. 37, and that, if, as counsel for the authority contends, the carrying on of the power station destroyed as a necessary consequence the riparian rights, or some of the riparian rights, of the earl, then there was no point whatever in adding these words at the end of s. 37 (2).

On the face of the language used in s. 37 (2), it is difficult to see any answer to the argument on construction put forward by counsel for the plaintiffs. After a specific reference to the rights of the earl as owner of the mills and weirs, the draftsman has inserted, in the widest possible terms, the words "or as riparian owner or owners upon the river". But the words of any clause in a statute, or in an agreement, have to be construed according to the properly admissible surrounding circumstances. What were the facts in 1929 when this Act was passed? We know that the land lying on the right bank of the river, which is now the property of the electricity authority, was then the property of the Earl of Harrington. In other words, the earl was a riparian owner immediately opposite the outfall from the power company's works. But beyond that there is no evidence. We do not know what the facts were as to the temperature of the water when it was discharged from the power station in 1929 and whether it could be said as a fact that the necessary consequence of having the power station operated on its present site must have been (and must have been known to have been) to cause some "sensible alteration" of the character and quality of the water, so that any view of the effect of this section other than that suggested by counsel for the authority would inevitably mean some derogation from the earl's grant in the scheduled deed. It is true that the earl sued as a riparian owner, but the main question in the action was in regard to the fishery, and in that matter the earl joined forces with the plaintiff association in his attack on the three defendants. Nor, indeed, so far as I understand, is it suggested that at the moment the earl is suffering from, or likely to suffer from, any damage to his riparian rights over and above anything that may be done to the fishery, nor has he made any specific complaint to that effect. In these circumstances, and having regard, in particular, to the fact that the injunction in its widest form could not be sustained on the part of the plaintiff association, it seems to me that the fair and just thing to do at the present time is to limit the present injunction in the way suggested so as only to prohibit the electricity authority from returning the water, after using it, in such a condition as to cause injury to fish, but to give to the earl (and to his successors in title) liberty to apply for a further injunction, if he should desire to contend, or if he can show, that in some other way some other of his riparian rights are being injuriously affected by the authority's activities. To that extent, therefore, the appeal on the part of the British Electricity Authority succeeds.

DENNING, L.J.: In submitting the appeal of the Derby Corporation, counsel urged that there was a difference between misfeasance and non-feasance.

He admitted that the corporation had been guilty of non-feasance because they had not enlarged their sewage works so as to cope with the increased population. But this, he said, did not give rise to an action at law, the only remedy being by complaint to the Minister of Local Government and Planning under the Public Health Acts. There is one decisive answer to that argument, and it is this. The distinction between misfeasance and non-feasance is valid only in the case of highways repairable by the public at large. A
It does not apply to any other branch of the law. I am well aware that in 1924, in *Hesketh v. Birmingham Corpn.* (10), SCRUTTON, L.J., said ([1924] 1 K.B. 271): "The general rule is that a local authority is liable for misfeasance but not for non-feasance". But when he said that, I fear that, for once, Homer nodded. It would, I think, be very unfortunate if the exemption for non-feasance was extended to local authorities generally. Even in highway cases, B
it has been said to be unsatisfactory: see *Swain v. Southern Ry. Co.* (14) ([1939] 2 All E.R. 807). It introduces distinctions so fine as to be scarcely perceptible: compare *Boorman v. Brown* (15) (3 Q.B. 526); and it is only to be explained on historical grounds. I tried to trace its history and its limits in a note I wrote in 1939 in the LAW QUARTERLY REVIEW, vol. 55, p. 343.

If we put highway cases on one side, there are innumerable cases to be found where public authorities have been held liable for non-feasance. Let me give just four instances over the centuries. In 1594 the parson at Quarleys in Hampshire was under a public duty to keep a common bull for the service of the cows of his parishioners. For three years he neglected to find a bull, and it was held that every inhabitant who had suffered damage was entitled to bring an action: see *Yielding v. Fay* (16). In 1828 the corporation of Lyme C
Regis were under a public duty to repair the sea wall. They failed to do it, and the sea came in and overran some cottages. It was argued that the corporation were not liable for non-feasance, but they were held liable by all the courts, and by the House of Lords: see *Henly v. Lyme Corpn.* (17) (5 Bing. 109). In 1900 the Portslade Urban District Council failed to clean out its sewers, and thus caused a nuisance to the plaintiff. It was held by this court that they D
were liable to an action: see *Baron v. Portslade Urban Council* (18). Finally, in 1938 the Islington Borough Council took over a disused tramway, but took no steps to rid the highway of the danger caused by the derelict tramlines, and they were held by this court to be liable for the consequent death of a cyclist in 1941: see *Simon v. Islington Borough Council* (19). The only cases, other E
than highway cases, where it has been suggested, at any rate in this court, that a local authority are exempt from liability for non-feasance are the F
Isleworth case (2), the *Dorking* case (4), the *Workington* case (9), and the *Birmingham* case (10), but those were all cases of a particular kind of non-feasance. They were cases where all that could be said against the local authority was that they had failed to carry out their statutory duty to drain their district, and, on the true construction of the statute, the remedy for that omission was not by action at law, but by complaint to the Local Government G
Board (whose functions were later transferred to the Minister of Health). Those four cases do not illustrate any general exemption for non-feasance, but only the rule that the question whether an action lies for breach of a statutory duty depends on the true construction of the statute. That appears clearly from the explanation which LORD ESHER, M.R., gave ([1897] 1 Q.B. 621) of H
the *Workington* case (9).

Once rid of the distinction between misfeasance and non-feasance, the case can be reduced to simple terms. The first question is: Have the plaintiffs a prima facie cause of action at common law? If so, the second question is: Have the defendants a defence by reason of statutory authority? In this case, negligence is not alleged. The only cause of action available to the plaintiffs is an action for nuisance. I pause here to say that I doubt whether the

doctrine of *Rylands v. Fletcher* (6) applies in all its strictness to cases where a local authority, acting under statutory authority, build sewers which afterwards overflow, or sewage disposal works which later pour out a polluting effluent, for the simple reason that the use of land for drainage purposes by the local authority is "such a use as is proper for the general benefit of the community", and is on that ground exempt from the rule in *Rylands v. Fletcher* (6): see *Rickards v. Lothian* (20), per LORD MOULTON ([1913] A.C. 280), approved by the House of Lords in *Read v. J. Lyons & Co., Ltd.* (21), per VISCOUNT SIMON ([1946] 2 All E.R. 475) and per LORD UTHWATT (*ibid.*, 484); and also on the ground of statutory authority: see *Hammond v. St. Pancras Vestry* (22) per BRETT, J. (L.R. 9 C.P. 322). But, although the plaintiffs may not be able to rely on the doctrine of *Rylands v. Fletcher* (6) as such, they have a perfectly good cause of action for nuisance if they can show that the defendants created or continued the cause of the trouble, and it must be remembered that a person may "continue" a nuisance by adopting it, or in some circumstances by omitting to remedy it: see *Sedleigh-Denfield v. O'Callaghan* (23).

This liability for nuisance has been applied in the past to sewage and drainage cases in this way. When a local authority take over or construct a sewage and drainage system which is adequate at the time to dispose of the sewage and surface water for their district, but which subsequently becomes inadequate owing to increased building which they cannot control, and for which they have no responsibility, they are not guilty of the ensuing nuisance. They obviously do not create it, nor do they continue it merely by doing nothing to enlarge or improve the system. The only remedy of the injured party is to complain to the Minister of Health. That was the position in the four "non-feasance" cases which I have mentioned. In the *Isleworth* case (2) and the *Dorking* case (4), the local authority had not themselves constructed the sewers. They had only taken them over from others, and done nothing. In the *Workington* case (9) and the *Birmingham* case (10), the local authority had themselves constructed a drainage system which was quite sufficient at the time, but later became inadequate through increased building which the local authority could not control. It is very different, however, when the local authority themselves do the increased building, or permit it to be done, because they are then themselves guilty of the nuisance. They know (or ought to know) that the increase in building will cause the existing sewers to overflow, and yet they allow it to go on without enlarging the capacity of the sewage system. By so doing, they themselves are helping to fill the system beyond its capacity, and are guilty of the nuisance. That is, I think, fully established by *Hawthorn Corpn. v. Kannuluik* (24) in the Privy Council (of which I have examined the record) and *Hanley v. Edinburgh Corpn.* (25) in the House of Lords. A moment's reflection will show that the four "non-feasance" cases have little or no application at the present day. In the nineteenth century local authorities had no authority over increased building. They did not build dwelling-houses themselves and could not control building by others, and anyone who built a house had a statutory right to connect it to the sewer. But in the last few years, the position has radically changed. The local authorities have built more houses than anyone else, and under the Town and Country Planning Acts they have full control over the building in their district. They cannot now disclaim responsibility for increased building. By building houses themselves or permitting others to build them, they become responsible for any nuisance that results from the sewage system, just as the corporations were responsible in the *Hawthorn* case (24) and the *Edinburgh* case (25).

It would not be right to found the decision in this case on that point, because no evidence was given of the building or planning activities of the Derby Corporation, but their responsibility is amply shown on other grounds. When

the increased sewage came into their sewage disposal works at Spondon, they took it under their charge, treated it in their works, and poured the effluent into the river Derwent, but their treatment of it was not successful in rendering it harmless. It was still noxious. Their act in pouring a polluting effluent into the river makes them guilty of nuisance. Even if they did not create the nuisance, they clearly adopted it within the principles laid down in *Sedleigh-Denfield v. O'Callaghan* (23), and they are liable for it at common law unless they can defend themselves by some statutory authority. A

Have they, then, any statutory authority to commit this nuisance? None at all. Like other local authorities, they had statutory authority to pour a harmless effluent into the river, but they had no authority to pour into the river an effluent which was noxious or polluting. That is made plain by s. 17 of the Public Health Act, 1875 (now s. 30 of the Public Health Act, 1936), s. 3 of the Rivers Pollution Prevention Act, 1876 (now s. 2 of the Rivers (Prevention of Pollution) Act, 1951), s. 109 and s. 113 of the Derby Corporation Act, 1901, and *Midwood & Co. v. Manchester Corpn.* (26). The corporation are, therefore, guilty of a nuisance, and are liable in damages to any riparian owner or fishery owner who has suffered damage by it. B

The remaining question is whether an injunction should be issued against them. Counsel for the corporation argued that an injunction should not issue. The corporation, he said, could not dam back the sewage because that "would cause a most frightful nuisance" to the inhabitants of Derby, and they could not extend their sewage disposal works because they were prohibited under the Defence (General) Regulations, 1939, reg. 56A, from doing so without the consent of the Minister of Works. These are strong reasons for suspending the injunction, but are no reasons for not granting it. The power of the courts to issue an injunction for nuisance has proved itself to be the best method so far devised of securing the cleanliness of our rivers, and in this connection it is significant that the law relating to nuisance has been expressly preserved by s. 11 (6) of the Rivers (Prevention of Pollution) Act, 1951. The issue of an injunction does not interfere with the power of the Minister to determine the proper order of priority of public works, but it does mean that, if these works are to be deferred, the court will want to know the reason why. Only an over-riding public interest will suffice. C D

One further point. It has, I believe, been suggested in some of these cases that the individual members of a corporation may themselves be liable to be committed for breach of an injunction. As to that, I would only say, with *BLACKBURN, J.* (L.R. 10 Exch. 95), in *Mill v. Hawker* (27) that, if it were necessary to decide that question, I should require time for consideration: see what was said by *KELLY, C.B.* (L.R. 9 Exch. 321) in *Mill v. Hawker* (27). A corporation can in these days be fined—it could not previously—or its property sequestered for breach of an injunction, but I would not wish to assert that individual members could be committed unless I was satisfied by authority that it could be done. I agree that the appeal of the Derby Corporation should be dismissed. E F

The appeal of the British Electricity Authority raises only two points of construction. It seems to me that the provision in s. 37 (1) of the Act of 1929 prescribes a standard for the effluent from the generating station. The used water, when returned into the river, must not, by its presence there, cause injury to fish. Section 37 (2) appears to me to be designed to protect the rights of the Earl of Harrington in regard to flow and quantity, but I doubt whether it entitles him to insist on a higher standard for the effluent than anyone else. If the effluent does not cause injury to fish in the river, he has not much cause for complaint. I think that the appeal of the authority should be allowed to the extent stated by the Master of the Rolls, and I agree with my Lord in the orders that he has proposed. G H

ROMER, L.J.: I also agree. Once it is conceded or established that the deplorable condition of the river Derwent below Borrowash Bridge is due in a substantial degree to the discharge of noxious material from the Derby Corporation's sewage works (and there can be no doubt whatever that such is the fact), then the corporation can escape liability only by showing that the nuisance which has arisen is the inevitable result of the performance by them of that which they are authorised by statute to do. In my judgment, there are two conclusive reasons why that defence cannot succeed. First, the works which the corporation were authorised (and, indeed, compelled) to construct and maintain under the Act of 1901 were not such as inevitably to result in a nuisance by pollution to anyone, and, moreover, no nuisance did, in fact, occur for years after the works were put into operation. It was not inevitable in 1901 that the population of Derby would substantially increase, and there is certainly no indication in the Act of 1901 that Parliament envisaged that it would or might increase beyond the capacity of the authorised works. If the population had remained static, or had increased only slightly, or (as was possible) had decreased, no question of a nuisance would ever have arisen. Secondly, on the construction which the Master of the Rolls has placed on s. 109 of the Act (and with which I entirely agree), it is impossible for the corporation to say that Parliament impliedly authorised them to create a nuisance, for it enacted in unmistakable language by that section that they were not to do so, and this intention of the legislature is fortified, if it needed fortification, by the references, in s. 113 of the Act of 1901, to the Rivers Pollution Prevention Act, 1876, and s. 17 of the Public Health Act, 1875, and see also s. 115 (15) of the Act of 1901. It appears plain to me, therefore, that the corporation have no statutory defence to the plaintiffs' action, and, as they have no other defence, the action must succeed.

I would like, however, to say a few words on the question whether an injunction should be granted against the corporation. It was strongly urged on HARMAN, J., and as forcibly urged on us, that the plaintiffs should be relegated to their right to damages, and that it was not right or proper that the court, in the exercise of its discretion, should enjoin the corporation against further continuing the nuisance which they are causing. Counsel for the corporation, in the course of his argument before us on this point, said that he was prepared, if necessary, to contend that no injunction should ever be granted against a local authority by reason of the public services which it is their duty to render. If this contention were to be accepted, the result would be to confer on local authorities a privilege which is enjoyed by no other section of the community, and which, so far as I am aware, has never been accorded by the courts to any person or body of persons since the equitable remedy of injunction was devised. For my part, I am quite unable to accept the contention, and can find no possible warrant for it. Anyone who creates an actionable nuisance is a wrongdoer, and the court will *prima facie* restrain him from persisting in his activities. If special circumstances be shown, the court may leave the injured party to his remedy in damages, but, in my judgment, the mere fact, in itself, that the wrongdoer is a local authority (however important) has never been, and ought not now to be, regarded as a circumstance of this character. Local authorities have great and important duties to discharge, and the court, in deciding what order it should make, would, undoubtedly, take those duties into consideration, and would no more make an order that was virtually impossible for an authority to perform than it would order a private individual to perform an act which it was not in his power to do. Accordingly, it would be quite wrong in the present case to grant an injunction against the Derby Corporation which was to take immediate effect, nor have the plaintiffs ever suggested that such an order should be made. Why, however, no injunction should be granted at all—with the result that the plaintiffs would be compelled to bring one action

after another for damages in the future—I am wholly at a loss to see. The proper course to adopt (and one which has been adopted on innumerable occasions in the past) is that which was taken by HARMAN, J., and which my Lord has indicated, namely, to grant an injunction, but to suspend its operation for a reasonable time with liberty to the defendants to apply for a further suspension in the event of circumstances rendering it necessary for such an application to be made. It would be as well, however, for the members of the corporation to bear very clearly in their minds that a further suspension of the injunction will by no means be granted automatically, but only on their satisfying the judge (and the onus will be wholly on them) that they have in all sincerity done all that is reasonably within their power to remedy the grievous injury which they are inflicting on the plaintiffs, but that, notwithstanding their efforts, they have been unable to comply fully with the order which has been made against them. In my view, therefore, the appeal of the Derby Corporation fails. As to the appeal of the British Electricity Authority, I entirely agree with what the Master of the Rolls has said, and with the order which he has proposed.

Appeal of Derby Corporation dismissed. Appeal of British Electricity Authority allowed in part.

Solicitors: *Sharpe, Pritchard & Co.*, agents for *E. H. Nichols*, town clerk, Derby (for Derby Corporation); *R. A. Finn* (for British Electricity Authority); *Marchant, Gerrish & Newington* (for the plaintiffs); *Linklaters & Paines* (for British Celanese, Ltd.).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

R. v. ROGERS.

[COURT OF CRIMINAL APPEAL (Lord Goddard, C.J., Hilbery and Hallett, JJ.), December 17, 1952.]

Criminal Law—Sentence—Corrective training—Preventive detention—Supervision—Previous convictions—"Previous occasions"—Criminal Justice Act, 1948 (c. 58), s. 21 (1) (b), s. 21 (2) (b), s. 22 (1) (a).

Criminal Law—Sentence—Supervision—Order not made by court of trial per incuriam—Inclusion in sentence by Court of Criminal Appeal.

Before a court can pass a sentence of preventive detention under the Criminal Justice Act, 1948, s. 21 (2), it must be proved (s. 21 (2) (b)) that the offender has been "convicted on indictment on at least three previous occasions". A "previous occasion" within the sub-section means a separate occasion at a separate assizes or quarter sessions. The same construction is to be put on the similar words in s. 21 (1) (b) (relating to corrective training) and in s. 22 (1) (a) (relating to supervision of the offender after discharge from prison). Summary convictions for the purposes of s. 21 (1) (b) are on separate occasions if they take place on different days.

Where a supervision order under s. 22 (1) has not been made by the court of trial per incuriam the Court of Criminal Appeal may alter the sentence imposed to include such an order.

FOR THE CRIMINAL JUSTICE ACT, 1948, s. 21 (1), (2), s. 22, see HALSBURY'S STATUTES, Second Edn., Vol. 28, pp. 371-373.

APPEAL against a sentence of eight years' imprisonment passed at Dorset Quarter Sessions on the conviction of the appellant on charges of housebreaking and larceny.

Elam for the appellant.

Buzzard for the Crown.

LORD GODDARD, C.J., delivered the following judgment of the court. The appellant was convicted at Dorset Quarter Sessions of housebreaking and

A larceny, and, he being a man with a very bad record and it being shown that he was really incorrigible (because on the very day he had been put on probation he committed the offences for which he was before the quarter sessions) he was regarded as a very fit person for preventive detention, but the learned deputy chairman saw a difficulty because the three previous convictions, notice of which had been served on him, consisted of a conviction at Wiltshire Quarter Sessions and two convictions before the Dorset Sessions which took place at the same sessions on the same day. The learned deputy chairman said that he was not satisfied that he had jurisdiction to pass a sentence of preventive detention because the Criminal Justice Act, 1948, s. 21 (2) (b), provides that, before that can be done, the offender must have "been convicted on indictment on at least three previous occasions", and there had not been such three previous convictions unless the two convictions that took place at Dorset Sessions on the same day, which were on two counts of the same indictment, could be regarded as two separate occasions.

B The court gave leave to appeal because, though we had no doubt that the sentence which the sessions passed (a sentence of eight years in the aggregate) was in the circumstances right in point of time, it was obvious that a matter of great importance was raised because these circumstances might easily arise again at any assizes or quarter sessions, and, therefore, we gave leave to appeal so that we could consider what is the meaning of the words "at least three previous occasions". Do they mean at least three separate appearances before a court, or do they mean three different convictions of which separate records of conviction can be drawn up? In other words, if a man has appeared before, let us say, the Central Criminal Court in the January sessions and has there pleaded Guilty either to an indictment containing three counts or to three separate indictments all at the same sessions, has he been convicted on three previous occasions so that, if he subsequently commits an offence, he can be sent to preventive detention?

C The Criminal Justice Act, 1948, uses practically the same expression in two other places—in s. 21 (1) (b) and in s. 22 (1) (a). Section 21 (1) deals with corrective training, and provides, among other things, that an offender must have been convicted "on at least two previous occasions . . . of offences punishable on indictment with [a sentence of imprisonment]", but on those occasions he need not have been convicted on indictment. Section 22 (1) provides:

F "Where a person is convicted on indictment of an offence punishable with imprisonment for a term of two years or more and that person—
(a) has been convicted on at least two previous occasions of offences for which he was sentenced to Borstal training or imprisonment . . ."

G an order under that section shall be made requiring him to report when he comes out of prison. So there are at least three places where the words "previous occasions" are used, and, in the opinion of the court, the same interpretation must be put on those words where they appear in s. 21 (1) (b), relating to corrective training, and in s. 22 (1) (a), relating to notice to report, as the court puts on them in regard to s. 21 (2) (b), dealing with preventive detention. It is obvious that where you find an expression like "previous occasions" being used twice in one section and once in the following section, H the same construction must be put on it.

The object of preventive detention is the protection of the public by keeping an offender who is liable to it in detention for a long period. If a person is sentenced at assizes for two or three offences, the court always aggregates those offences, and says in effect either: "You will have five years on count 1 and three years on count 2 concurrent, in which case you will serve five years", or, if it does not think that is sufficient: "You will have five years on the first count and three years on the second count consecutive, which means you

will serve eight years ". Is it, therefore, to be said that when he is sentenced to five years and to three years, he is being sentenced on two separate occasions whereas if he is sentenced to five years alone he is being sentenced on one occasion only ? The point is that if he shows that the sentences he receives at that court and two other courts do not deter him from committing crime, he is to be liable to preventive detention.

Therefore, the court is of opinion that we must construe these words " on at least three [or " two "] previous occasions ", as meaning that each occasion is a separate occasion, that is to say, the convictions referred to are convictions at different sessions or assizes, and two or more convictions at the same sessions or assizes will not rank as separate occasions. I think that, on the whole, that is giving effect to the intention of the Act. A

The only difference with regard to the provision relating to corrective training in s. 21 (1) (b) is that in those cases summary convictions count if they are of offences which would be punishable with imprisonment for a term of two years or more. In our view, there is a conviction on a separate occasion on each occasion when a court of summary jurisdiction adjudicates on an information. If the offender is dealt with for two offences in, say, the month of April, he will only have been convicted on one occasion if that is done at the same court, but if he appears on separate informations twice in the same month, but at courts held at an interval, he will then be convicted on two occasions. For these reasons we think that the learned deputy chairman was right in holding that the appellant was not eligible for preventive detention, and we see no reason to alter the sentence. B C

The only other thing I have to say is that we mentioned in giving leave to appeal that the deputy chairman had not said in passing sentence that there would be an order for supervision under s. 22 (1). That matter has been considered in this court before now. Where it appears, when a case comes up on appeal, that an order has not been made *per incuriam*, we find no difficulty in saying that the sentence will be altered to that extent. In this case, the appellant has leave to appeal against sentence and so clearly we can do this, but in a case where an appellant has not appealed against sentence we have called attention to the fact that the order can be made because the statute is mandatory that the order shall be made unless, having regard to the circumstances, the court refrains from making it. I think also we may say that, if, when the governor of the gaol receives the prisoner in custody or the return signed by the clerk of the peace, he finds, in a case in which the section would operate, that an order has not been made, there is no objection to his applying to the clerk of assize or the clerk of the peace to find out whether the order has not been made *per incuriam*—whether it was omitted because the court forgot to make it or the clerk of the peace forgot to record it. The governor is entitled to call the court's attention to it. D E F

Appeal dismissed.

Solicitors: Registrar of Court of Criminal Appeal; Director of Public Prosecutions. G

[Reported by G. A. KIDNER, Esq., Barrister-at-Law.]

VAUGHAN v. VAUGHAN.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Denning and Romer, L.JJ.),
December 18, 1952.]

Licence—Licence to occupy premises—Revocation—Deserted wife in occupation of matrimonial home—Dissolution of marriage—Length of notice to deliver up possession.

Husband and Wife—Deserted wife in occupation of husband's dwelling-house—Dissolution of marriage—Revocation of licence to occupy premises—Length of notice to deliver up possession.

The husband was the owner of a dwelling-house which was the former matrimonial home of the parties. In 1948 he deserted the wife, leaving her in the house and saying that she could "always live there". On June 19, 1950, the wife obtained a decree of divorce on the ground of the husband's adultery. By letter dated Mar. 11, 1952, the husband purported to determine the licence of the wife to remain in the house. On a claim by the husband for possession of the house,

HELD: after the dissolution of the marriage the wife could not assert a continuing right to remain in occupation of the former matrimonial home unless she could set up some kind of contract; the husband's statement and the subsequent conduct of the parties could amount to no more than that the wife was entitled to remain in occupation as a bare licensee of the husband under a licence which was revocable; but after revocation of the licence the wife must be given reasonable time to remove herself and her belongings from the premises, and, in the circumstances six months was reasonable.

PER SIR RAYMOND EVERSLED, M.R.: I did not intend to lay it down in *Foster v. Robinson* ([1950] 2 All E.R. 346) that, where a promise has been made which is not contractual in form or effect and that promise has been acted on, then and without more a right is given to the promisee to go on enjoying the subject-matter of the promise indefinitely.

PER DENNING, L.J.: A contractual licence by the husband giving the wife the right to stay in the house for the rest of her life . . . would be a "post-nuptial settlement" within the jurisdiction of the Divorce Court which could then decide whether or not the husband should get possession and, if so, on what terms.

AS TO LICENCES, see HALSBURY, Hailsham Edn., Vol. 20, pp. 8-13, paras. 5-8; and FOR CASES, see DIGEST, Replacement Vol. 30, pp. 526-550, Nos. 1635-1830.

Cases referred to:

- (1) *Bendall v. McWhirter*, [1952] 1 All E.R. 1307; [1952] 2 Q.B. 466.
- (2) *Errington v. Errington*, [1952] 1 All E.R. 149; [1952] 1 K.B. 290.
- (3) *Foster v. Robinson*, [1950] 2 All E.R. 342; [1951] 1 K.B. 149; 31 Digest, Replacement, 697, 7888.
- (4) *Winter Garden Theatre (London), Ltd. v. Millennium Productions, Ltd.*, [1947] 2 All E.R. 331; [1948] A.C. 173; [1947] L.J.R. 1422; 177 L.T. 349; 2nd Digest Supp.
- (5) *Smith v. Smith*, [1945] 1 All E.R. 584; 114 L.J.P. 30; 173 L.T. 8; 27 Digest, Replacement, 647, 6101.
- (6) *Gunner v. Gunner & Stirling*, [1948] 2 All E.R. 771; [1949] P. 77; [1948] L.J.R. 1904; 27 Digest, Replacement, 647, 6102.
- (7) *Halpern v. Halpern*, [1951] 1 All E.R. 315; [1951] P. 204; 27 Digest, Replacement, 648, 6106.
- (8) *Dillwyn v. Llewelyn*, (1862), 4 De G.F. & J. 517; 31 L.J.Ch. 658; 6 L.T. 878; 45 E.R. 1285; 25 Digest 538, 264.

- (9) *Plimmer v. Wellington Corpn.*, (1884), 9 App. Cas. 699; 53 L.J.P.C. 105; 51 L.T. 475; 11 Digest 123b.
- (10) *Bennett v. Bennett*, [1952] 1 All E.R. 413; [1952] 1 K.B. 249.
- (11) *Minister of Health v. Bellotti*, [1944] 1 All E.R. 238; [1944] K.B. 298; 113 L.J.K.B. 436; 170 L.T. 146; 30 Digest, Replacement, 540, 1747.

APPEAL by the husband from a decision of His Honour JUDGE EMLYN JONES, sitting at the Birkenhead County court, dated Nov. 3, 1942.

F. D. Paterson for the husband (plaintiff).

W. G. O. Morgan for the wife (defendant).

SIR RAYMOND EVERSLED, M.R.: This appeal raises, in a somewhat different form from that in which it has appeared in other recent cases, a problem concerning the occupation of the former matrimonial home by a former wife. I emphasise those last three words, "a former wife", because it is important to note that the marriage between the husband (the plaintiff in the action) and the wife was dissolved on the wife's petition on June 19, 1950. Whatever may have been her rights as regards the matrimonial home before that date, thenceforward any rights she can assert to remain in occupation of the former matrimonial home must rest on some other basis than that of her being the wife of the proprietor of the premises.

The facts, so far as it is necessary to state them, are these. No. 65, Grosvenor Road, Birkenhead, is a house belonging to the husband. For some time before February, 1948, that house was the matrimonial home of the husband and wife. They had been married for some twenty-one years, but whether they lived there during all that time is not in evidence. On Feb. 10, 1948, the husband deserted his wife, leaving her in the house. According to the findings of the learned judge, who in this regard accepted the evidence given to him by the wife, at the time of the desertion the husband told his wife that she could "always live there"—that is, at 65, Grosvenor Road. In January, 1949, the wife took proceedings for judicial separation, but on June 19, 1950, she obtained a decree on the ground of her husband's adultery. By the present proceedings the husband seeks to obtain an order for possession of the house. The learned county court judge refused to make the order on the ground that the statement or promise made by the husband to the wife, which I have mentioned, gave her a right, as a licensee, under a licence not revocable by the husband, to continue, and continue indefinitely, in the premises. That view was based on certain observations of DENNING, L.J., in *Bendall v. McWhirter* (1), and *Errington v. Errington* (2) where reference was also made ([1952] 1 All E.R. 155) to certain observations of mine in *Foster v. Robinson* (3).

In my judgment, and without trying to expound this subject to any greater degree than is necessary to decide this case, the wife cannot, now that the marriage has been dissolved, assert a continuing right to remain in occupation of this house unless she can set up some kind of contract. I do not need to pursue the question whether there should be a good consideration, but there must be something contractual—that is, a promise made, intended to have and having contractual effect. When reference is made to this statement of the husband's and regard is had to the time at which it was made, it seems to me impossible to suppose that what the husband said could have been meant or intended by him or understood by her to have had any contractual basis or effect. Nothing, be it observed, was said at all about paying rent or rates or about repairs. Without more, it seems to me impossible to suppose that the husband intended to bind himself so that the wife was entitled, for the whole of her life, come what may, to remain in occupation of the house—I suppose on terms that her husband would provide the rent and the rates and, possibly, money for repairs also. If that is right, then this statement made by the husband and the subsequent conduct of the parties, which is consistent

A with the statement originally made, can amount to no more than that the wife was entitled to remain in occupation as a bare licensee of her then husband as the proprietor of the premises. If that view is right, the licence was clearly revocable. Being revocable, and having, in fact, been revoked, either by notice (which, I understand, was given in March, 1952), or, failing all else, by the issue of a summons, the only question remaining is: What length of time ought to be allowed for the wife to remove herself from the premises? It is well settled that, though a licence may be revoked, the licensee is not
B instantaneously turned into a trespasser; he or she must be given time, reasonable in all the circumstances, in which to remove himself or herself and his or her belongings from the land in respect of which the licence operated. On that matter I have been much assisted by the suggestion of counsel for the husband, for he said that he would not object to four to six months being
C allowed to the wife. I take the larger period, for I think that, though it is generous, it is also not unreasonable, bearing in mind the length of time during which she has occupied the house.

One other thing only I need say. *Foster v. Robinson* (3) was a somewhat special case. Possession was sought, not against the person who had, as it was said, become a licensee of the premises, but against his daughter. Shortly
C after the end of the first world war the plaintiff took over the management of a farm and let a cottage near by to a man who worked on the farm at a rent of £3 5s. a half-year. Later, the plaintiff let the farm, but the tenant of the cottage continued to work till, in 1946, he became unfit to do so by reason of age and infirmity. The plaintiff then told him that the existing
D tenancy would cease, but that he could live at the cottage rent free till he died. The tenant accepted that offer and lived in the cottage without paying rent till he died. The defendant, his daughter, had lived in the cottage for nine years, and, on her father's death, she took out letters of administration of his estate and claimed to remain on at the cottage paying the old rent. In proceedings by the plaintiff to recover possession, it was held that the plaintiff
E was entitled to possession on the ground that the original tenancy had, as a result of the arrangement in 1946, been surrendered by operation of law. The court was not concerned with the question whether the former tenant could enforce the promise made to remain rent-free at the cottage. It is, no doubt, true that the pre-existing tenancy could only come to an end if its place were taken by something else. Certain findings of fact had been made
F by the county court judge. I observe from the judgment of SINGLETON, L.J. ([1950] 2 All E.R. 350), that the county court judge had found that from May, 1946, until his death the father was a licensee, paying no rent, but entitled to remain in the cottage for the rest of his life. The passage from my own judgment on which reliance was placed in the court below is this (*ibid.*, 346):

G "Since the recent decision in *Winter Garden Theatre (London), Ltd. v. Millennium Productions, Ltd.* (4) I think that, although a licence of that kind may, apart from the terms of the contract, be revoked, it may now be taken that, if the landlord, having made that arrangement, sought to revoke it, he would be restrained by the court from so doing. Thus, the result is arrived at that Mr. Robinson was entitled as licensee to occupy the cottage without charge for the rest of his days, and he did so. I prefer
H that analysis of the case."

I did not intend to lay it down in that passage that, where a promise has been made which is not contractual in form or effect and that promise has been acted on, then and without more a right is given to the promisee to go on enjoying the subject-matter of the promise indefinitely. I have thought it right to make that explanation because I think the county court judge in the present case may have thought that the words of mine which I have read did lead to such a conclusion; that though there was in the present case nothing

contractual, still, the promise having been made, the wife was entitled to assert it as a defence to any proceedings by her former husband to recover possession of his premises notwithstanding that he had in the meantime revoked the licence. In my opinion, the defence which was set up is not available to the wife, and I think this appeal must be allowed, and I think that the proper order will be that the wife should be required to deliver up possession by June 24, 1953.

DENNING, L.J.: The county court judge seems to have thought that there was a contractual licence by the husband giving the wife the right to stay in the house for the rest of her life. If such a contractual licence were established, I would agree that the husband's claim should be dismissed, but I would like to say that, in that event, the contractual licence would be a "post-nuptial settlement" within the jurisdiction of the Divorce Court which could then decide whether or not the husband should get possession and, if so, on what terms, for, as I understand the law on this matter, when a husband makes a continuing provision for the future needs of his wife, in her character as a wife, which is still continuing when the marriage is dissolved, the provision is a "settlement" which can be brought before the court to see whether it should continue now that she has ceased to be a wife: see *Smith v. Smith* (5); *Gunner v. Gunner & Stirling* (6); *Halpern v. Halpern* (7).

The difficulty here is to see that a contractual licence was established. To establish a contractual licence there must be a promise which is intended to be binding and is either supported by consideration or is intended to be acted on and is, in fact, acted on: see *Dillwyn v. Llewelyn* (8) and *Plimmer v. Wellington Corpn.* (9). In this case I cannot interpret the promise as one which was intended to create legal relations for life. It simply expressed in words the authority which the court would presume if nothing was said, namely, that the wife had authority to stay in the house in her capacity as a wife during the marriage. It is one of the familiar cases where the express authority is co-extensive with the presumed authority and, like it, comes to an end by death or divorce: see *Bendall v. McWhirter* (1) ([1952] 1 All E.R. 1311). The result is that the wife's right to stay in the house came to an end when she divorced her husband. She ought to have protected her position by taking steps in the divorce proceedings before decree absolute. She ought to have applied in those proceedings for maintenance, and then have come to an arrangement with her husband whereby he agreed not to turn her out of the house except by an order of the court and she in return agreed to accept a reduced sum for maintenance so long as she lived in the house. Such an arrangement would, undoubtedly, be sanctioned by the Divorce Court on or after making the decree and thus become binding: *Bennett v. Bennett* (10). The wife here, unfortunately, did not protect her position in that way, and on the decree absolute she became simply a licensee with a revocable licence to stay in the house. She could not, however, be turned out at once. She was entitled to have a reasonable time to make her arrangements, and what is a reasonable time depends on all the circumstances of the case: see *Minister of Health v. Bellotti* (11). Regard must, therefore, be had to the history of the marriage, to the fact that these persons had been married for twenty-one years when the husband deserted the wife and later committed adultery, and also to the question whether any alternative accommodation was available for the wife. Any difficulty about fixing a reasonable time in this case was, however, solved when counsel for the husband said that he was prepared to allow the wife another six months. That gives her time to go to the Divorce Court and get the maintenance increased up to a sum sufficient for her to live in comparable comfort somewhere else. I agree that the appeal should be allowed and an order made for possession on June 24, 1953.

ROMER, L.J.: I agree. If a wife is to establish a contractual right to continue to reside indefinitely in the former matrimonial home after the

dissolution of the marriage, it seems to me that she would have to have much more material at her disposal than the wife has here, because all sorts of things would have to be considered as incidental to that right. SIR RAYMOND EVERSHERD, M.R., mentioned the question of repairs and rates, which would be material matters for consideration and agreement. Then there is the question whether or not the wife's right should continue after her re-marriage, the question whether she should have powers, and, if so, what powers, of sub-
 A letting or assigning, and the further question whether, supposing she went abroad for three or four years, she would be entitled to resume possession on her return. All sorts of considerations of that kind would have to be considered as preliminary to the granting of a right to remain in possession of the former home. It is not suggested that any of these matters were considered between the parties in the present case. Further, it seems to me that, if the position of the wife
 B in this case was as her counsel suggested it was, the result would be that (subject only to the arrangement being embodied in a written instrument) the wife would have the powers of a tenant for life under the Settled Land Act, 1925, and could sell the premises. I am sure that no such conception was present to the minds of either party in the present case. I am satisfied that the wife is not entitled to the right which she is claiming, and I am unable,
 C therefore, to agree with the learned judge when he said that the husband was precluded from asserting his legal right as owner. I think the position is as SIR RAYMOND EVERSHERD, M.R., has indicated, and that, subject to reasonable notice being given, the wife must leave the premises.

Appeal allowed.

D Solicitors: *Field, Roscoe & Co.*, agents for *Berkson & Berkson*, Birkenhead (for the plaintiff); *George A. Herbert*, agent for *E. A. Simans*, Birkenhead (for the defendant).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

MORGAN AND ANOTHER v. GRAY AND OTHERS.

[CHANCERY DIVISION (Danckwerts, J.), December 19, 1952.]

Company—Shareholder—Bankruptcy—Right to vote.

F The authorised share capital of a company was £100 divided into shares of £1 each, of which A. and B., the only directors, held fifty each. A. was adjudicated bankrupt, and under the articles of association of the company he became disqualified from being a director. B. appointed his wife a director in place of A., and it became necessary for her, under
 G art. 18 of the company's articles, to acquire, as qualification, at least fifty shares. A meeting of the company was called, notice being given to A.'s trustee in bankruptcy, and was attended, for the purpose of voting, both by A. and a representative of the trustee each of whom in the alter-
 H native tendered proxies. The proxies were refused by B., who declared that there was no quorum present, and, in accordance with the articles, adjourned the meeting for one week. At the adjourned meeting, at which proxies were again tendered on behalf of A. and his trustee, the proxies being once more refused by B., B., as the only member present, passed a resolution, inter alia, deleting art. 18. A. and the trustee sought to restrain the company from acting on the resolution.

HELD: there being no provision in the company's articles or in the Companies Acts to the contrary, as A. remained on the register of shareholders, notwithstanding his bankruptcy he was entitled to attend the meetings of the company and to vote in person or by proxy, and, therefore, the resolution was invalid, and an injunction would be granted.

AS TO EFFECT OF BANKRUPTCY OF SHAREHOLDER, see HALSBURY, 1949 Edn., Vol. 5, pp. 285, 293, 300, paras. 492, 503, 514; and FOR CASES, see DIGEST, Vol. 9, pp. 410, 411, Nos. 2636-2643.

Cases referred to:

- (1) *Wise v. Lansdell*, [1921] 1 Ch. 420; 90 L.J.Ch. 178; 124 L.T. 502; 9 Digest 410, 2638.
- (2) *Motion v. Moojen*, (1872), L.R. 14 Eq. 202; 41 L.J.Ch. 596; *subsequent proceedings, sub nom. Re Motion, Maule v. Davis*, 9 Ch. App. 192; 5 Digest 998, 8142.
- (3) *Re Cape Breton Co.*, (1881), 19 Ch.D. 77; 51 L.J.Ch. 202; 45 L.T. 395; 4 Digest 178, 1651.

MOTION for an injunction restraining the defendants in the action from acting on a resolution which a meeting of the members of British Ethical Proprietaries, Ltd., purported to pass on Sept. 5, 1952, amending the company's articles of association, or on a resolution which a meeting of members purported to pass on Oct. 25, 1952, appointing the second-named defendant a director of the company. The parties agreed to treat the hearing as the trial of the action.

Harold Lightman for the plaintiffs, Seamus Brendan Morgan, and his trustee in bankruptcy.

Harold Christie, Q.C., and *G. B. Parker* for the defendants, Lionel Arthur Gray, Mabel Muriel Gray, and British Ethical Proprietaries, Ltd.

DANCKWERTS, J.: This is a motion in an action brought by Seamus Brendan Morgan and the trustee of his property in bankruptcy against Lionel Arthur Gray and his wife, Mabel Muriel Gray, who claim to be directors of the defendant company, British Ethical Proprietaries, Ltd. The notice of motion asks for an injunction to restrain the defendants from acting in pursuance of resolutions claimed to have been passed at certain meetings of the company which the plaintiffs say were not properly constituted.

The company has a share capital of £100, and originally fifty shares of £1 each were issued to Mr. Morgan, and fifty to another member, who in 1951 transferred his shares to the first defendant, Mr. Gray. On Apr. 30, 1952, Mr. Morgan was adjudicated a bankrupt, and thereupon he became disqualified to be a director, but, possibly, he resigned his post as director on the preceding day, Apr. 29, 1952. On Aug. 6, 1952, Mr. Gray appointed Mrs. Gray to be an additional director to fill the vacancy left by Mr. Morgan's disappearance from the board. Under the articles as they stood Mrs. Gray would have to acquire fifty shares, which, in effect, would have meant acquiring Mr. Morgan's fifty shares, within two months of her appointment as director, otherwise she would cease to be qualified. A meeting was called of the company for Aug. 29, 1952. At that meeting, Mr. Gray acted as chairman. Mr. Morgan and a representative of his trustee in bankruptcy attended the meeting for the purpose of voting and tendered proxies, but Mr. Gray refused to accept their proxies. He declared that there was not a quorum, the company's articles calling for a quorum of two holding sixty per cent. of the capital, and he adjourned the meeting after half an hour until Sept. 5, 1952. On Sept. 5, 1952, proxies were tendered again on behalf of Mr. Morgan and his trustee and were refused by Mr. Gray as chairman, and, after waiting half an hour, the chairman acted on the footing that the member present, being himself only, constituted a quorum and proceeded to pass a resolution altering the articles of the company by deleting art. 16 and art. 18. The effect of deleting art. 18 would be to remove the requirement that a director should hold fifty shares. On Oct. 18, 1952, the annual general meeting of the company was held, pursuant to a notice dated Sept. 26, 1952, which was sent to the trustee in bankruptcy. At the meeting, Mr. Gray was again tendered forms of proxy from the trustee in bankruptcy and Mr. Morgan, and disallowed the proxies. Mr. Morgan was not present in person

at that meeting. After half an hour, the same result followed as at the previous meeting, it being declared that there was not a quorum, and the meeting was adjourned. On Oct. 25, 1952, the adjourned meeting was held and Mrs. Gray was elected a director of the company. The annual accounts were dealt with at that meeting.

A It is claimed on behalf of the plaintiffs that, as Mr. Morgan remained on the register of the company at all these material dates, he was entitled to vote at those meetings, and his vote in person when he was present, and his proxies which would have been available if he or his representatives had been allowed to demand a poll, were improperly disallowed, and, therefore, the resolutions were not properly passed. The articles of the company provide, by art. 7:

B “No person shall be recognised by the company as holding any share upon any trust, and the company shall not be bound by or recognise any equitable, contingent, future or partial interest in any share or any interest in any fractional part of a share, or (except only as by these presents otherwise expressly provided) any other right in respect of any share except an absolute right to the entirety thereof in the registered holder.”

C Article 9 provides:

“No business shall be transacted at any general meeting unless a quorum of members is present at the time when the meeting proceeds to business. Two members present in person or by proxy and holding between them not less than sixty per cent. of the issued share capital shall be a quorum.”

D By art. 13:

“The chairman shall have no second or casting vote.”

By art. 14:

“A poll demanded shall be taken forthwith.”

By art. 16:

E “Unless and until otherwise determined by the company in general meeting, the number of the directors shall be two. The first directors of the company shall be James Devane and Seamus Brendan Morgan who shall be life directors, and they shall hold office until they respectively die or resign (subject to art. 23) and they shall not be liable to retire by rotation.”

F By art. 18:

“The qualification of a director shall be the holding of at least fifty shares in the company of the aggregate nominal value of at least £50, and it shall be his duty to comply with the provisions of s. 141 of the Companies Act, 1929. A director may act before acquiring his qualification.”

G Under art. 23 a director who becomes bankrupt is disqualified. Table A of the Companies Act, 1929, is incorporated with the exception of the articles which are excluded, and among those which are excluded is art. 45. Article 22 of Table A of the Companies Act, 1929, provides:

H “A person becoming entitled to a share by reason of the death or bankruptcy of the holder shall be entitled to the same dividends and other advantages to which he would be entitled if he were the registered holder of the share, except that he shall not, before being registered as a member in respect of the share, be entitled in respect of it to exercise any right conferred by membership in relation to meetings of the company.”

Article 46 is important, because under that article the chairman purported to act:

“If within half an hour from the time appointed for the meeting a quorum is not present, the meeting, if convened upon the requisition of members, shall be dissolved; in any other case it shall stand adjourned

to the same day in the next week, at the same time and place, and if at the adjourned meeting a quorum is not present within half an hour from the time appointed for the meeting the members present shall be a quorum."

Article 54 provides:

"On a show of hands every member present in person shall have one vote.

On a poll every member shall have one vote for each share of which he is the holder."

Under art. 78 and art. 79 an additional director can be appointed to fill a vacancy. Article 106 provides:

"A notice may be given by the company to the persons entitled to a share in consequence of the death or bankruptcy of a member by sending it through the post in a prepaid letter addressed to them by name, or by the title of representatives of the deceased, or trustee of the bankrupt, or by any like description, at the address, if any, within the United Kingdom supplied for the purpose by the persons claiming to be so entitled, or (until such an address has been so supplied) by giving the notice in any manner in which the same might have been given if the death or bankruptcy had not occurred."

By art. 107:

"Notice of every general meeting shall be given in some manner hereinbefore authorised to (a) every member except those members who (having no registered address within the United Kingdom) have not supplied to the company an address within the United Kingdom for the giving of notices to them, and also to (b) every person entitled to a share in consequence of the death or bankruptcy of a member, who, but for his death or bankruptcy, would be entitled to receive notice of the meeting. No other persons shall be entitled to receive notices of general meetings."

It appears, therefore, that the company would be justified in sending notice of a general meeting to the persons who became entitled in consequence of the bankruptcy of a member, and, by inference, in place of the member who had become a bankrupt.

It is curious that the question has never been decided, so far as can be ascertained, whether, in spite of his bankruptcy, a member of the company who remains a registered proprietor of shares on the company's register can continue to vote. It is, no doubt, the case that, if he can vote, he must exercise those votes in accordance with the direction of the persons beneficially entitled to the shares, which in the present case would be his trustee in bankruptcy, because the beneficial interest in his shares would have vested in the trustee. I am referred by counsel for the plaintiffs to *Wise v. Lansdell* (1), in which ASTBURY, J., treats the bankrupt member still on the register as entitled to vote. The circumstances were somewhat different in that case, since the persons who were entitled to direct the votes were mortgagees, and the equity of redemption in the shares in question had been disclaimed by the trustee. Consequently, so far as the trustee was concerned, he had no further interest in the shares, and in fact the bankrupt was a trustee for the mortgagees.

Counsel for the defendants relied on two cases. *Motion v. Moojen* (2) did not seem to me to affect the matter very much. It merely depended on the general principle that a bankrupt cannot sue, but an action can be brought by the trustee in bankruptcy. Of more interest, perhaps, was *Re Cape Breton Co.* (3). There, in the case of a company in liquidation, it was held that the bankrupt was not a contributory, and, therefore, was a stranger to the company, and could not interfere in regard to the administration of the company's affairs in its liquidation. It seems to me that that case has nothing to do with the present one, because there was in the Companies Act, 1862, s. 77, a provision

similar to that which is now to be found in the Companies Act, 1948, s. 216, in these terms:

“ If a contributory becomes bankrupt, either before or after he has been placed on the list of contributories,—(a) his trustee in bankruptcy shall represent him for all the purposes of the winding-up, and shall be a contributory accordingly, and may be called on to admit to proof against the estate of the bankrupt, or otherwise to allow to be paid out of his assets in due course of law, any money due from the bankrupt in respect of his liability to contribute to the assets of the company . . . ”

Those words are very strong. It is plain that the trustee in bankruptcy is the contributory and the bankrupt is not, and, therefore, it follows that the bankrupt has no status in the winding-up of the company and cannot be allowed to interfere. That, however, is very different from the position where the company is still in operation and the bankrupt remains the registered proprietor on the company's register of the shares which he formerly owned beneficially as well as legally. It seems to me that, unless there is some provision in the company's articles or in the Companies Acts which empowers me to say that the bankrupt is no longer a member of the company, and, therefore, is, expressly, unable to vote, I must come to the conclusion that he remains a member as long as he is on the register, notwithstanding that, by taking steps under the appropriate provisions, the trustee in bankruptcy may be able to secure registration of himself as the proprietor of the shares. Unless and until that is done, and so long as the bankrupt remains on the register of the company, he remains a member in respect of those shares, and is entitled to exercise the votes which are attributed to that status, notwithstanding that he has no longer any beneficial interest in the shares and that the company is entitled to pay any dividends to his trustee in bankruptcy.

It seems to me, therefore, that at all material times in the present case the person who was the proprietor of the fifty shares not held by Mr. Gray was Mr. Morgan, and Mr. Morgan was entitled to attend the meetings of the company, whether or not he was entitled to demand that notices of general meetings should be sent to him and not to his trustee in bankruptcy. If he attended, as long as he was on the register he was entitled to vote, and as long as he was on the register he was entitled to give proxies for somebody else to vote on his behalf. Accordingly, it seems to me, in the result the resolutions on which the defendants rely should not have been passed.

Injunction granted.

Solicitors: *McKenna & Co.* (for the plaintiffs); *Stafford Clark & Co.* (for the defendants).

[*Reported by R. D. H. OSBORNE, Esq., Barrister-at-Law.*]

THE HANS HOTH.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Willmer, J.), October 29, 30, 1952.]

Shipping—Collision—Limitation of liability—Actual fault or privity of owner—Local traffic signals ignored—Compulsory pilot on board.

Harbour—Pilot—Compulsory pilot—Responsibility of shipowner—Local traffic signals ignored.

On matters of local knowledge, such as local signals, a master, exercising ordinary and reasonable care, is entitled to rely on the guidance which he obtains from the local pilot.

Entrance to and exit from Dover Harbour was controlled by signals exhibited from a mast ashore. On May 14, 1951, the m.v. Hans Hoth arrived off Dover and took on a compulsory pilot in order to enter the harbour. A signal was exhibited denoting that a vessel (s.s. Halladale) was leaving harbour and that no vessel was to approach so as to obstruct the entrance. The pilot did not see the signal, and he proceeded to take the Hans Hoth into harbour. The master, who was on the bridge, saw the signal, but he did not ascertain its meaning in the official publication nor did he draw the pilot's attention to it. At the entrance to the harbour the Hans Hoth collided with the Halladale, which suffered damage. The owners of the Hans Hoth admitted liability. On a claim by the master, as one of the owners of the Hans Hoth, for a declaration of limitation of liability,

Held: the question of signals directing traffic was a matter of purely local knowledge, on which a master, exercising ordinary and reasonable care, was entitled to rely for guidance on the local pilot, and, therefore, the master was entitled to the declaration claimed.

The Tactician ([1907] P. 244), and *S.S. Alexander Shukoff v. S.S. Gothland, S.S. Larenberg v. S.S. Gothland* ([1921] 1 A.C. 216), distinguished.

AS TO LIMITATION OF LIABILITY OF OWNERS AND OTHERS, see HALSBURY, Hailsham Edn., Vol. 30, pp. 940-946, paras. 1303-1311; and FOR CASES, see DIGEST, Vol. 41, pp. 914-927, Nos. 8058-8167.

Cases referred to:

(1) *Asiatic Petroleum Co., Ltd. v. Lennard's Carrying Co., Ltd.*, [1914] 1 K.B. 419; 83 L.J.K.B. 861; 109 L.T. 433; *affd.* H.L., *sub nom. Lennard's Carrying Co., Ltd. v. Asiatic Petroleum Co., Ltd.*, [1915] A.C. 705; 84 L.J.K.B. 1281; 113 L.T. 195; 41 Digest 418, 2616.

(2) *The Tactician*, [1907] P. 244; 76 L.J.P. 80; 97 L.T. 621; 41 Digest 902, 7951.

(3) *S.S. Alexander Shukoff v. S.S. Gothland, S.S. Larenberg v. S.S. Gothland*, [1921] 1 A.C. 216; 90 L.J.P. 51; 124 L.T. 355; 41 Digest 902, 7948.

ACTION by the plaintiffs, owners of the German motor vessel, Hans Hoth, for a declaration of limitation of liability arising out of a collision between the said motor vessel and s.s. Halladale on May 14, 1951.

The Hans Hoth carried a crew of nine and her engines were controlled directly from the bridge. On May 14, 1951, she arrived off the entrance to Dover Harbour in daylight, in fine, clear weather, and exhibited the appropriate signal requesting a pilot, whose presence on board a ship entering the harbour was compulsory. A pilot duly put off in a boat and proceeded on board. There was only one entrance to the harbour in use, and admission to, and exit from, it was controlled by visual signals exhibited from a mast near the southern extremity of the eastern arm of the breakwater. On the occasion in question the signal three red balls in a triangle was being shown, denoting:

"A vessel is leaving the harbour, and no vessel is to approach so as to obstruct the entrance whilst this signal is shown."

The pilot failed to see the signal and proceeded to take the Hans Hoth into harbour, ordering the engines "full speed ahead". The master, who was one of the plaintiffs, was on the bridge at the engine control and he saw the signal. He knew from the chart and from what he described as a "sailor's handbook" that signals were exhibited at Dover to control traffic, but he did not refer to the official German publication to see what this particular signal meant. The Halladale was first seen at the entrance to the harbour approaching on a crossing course, broad on the starboard bow and at close quarters, and, although the Hans Hoth altered course to port and the Halladale to starboard, the two ships collided.

The plaintiffs, who were the three owners of the Hans Hoth, admitted liability for the collision. The defendants conceded that two of the plaintiffs were entitled to the decree sought, but said that the third plaintiff, who was acting as master, was not entitled to a decree on the ground that he was on the bridge and in command and that the collision occurred with his actual fault and/or privity. On behalf of the defendants, it was contended (i) that the master failed to post a proper look-out or to see that the pilot received such assistance as he was entitled to expect in the matter of look-out; and (ii) that the master failed to acquaint himself with the signals beforehand, and to draw the pilot's attention to the fact that he was taking the vessel into harbour against the signals. On the first contention WILLMER, J., found on the facts in favour of the plaintiffs and this report deals only with his finding on the second contention.

Adams, Q.C., and *Hene* for the plaintiffs.

Carpmael, Q.C., and *J. B. Hewson* for the defendants.

WILLMER, J.: In cross-examination the master said:

"We had all the proper books on board. It was my duty, as master, to see that we had them on board. The books were supplied so that I might consult them as necessary. I agree I ought to consult them when going to a port which I have not been to before."

Later, he said:

"My duty, as master, is to study the official book."

He then explained that the "sailor's handbook" referred him to the official book, which, he says, he did not consult. He then went on to say:

"I agree it was my duty to learn what the signals were."

By way of defence, or in mitigation of the offence he was admitting, he said:

"Sometimes signals are changed. The pilot would then tell me what the signals are. Since in this case the pilot was on board, I did not look at the book any more."

Towards the end of his cross-examination, he came back to the point again, and said:

"If I had read in the book and knew about the three red balls signal, I would have said to the pilot: 'Are they the right signals?' I would have asked him: 'Are they stopping us going in?' That is what ought to have happened. It did not happen. It was not only my fault. You have to think that the pilot knows the regulations. I should have known about the signals. I ought to have known about them."

Those answers, bearing in mind where the onus of proof lies in a limitation action, certainly did not make the case any easier for the plaintiffs. It is, nevertheless, argued that, when a local pilot is engaged, a master cannot be under any sort of duty to know all the local signals for himself, or to do anything other than trust his pilot in such a matter of local knowledge. I

think it is fair, in that connection, that I should refer to some answers which the pilot himself gave in reply to questions which I put to him. He said:

"I did not expect any assistance beyond what I got. It was the usual thing. I do not blame anyone else for my failure."

Therefore, the pilot was not in any way trying to place a share of the blame on the master for not checking him with regard to the signals.

I think I have said enough now to make it clear that, without question, A there was some omission on the part of the master. He himself admitted that omission. I thought that the contention of counsel for the plaintiffs was well founded when he submitted that, following what BUCKLEY, L.J., said in *Asiatic Petroleum Co., Ltd. v. Lennard's Carrying Co., Ltd.* (1), the test is blameworthiness. I think it may be useful to read the relevant passage from BUCKLEY, L.J.'s judgment in that case, and I merely remark, in passing, that, B although that case went to the House of Lords, nothing, so far as I know, was said by any of their Lordships to cast any doubt on the accuracy of the following statement of principle enunciated by BUCKLEY, L.J. ([1914] 1 K.B. 432):

"The words 'actual fault or privity' in my judgment infer something C personal to the owner, something blameworthy in him, as distinguished from constructive fault or privity such as the fault or privity of his servants or agents. But the words 'actual fault' are not confined to affirmative or positive acts by way of fault. If the owner be guilty of an act of omission D to do something which he ought to have done, he is no less guilty of an 'actual fault' than if the act had been one of commission. To avail himself of the statutory defence, he must show that he himself is not blameworthy for having either done or omitted to do something or been privy to something. It is not necessary to show knowledge. If he has means of knowledge which he ought to have used and does not avail himself of them, his omission so to do may be a fault, and, if so, it is an actual fault and he cannot claim the protection of the section."

E It will be seen, as I have said, that BUCKLEY, L.J., there makes the test one of blameworthiness. What constitutes blame is that which would impart a legal liability. It seems to me, therefore, that I have to view the master's conduct in relation to these signals in the same way as I would view it if he were being sued for negligence for his part in relation thereto. The test is whether he failed in his duty to exercise that ordinary and reasonable care which is to F be expected of an ordinarily competent master of a vessel of this class in these circumstances. Again, I must stress that I bear in mind throughout that in a limitation action it is for the plaintiff to satisfy me that he has exercised that degree of care.

G I was pressed with a number of authorities in which the duties of a master in relation to the pilot have been considered. It is well known that those cases mostly arose in connection with the old defence of compulsory pilotage, which in recent years has no longer been available, but, so long as it existed, that defence led to a number of interesting and important decisions on the functions of pilot, master, and crew respectively. I propose to refer to two of the cases cited, which, I think, contain short statements of the principle relied on here on behalf of the defendants. The first of those cases is *The Tactician* (2). I desire H to refer to a short passage in the judgment of LORD ALVERSTONE, C.J., sitting in the Court of Appeal. LORD ALVERSTONE dealt, first, with the danger of divided command and the risks which might be caused by undue interference by the master with the pilot's conduct, and he went on ([1907] P. 250):

"But side by side with that principle is the other principle that the pilot is entitled to the fullest assistance of a competent master and crew, of a competent look-out, and a well-found ship. I agree with the appellants'

counsel that the cases in which the master has to interfere at all with the pilot very rarely occur, but I think the passages they have cited from the cases show that there is, or may be, a distinction between interference and bringing to the pilot's notice anything which the pilot ought to know. The pilot has a good many things to attend to, particularly in a place like the Thames, and certainly it is not putting the case too high to say that he is entitled to full information with regard to any surrounding fact which it is important that he should know."

The other case to which I ought to refer shortly, which contains a similar statement of principle, is *S.S. Alexander Shukoff v. S.S. Gothland, S.S. Larenberg v. S.S. Gothland* (3). There, again, the defence of compulsory pilotage was under discussion—this time in the House of Lords. In the course of the case, LORD BIRKENHEAD, L.C., referring to the question of responsibility in relation to compulsory pilotage, said ([1921] 1 A.C. 223):

" . . . this rule, which is intended as a measure of security, does not mean, and must not be taken to mean, that a pilot when once he is in charge of a vessel is so circumstanced that the master and crew owe him no duty to inform him of circumstances which, whether he has noticed them himself or not, are material for him to know in directing the navigation of the vessel. The master and crew are not mere passengers when a pilot is on board by compulsion of law. The pilot is entitled to their assistance, and to apply the defence of compulsory pilotage to a case where the accident would have been averted if such assistance had been given, though in fact it was not, would defeat the policy which has created the defence, and so far from increasing the safety of navigation would actually increase its risks."

Those are two striking passages, and there are others, both in the same cases and in other cases to which I was referred, where similar statements of principle were made which go to show that there is, undoubtedly, a duty on the part of the master and crew of a vessel towards the pilot.

It is contended that the same principle applies here to impose a duty on this master in relation to the signals at Dover Harbour, that is to say, it is contended that he ought to have known what the signals were, and, knowing what they were, ought to have drawn the attention of the pilot to them. I have to consider that forceful argument very carefully, but I think it is right to say that, in my judgment, there is a distinction to be drawn between the cases

which have been cited in support of the defendants' proposition and the facts of this case. *The Tactician* (2), *The Alexander Shukoff* (3), and the other cases where the duty of the master and crew were similarly stressed were cases dealing with their duty to draw the pilot's attention to such things as lights of other vessels, that is to say, matters of ordinary navigation within the competence of any seaman and quite apart from any question of local knowledge. Here, on the other hand, the omission relied on is solely in relation to a piece of local knowledge, on which the pilot would ordinarily have been expected to be himself an authority. Because a pilot is entitled to the assistance of the master and crew in relation to matters such as the observation of lights of other vessels, sound signals, and so on, it does not in the least follow, to my mind, that the same duty necessarily arises in relation to matters of purely local knowledge, such as the signals with which we are concerned in this case—i.e., the signals exhibited by the local harbour authority. It appears to me that it is a question of what standard one ought to exact from a master of ordinary skill, exercising reasonable care.

I think I am right in saying that in the course of the argument both counsel agreed that it was a matter on which it would be proper that I should consult the Elder Brethren. I have, therefore, consulted them, to ascertain their view as to what could reasonably be expected of a competent master, exercising

reasonable care in circumstances such as those of the present case. In putting my question to the Elder Brethren I invited them to assume that they were in command of a British vessel, of the size of the *Hans Hoth*, which was in the process of visiting a foreign port where it was known that local signals directing traffic were in existence. I asked the Elder Brethren whether, in such circumstances, they would regard it as being a part of their duty in the ordinary way to check the observations of the pilot with regard to such matters as local signals, and so forth. Their advice to me was that they would not regard that as being part of the ordinary duty of a competent master exercising ordinary care. They point out that, if one were to impose that sort of duty on a master visiting a strange or foreign port, it is difficult to see where the duty would stop. If it is right that a master visiting Dover from abroad ought to know the significance of a signal of three red balls in a triangle exhibited at the entrance to the harbour, and ought to be ready to warn the pilot if he is going against that signal, it would be equally right that he should know the significance of all the other local signals which he might encounter in that port. One can, perhaps, test it, as the Elder Brethren invited me to test it, by imagining how much a foreign master visiting the River Thames would have to know, if he were to be prepared to check the pilot. As is well known, the Port of London Authority issues a handbook of local bye-laws which gives descriptions of local lights, signals, and so forth. All those are matters which a local pilot knows, and must know, as part of his ordinary stock-in-trade. The Elder Brethren advise me that one could not reasonably expect any ordinarily competent master, when visiting a foreign port, to know all that sort of thing, or to be ready to check the pilot in relation to what is no more than a question of local knowledge.

Having received that advice, it only remains for me to say that I unhesitatingly accept it. Not only do I attach great importance to such advice coming from such a quarter, but I am bound to add that the advice which I have received accords with my own idea of the common sense of the matter. In my judgment, it would be putting too much on a master and would be asking him to exercise more than ordinary care, to regard him as being under a duty to know all the local signals when he has a pilot on board, or to expect him to be ready to query the pilot's actions in relation to such local signals. In my judgment, on such matters of purely local knowledge, a master exercising ordinary and reasonable care is entitled to rely on the guidance which he obtains from the local pilot. After all, it is for the reason that he has this local knowledge, and for no other reason, that the ship is required by Act of Parliament to take a pilot. One must further remember, as was pointed out by the master himself when he was giving his evidence, that, even if the master of a ship visiting a strange port does take the trouble to read in advance from some official publication what the local signals are at the port he is to visit, it does not follow that when he gets there he will not find that the signals have been changed overnight by some edict of the responsible harbour authority. I have come to the conclusion that, the omission of the master here being in relation to something of purely local significance, this case is to be distinguished in principle from cases such as *The Tactician* (2) and the other cases to which I was referred. I am satisfied that the plaintiff master cannot be held to be blameworthy in the sense in which I understand *BUCKLEY, L.J.*, to be using that word in *Asiatic Petroleum Co., Ltd. v. Lennard's Carrying Co., Ltd.* (1). It follows, therefore, that the plaintiffs have, although not without difficulty, succeeded in establishing to my satisfaction that this collision occurred without their actual fault or privity. In my judgment, they are entitled to the relief claimed.

Judgment for plaintiffs.

Solicitors: *Bentleys, Stokes & Lowless* (for the plaintiffs); *Ingledeu, Brown, Bennison & Garrett* (for the defendants).

[Reported by A. T. HOOLAHAN, ESQ., Barrister-at-Law.]

Re PERREYMAN (deceased). NATIONAL PROVINCIAL BANK,
LTD. v. PERREYMAN AND OTHERS.

[CHANCERY DIVISION (Danckwerts, J.), November 26, 1952.]

National Health Service—Hospital—Gift of share of residue—“To any three hospitals in . . . Devon which . . . are most in need of it”—“Need” of hospitals vested in Minister of Health—National Health Service Act, 1946 (c. 81), s. 54 (1), (2).

By his will, dated Mar. 20, 1941, the testator, who died on Sept. 3, 1948, appointed the plaintiff bank as his executor and trustee and gave his residuary estate to the bank on trust to pay one-half thereof to a certain hospital and to divide and pay the other half “to any three hospitals in the county of Devon which in the opinion of the bank are most in need of it and in such proportions as the bank deem most suitable”. On July 5, 1948, under the National Health Service Act, 1946, s. 6, the hospitals in Devon vested in the Minister of Health. By s. 52 (1) of the Act any expenses incurred by the Minister in the exercise of his functions under the Act are to be defrayed out of moneys provided by Parliament, and s. 54 (1) provides for payment to the regional hospital boards, out of moneys provided by Parliament, of such sums as may be necessary to defray the expenditure of the board, being expenditure approved by the Minister in the manner prescribed by regulations made under the Act. In an affidavit sworn on Aug. 8, 1952, on behalf of the South Western Regional Hospital Board, who were responsible for all hospitals in Devon which vested in the Minister under the Act of 1946, the secretary of the board stated that there were considerable differences between the hospitals in their standards of efficiency and upkeep, and, consequently, in their financial needs; that, though this difference had been mitigated to some extent since July 5, 1948, it had not been abolished, as the annual grants made by the Exchequer to the board for capital expenditure were insufficient to bring the hospitals in the lower categories up to the standard of those which were efficient; and that, owing to shortage of funds, the progress of hospital development and improvement, designed to produce an equal standard of efficiency as between different hospitals, was necessarily slow and the existing inequalities were certain to persist for a long period.

HELD: as the Exchequer was unable, at present, to provide sufficient funds for all the needs of the hospitals so as to enable every hospital vested in the Minister of Health to maintain a proper standard, hospitals vested in the Minister could be in need of funds additional to those provided by Parliament, and, therefore, they were objects of the discretionary trust contained in the will and were entitled to benefit thereunder.

FOR THE NATIONAL HEALTH SERVICE ACT, 1946, s. 52 and s. 54, see HALSBURY'S STATUTES, Second Edn., Vol. 15, pp. 385, 386.

ADJOURNED SUMMONS to determine, inter alia, whether on the true construction of the will of Richard Charlie Perreyman, who died on Sept. 3, 1948, any hospitals now vested in the Minister of Health by virtue of the National Health Service Act, 1946, were objects of a discretionary trust, conferred on the plaintiff bank, the trustee of the will, to pay a moiety of the testator's residue “to any three hospitals in the county of Devon which . . . are most in need of it”.

Rink for the plaintiff bank.

M. Browne for the first, second and third defendants, interested under an intestacy.

Denys B. Buckley for the South Western Regional Hospital Board and the Attorney-General.

DANCKWERTS, J.: By his will, dated Mar. 20, 1941, the testator, Richard Charlie Perreyman, appointed the plaintiff bank to be the executor and trustee thereof. He gave his residuary estate to the bank on the usual trusts for sale and conversion, and, after giving thereout certain pecuniary legacies, he directed the bank to pay one-half of the residue to Brixham Cottage Hospital for the general purposes thereof and

“ . . . to retain the other half upon trust to divide and pay the same to any three hospitals in the county of Devon which in the opinion of the bank are most in need of it and in such proportions as the bank deem most suitable.”

The testator died on Sept. 3, 1948, and, therefore, his will came into operation shortly after the National Health Service Act, 1946, came into effect on July 5, 1948. The question is whether any of the hospitals which vested in the Minister of Health under s. 6 of the Act are qualified to take under the terms of the discretionary trust regarding the second moiety of the testator's residuary estate.

Section 3 (1) of the Act of 1946 provides:

“ As from the appointed day, it shall be the duty of the Minister to provide throughout England and Wales, to such extent as he considers necessary to meet all reasonable requirements, accommodation and services of the following descriptions, that is to say:—(a) hospital accommodation; (b) medical, nursing and other services required at or for the purposes of hospitals; (c) the services of specialists . . . and any accommodation and services provided under this section are in this Act referred to as ‘ hospital and specialist services ’.”

Section 7 provides:

“ (4) All endowments of a voluntary hospital to which [s. 6] applies . . . being endowments held immediately before the appointed day, shall on that day be transferred to and vest in the Minister by virtue of this Act free of any trust existing immediately before that day; and the Minister shall establish a fund, to be called the Hospital Endowments Fund, to which he shall transfer all such endowments . . . (5) Regulations shall provide . . . (b) for enabling the Minister to apply, to such extent as may be prescribed, the assets of the fund for discharging any liabilities transferred to him under [s. 6] in connection with the transfer of such a voluntary hospital as is mentioned in [s. 7 (4)], or transferred to him under this section; (c) subject to any provision for the discharge of such liabilities, for apportioning the capital value of the fund among the several regional hospital boards and hospital management committees constituted under the following provisions of this Part of this Act, in such shares as may be determined by the Minister in the prescribed manner, and for distributing the income of the fund to those boards and committees proportionately to those shares; (d) for enabling the Minister, on the application of a regional hospital board or hospital management committee, to transfer to that board or committee for such purposes as may be approved by the Minister any part of the capital assets of the fund not exceeding in value the said share of that board or committee, and for reducing that share accordingly. (6) Subject to such general conditions as may be prescribed, any income received by a regional hospital board or hospital management committee under the last foregoing sub-section may be used for such purposes relating to hospital services, or to the functions of the board or committee under this Part of this Act with respect to research, as the board or committee thinks fit. (7) Every board of governors and hospital management committee shall, in the case of any endowment transferred to them under this section, and the Minister shall, in the case of any

endowment transferred to him and the Hospital Endowments Fund under this section, secure, so far as is reasonably practicable, that the objects of the endowment and the observance of any conditions attaching thereto, including in particular conditions intended to preserve the memory of any person or class of persons, are not prejudiced by the provisions of this section."

A Section 52 provides:

"(1) Any expenses incurred by the Minister in the exercise of his functions under this Act . . . shall be defrayed out of moneys provided by Parliament. (2) All sums received by the Minister under this Act, except sums required to be transferred to the Hospital Endowments Fund, shall be paid into the Exchequer."

B Section 54 provides:

"(1) There shall be paid out of moneys provided by Parliament to—
C (a) every regional hospital board such sums as may be necessary to defray the expenditure of the board (including expenditure incurred by a hospital management committee in exercising functions on behalf of the board), being expenditure approved by the Minister in the prescribed manner; (b) every board of governors of a teaching hospital such sums as may be necessary to defray the expenditure of the board being expenditure approved as aforesaid. (2) All expenditure of a hospital management committee approved as aforesaid shall be defrayed by the regional hospital board for the area in which the hospital or group of hospitals in question is situated . . .
D (6) Payments made under this section shall be made in accordance with regulations made by the Minister and approved by the Treasury, and shall be made at such times and in such manner as the Treasury may direct, and subject to such conditions as to records, certificates, or otherwise [as] the Minister may with the approval of the Treasury determine."

E Counsel for the next-of-kin submitted that, by reason of the provisions of the Act of 1946, the onus was on the Minister of Health to show that any of the hospitals vested in him were in need. He further contended that, as money was provided by Parliament to defray the needs of these hospitals, it could not possibly be said that they were "in need of" money left by the testator. This, no doubt, might be a valid argument if the funds provided by the
F Exchequer were unlimited so as to satisfy, beyond question of any possible need, whatever demands were made by the hospitals. But that this is not the case is shown by the affidavit of Mr. Carter, secretary of the South Western Regional Hospital Board, who are responsible for all hospitals in Devon which became vested in the Minister of Health under the Act of 1946. In his affidavit, which was sworn on Aug. 8, 1952, Mr. Carter says:

G "When the said hospitals became vested in the Minister on July 5, 1948, there were very considerable differences between them in their standards of efficiency and upkeep and consequently in their financial need . . . Some of them were well administered and equipped, and others were deficient in these respects . . . The difference in standards . . . has been to some extent mitigated since the appointed day, but it has not
H been wholly abolished, for the reason that the annual grants made by the Exchequer to the board for capital expenditure are insufficient . . . to bring the hospitals in the lower categories up to the standard of those which are most up-to-date and efficient . . . Owing, therefore, to shortage of funds, the progress of hospital developments and improvements, designed to produce an equal standard of efficiency as between different hospitals, is necessarily slow, and the existing inequalities are certain to persist for a very long period . . ."

Mr. Carter then specifies the hospitals in Devon which, in his opinion, are in the greatest need of help. It is thus clear that, at present, the Exchequer is unable to provide sufficient funds for all the needs of the hospitals so as to enable every hospital vested in the Minister of Health to maintain a proper standard. Therefore, it is not correct to say that none of the hospitals vested in the Minister is in need of funds additional to those provided by Parliament. Accordingly, hospitals vested in the Minister are within the terms of the discretionary trust contained in the will and are entitled to benefit thereunder.

A

Order accordingly.

Solicitors: *White & Leonard*, agents for *Parsons & Outfin*, Brixham (for the plaintiffs and the first, second and third defendants); *Peacock & Goddard*, agents for *Bevan, Hancock & Co.*, Bristol (for the South Western Regional Hospital Board); *Treasury Solicitor*.

[*Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.*]

B

PAULEY v. KENALDO, LTD.

[QUEEN'S BENCH DIVISION (Birkett, L.J., sitting as a judge of the Division), November 17, 18, December 18, 1952.]

C

Master and Servant—Wages—Regulation—Catering worker—Cloak-room attendant—Absence of control over manner of doing work—No contract of service Remuneration by tips—No “employment in undertaking”—“Deemed to be employed”—Catering Wages Act, 1943 (c. 24), s. 1 (2), (4).

The defendants, who were restaurant proprietors, entered into an oral agreement with the plaintiff under which she was to act as cloak-room and toilet attendant at their restaurant. She was to clean the cloak-room and toilet accommodation, for which she was supplied with the materials. She was given certain hours of work, but was not required to “clock in” like the other workers at the restaurant and she provided a substitute at her own expense when taking an evening off. She received no wages, but she kept all tips and was provided with certain meals. The defendants informed her that she was self-employed, and she stamped her insurance cards as a self-employed person. She paid no income tax under the “P.A.Y.E.” scheme. In an action by her to recover the minimum wages which she alleged were payable to her by virtue of s. 1 (2) and (4) of the Catering Wages Act, 1943, and the Wages Regulation (Licensed Residential Establishment and Licensed Restaurant) Order, 1949, sched. I, para. 2,

D

HELD: (i) as the defendants were unable to control the manner in which the plaintiff's work was done there was no contract of service between them, and

(ii) the plaintiff was not “employed” by the defendants within the meaning of s. 1 (2) of the Act of 1943, since “employed in any undertaking” in that sub-section did not mean merely “working in” the undertaking, but

E

F

(iii) the plaintiff was a worker who performed work in pursuance of an express arrangement made by her by way of trade with the defendants who were carrying on their restaurant undertaking for the purpose of that undertaking, and was, therefore, “deemed to be employed” within the meaning of s. 1 (4) of the Catering Wages Act, 1943, and was entitled to be paid the minimum wages prescribed under that Act and the order of 1949.

G

H

Dictum of LORD HEWART, C.J., in *Skinner v. Jack Breach, Ltd.* ([1927] 2 K.B. 225), applied.

FOR THE CATERING WAGES ACT, 1943, s. 1, see HALSBURY'S STATUTES, Second Edn., Vol. 9, p. 104.

Cases referred to:

- (1) *Re Winter German Opera, Ltd.*, (1907), 23 T.L.R. 662; 42 Digest 909, 58.
- (2) *Gould v. Minister of National Insurance*, [1951] 1 All E.R. 368; [1951] 1 K.B. 731; 2nd Digest Supp.
- (3) *Short v. Henderson, Ltd.*, (1946), 115 L.J.P.C. 41; 174 L.T. 417; 39 B.W.C.C. 62; 2nd Digest Supp.
- A (4) *Skinner v. Jack Breach, Ltd.*, [1927] 2 K.B. 220; 96 L.J.K.B. 834; 136 L.T. 726; 91 J.P. 109; 44 Digest 1302, 71.

ACTION for the recovery of alleged arrears of wages.

B The plaintiff was a cloak-room attendant, and, in June, 1949, on the introduction of an employment agency, she entered into an oral agreement with the defendants, proprietors of the "96" Restaurant, Piccadilly, London, to act as a cloak-room and toilet attendant at the restaurant. Under the agreement she was to do the cleaning of the cloak-room and toilets, all materials being supplied by the defendants, and she was given certain hours of work, but she did not have to "clock in" like other workers at the restaurant and she never asked for a "clocking in" card. She was to receive no wages, but she was to be allowed to keep all tips and was to have certain free meals. When taking an evening off each week she was to provide and remunerate a suitable substitute, and in her discretion, without asking for the approval of the defendants, she employed the wife of one of the waiters at the restaurant, this woman being remunerated with the tips for the evening. No provision was made as to employment cards, insurance cards, payment of income tax by "P.A.Y.E.", or the use of the staff entrance, but the plaintiff was informed D that she was not being employed by the defendants as one of their servants but was self-employed and "on her own". She stamped her insurance cards with 5s. 1d. stamps as a self-employed person after a refusal by the defendants' secretary to stamp them. She paid no income tax. On July 7, 1950, she was given notice to leave on July 14.

E The plaintiff contended that she was at all material times a worker to whom the provisions of the Catering Wages Act, 1943, applied, and, therefore, for whom "statutory minimum remuneration for employment" had been fixed by the Wages Regulation (Licensed Residential Establishment and Licensed Restaurant) Order, 1949, the minimum rate for a cloak-room and toilet attendant being set out in para. 2 of sched. I, and that she was employed by the defendants as a cloak-room and toilet attendant either under a contract F of service made orally between the parties in June, 1949, within the meaning of s. 1 (2) of the Act of 1943, or, in the alternative, that she was to be "deemed to be employed" by them under s. 1 (4) of the Act. The defendants contended that the Act and the regulations had no application to the plaintiff, that there was no contract of service between the parties, and that s. 1 (2) and (4) of the Act did not enable her to say that she was employed or "deemed to be G employed" within the meaning of those sub-sections.

P. M. O'Connor for the plaintiff.

Winn for the defendants.

Cur. adv. vult.

H Dec. 18. BIRKETT, L.J., read a judgment in which he stated the facts and continued: The first question I have to decide is whether the plaintiff was a worker employed in the defendants' undertaking. The Catering Wages Act, 1943, is described as:

"An Act to make provision for regulating the remuneration and conditions of employment of catering and other workers and, in connection therewith, for their health and welfare and the general improvement and development of the industries in which they are employed."

Section 1 of the Act provides:

"(1) The Minister of Labour and National Service . . . shall establish a commission, to be called the Catering Wages Commission . . . to perform, in relation to the workers to whom this Act applies and their employers, such functions as are entrusted to the commission by this Act . . . (2) The workers to whom this Act applies are all persons employed in any undertaking, or any part of an undertaking, which consists wholly or mainly in the carrying on (whether for profit or not) of one or more of the following activities, that is to say, the supply of food or drink for immediate consumption, the provision of living accommodation for guests or lodgers or for persons employed in the undertaking and any other activity so far as it is incidental or ancillary to any such activity as aforesaid of the undertaking."

It is said, first, on the plaintiff's behalf that she was so employed under a contract of service made orally in June, 1949. This is a question of fact, as WARRINGTON, J., said in *Re Winter German Opera, Ltd.* (1) (23 T.L.R. 662) where he said that

" . . . the question in this and similar cases must turn upon the particular facts of each particular case, and the authority of other cases, and particularly of cases based upon different statutes, was of very little assistance."

Much point is given to this observation by a glance at STROUD'S JUDICIAL DICTIONARY, 3rd ed., vol. 2, pp. 943-949, where a bewildering array of decisions on various statutes is set out, and the construction of the word "employment" is dealt with.

In *Gould v. Minister of National Insurance* (2) ORMEROD, J., says ([1951] 1 All E.R. 371):

"It is easy in some cases to say that the contract is a contract of service and in others that it is a contract for services, but between these two extremes there is a large number of cases where the line is much more difficult to draw. Although the authority of cases based on different statutes may be of very little assistance in deciding any particular case, it is possible to extract from these authorities a common principle on which the decisions are founded. It is clear that the real question is one of the degree of control exercised by the person employing the artist, and this, as I see it, means not only the amount of control but the nature of that control and the direction in which it is exercised. In *Short v. Henderson, Ltd.* (3), a case in the House of Lords under the Workmen's Compensation Acts, LORD THANKERTON (115 L.J.P.C. 47) recapitulates with approval the four indicia of a contract of service derived by the Lord Justice-Clerk from the authorities referred to by him. These are: (a) the master's power of selection of his servant; (b) the payment of wages or other remuneration; (c) the master's right to control the method of doing the work; and (d) the master's right of suspension or dismissal. He goes on to say that the particular requirement of a contract of service is the right of the master in some reasonable sense to control the method of doing the work, and that this factor of superintendence and control has frequently been treated as critical and decisive of the legal quality of the relationship."

In the case now before me the defendants selected the plaintiff. There was remuneration solely by tips (and, of course, a person may be none the less a servant by reason of the fact that his remuneration consists solely of tips). The defendants could suspend or dismiss the plaintiff, but, in my opinion, they did not control the manner in which the work should be done. The plaintiff was not obliged to "clock in" as the other workers were. She stamped her own card as a self-employed person within s. 1 (2) (a) (b) of the National

Insurance Act, 1946. She could stay away when she pleased and provide and pay for a substitute or an assistant, and, though the defendants required the work to be done, they did not control the manner in which it was to be done. I have come to the conclusion on all the facts of this case that there was no contract of service between the plaintiff and the defendants, and that it was well understood between them that the plaintiff was a self-employed person, and I do not accept the evidence of the plaintiff when she says otherwise.

A For the space of a year she appears to have been quite content, and with good reason. I was given no reliable evidence of the amount which she received in tips, for she kept no accounts and paid no income tax. There was no P.A.Y.E. card as in the case of other workers, and, while she told me that the amount she received was about £7 per week, from certain other information she gave and from the evidence about banquets and other special occasions, I incline

B to the view that she received more than this. It would appear to me that the union took up this matter as a question of principle, and the fact that the plaintiff, as I think, was remunerated on a handsome scale by the tips she received must not obscure the point of principle to be determined.

It was then said on behalf of the plaintiff that, if she was not employed under a contract of service, the meaning of the word "employed" in s. 1 (2) of the Act was merely that of "working in", and the section should, therefore,

C be read as: "The workers to whom this Act applies are all persons working in any undertaking". I cannot accept this contention, for it seems to me that, if that interpretation is to be put on the words, it is a strange thing that Parliament did not use the words "working in" instead of the word "employed". I think, therefore, that the plaintiff fails to bring herself

D within s. 1 (2) of the Act.

The application of s. 1 (4) seems to me to be the substantial question in the case. It reads:

"For the purposes of this Act, any worker who, for the purposes of any undertaking or part of an undertaking performs any work in pursuance of an arrangement express or implied, made by the worker by way of trade with the persons carrying on that undertaking shall be deemed to be employed by them in that undertaking or part."

If the Act is looked at as a whole, it is plain that the intention is to provide a complete code for the catering industry so far as conditions of work and remuneration are concerned. The Catering Wages Commission referred to in

F s. 1 (1) is given very wide powers. In the Wages Regulation (Licensed Residential Establishment and Licensed Restaurant) Order, 1949 (S.I., 1949, No. 908) made by the Minister of Labour and National Service, which came into operation on June 1, 1949, the cloak-room attendant is specifically provided for as follows (sched I, para. 21):

"Cloak-room and toilet attendant is a worker aged twenty-one years or over who is wholly or mainly employed on one or more of the following duties, that is to say, the receipt, custody and issue of personal effects deposited in the cloak-room, or the charge of, and responsibility for cleaning or for the cleanliness of, toilets."

and in para. 2 of sched. I the rates applicable to cloak-room and toilet attendant (female) are set out. In para. 22 of the order, the workers to whom the schedule

H applies are listed:

"Subject to the provisions of para. 23 the provisions of this schedule apply to all workers employed in Great Britain in a catering undertaking who are employed by the person or body of persons carrying on that undertaking and who are so employed . . . (2) . . . and who are engaged on any of the following work [then various categories are set out; and, finally] . . . (h) any work other than that specified in sub-paras. (a) to

(g) hereof performed on or about the premises or place where food or drink is prepared or served or where living accommodation is provided, including work in connection with any service or amenity provided on or about such premises or place."

Looking at s. 1 (4) in the light of all this, it is plain, and, indeed, it is not contested by counsel for the defendants, that the plaintiff is a worker. She is, in fact, a cloak-room and toilet attendant. Secondly, her work is for the purpose of an undertaking, i.e., the defendants' restaurant. Thirdly, that work is performed in pursuance of an express arrangement made by the worker with the defendants who are carrying on that undertaking. The crucial question which remains, and, I think, the only question, therefore, is: Is that arrangement made by the worker by way of trade? If the answer is in the affirmative, then the plaintiff

"shall be deemed to be employed by the defendants in that undertaking."

The contest on this point was simple and short. Counsel for the defendants submitted that the words "by way of trade" meant that the worker who made the arrangement with the persons carrying on the undertaking must be carrying on a specific trade and made the arrangement as such trader. He submitted that the plaintiff was not carrying on any trade, and the arrangement she made in this case with the defendants was, therefore, not made "by way of trade". When one looks at the "Table of weekly minimum remuneration" in para. 2 of sched. I, and sees all the various workers who are there set out, barman, barmaid, cashier, cellarman, chambermaid, chef, cleaner, clerk or receptionist, cloak-room attendant, cook, fireman and housekeeper, it would be difficult to say that any of them carried on a trade in the ordinary acceptation of that term, but they are all listed as workers to whom minimum rates apply.

Counsel for the defendants said the meaning of the words "by way of trade" ought not to be extended beyond the definition for which he contended. Counsel for the plaintiff, on the other hand, submitted that the words should not be so narrowly construed, and that they were wide enough in this case to cover the arrangement made, and, indeed, were intended to do so in order that the scheme of the Act of 1943 should not be weakened by any attempts at evasion. He said (and it is right that I should repeat it) that in this case the good faith of the defendants had never been impugned, and I should add that under the arrangement made with the plaintiff that could scarcely be said, because it was, I think, of an extremely profitable character, far exceeding the minimum wages laid down in the schedule to the order.

In the Trade Boards Act, 1909, these same words, "by way of trade" appear, and it is to be observed that the marginal note to s. 9 of that Act reads "prevention of evasion". Section 9 is in these terms:

"Any shopkeeper, dealer, or trader, who by way of trade makes any arrangement express or implied with any worker in pursuance of which the worker performs any work for which a minimum rate of wages has been fixed under this Act, shall be deemed for the purposes of this Act to be the employer of the worker, and the net remuneration obtainable by the worker in respect of the work after allowing for his necessary expenditure in connection with the work shall be deemed to be wages."

I gain considerable assistance, although the facts are very different, from *Skinner v. Jack Breach, Ltd.* (4). The headnote of that case reads ([1927] 2 K.B. 220):

"By orders made under the Trade Boards Acts, 1909 and 1918, the Minister of Labour directed that those Acts should apply to 'the mending, re-fitting and re-conditioning of drift nets', which thereby became a

‘specified trade’ within the meaning of the Acts, and in due course the trade board fixed for certain classes of female workers in the trade minimum rates of wages, which were made obligatory by an order of the Minister of Labour. The appellant, one of the workers in respect of whom the trade board had fixed minimum wages, had been employed for over three years, and was employed, with thirty other women, by the respondents, who were fishermen and owners of fishing boats, in mending drift nets, which were exclusively the property of the respondents and were only used by them in their business:—*Held*, that the Trade Boards Acts applied to workers in a ‘specified trade’ by whomsoever they were employed, if their employment was regular and for commercial purposes, and not only to workers employed in a ‘specified trade’ by an employer who was solely engaged in the same trade, and, therefore, the respondents were bound to pay to the appellant the minimum wage fixed by the trade board for workers of her class in her branch of industry.”

While, as I have said, the facts in that case were wholly different from the facts with which I have to deal, it does assist in some degree in shedding light on the meaning of the words “by way of trade”, and I observe that in the argument of the Attorney-General in this case, he said (*ibid.*, 224):

“In the Trade Boards Acts, the object of which is to prevent the underpayment of workers, ‘trade’ is used in the sense of the operations which are carried on by the worker by way of business; see s. 1 (1) (2), s. 4 (1) and other sections of the Act of 1909; and it is immaterial that the employer is engaged in a trade different from that which he employs the worker to carry on . . . Section 9, which compels the payment of the minimum wage to those who might be thought to be independent contractors, shows that the legislature regarded the matter from the point of view of the worker and his work, and wished to secure that a worker who was commercially employed should receive proper wages for his work, whatever the object for which that work was produced.”

That, of course, was the argument. LORD HEWART, C.J., said (*ibid.*, 225):

“We have to regard the true meaning of the Trade Boards Acts and the orders and regulations made under them. No doubt in a great many contexts the word ‘trade’ indicates a process of buying and selling, but that is by no means an exhaustive definition of its meaning. It may also mean a calling or industry or class of skilled labour. When one looks at Acts of Parliament like the Trade Disputes Act, 1906, it appears that the word ‘trade’ is commonly used to indicate the position created by the relation of employer and employed in certain branches or classes of industry . . . The meaning which has to be collected from phrases like that—and they by no means stand alone—and from the whole scheme and purpose of the Act is reinforced by the particular language of s. 9. That section, no doubt, deals with an individual matter, but it contains words which illuminate the purpose of the statute as a whole. It shows that, even where an outworker, or a worker who provides some of the requisite materials or tools, is concerned, the Act regards the nature of the work performed, and that, if the worker is doing a kind of work to which a minimum rate of wages applies, it matters not that the ‘shopkeeper, dealer, or trader’ would not describe his business, or the whole of it, by words applicable to that particular branch of industry . . . It is enough to say that casual work is not within the scope of the Acts, nor is work given to another by a private person. There must be trade in the sense of commercial employment, but if that is present it does not matter that the description of the work done by the worker is not exhaustive of the description of the whole business of the employer.”

In the present case I think I have to consider the whole purpose and design of the Catering Wages Act, 1943. I think its purpose was to see that the workers employed in an undertaking supplying food and drink for immediate consumption, such as the "96" Restaurant, or in any incidental or ancillary activity of the undertaking, should receive wages based on the figures laid down by the commission. Where on the special facts of any particular case it would not be said that they were employed within the meaning of s. 1 (2) of the Act, either by a contract of service or otherwise, nevertheless, if there was an arrangement made by the worker with the persons carrying on the undertaking, and that arrangement provided for the worker to do the kind of work to which a minimum rate of wages applied, that arrangement was by "way of trade", using and interpreting the term in the sense of commercial employment, and the worker was to

"be deemed to be employed by the persons carrying on the undertaking."

That, I think, was the position of the plaintiff on the facts of this case,¹ and I, therefore, give judgment for the plaintiff for the agreed sum of £200 and the costs of the action.

Judgment for the plaintiff.

Solicitors: *L. Bingham & Co.* (for the plaintiff); *Fladgate & Co.* (for the defendants).

[*Reported by F. A. AMIES, Esq., Barrister-at-Law.*]

PIKE v. PIKE.

[COURT OF APPEAL (Singleton, Denning and Hodson, L.J.J.), November 19, 20, 1952.]

Divorce—Desertion—Constructive desertion—Conduct equivalent to expulsion of other spouse—Conduct falling short of cruelty.

A charge of constructive desertion cannot be proved by evidence of conduct, alleged to have caused the petitioner to leave the matrimonial home, of the nature of cruelty, but not amounting to cruelty in law. A charge of cruelty must be distinctly pleaded and proved as such.

AS TO CONSTRUCTIVE DESERTION—WIFE FORCED OUT OF MATRIMONIAL HOME, see HALSBURY, Hailsham Edn., Vol. 10, p. 654, para. 964; and FOR CASES, see DIGEST, Replacement Vol. 27, pp. 350-352, Nos. 2897-2913.

Cases referred to:

- (1) *Russell v. Russell*, [1895] P. 315; 64 L.J.P. 105; 73 L.T. 295; *affd.*, H.L., [1897] A.C. 395; 66 L.J.P. 122; 77 L.T. 249; 61 J.P. 771; 27 Digest, Replacement, 307, 2551.
- (2) *Barnard v. Barnard*, (November, 1952). Unreported.

APPEAL by the husband against a decision of Mr. Commissioner GOODMAN ROBERTS, Q.C., on July 29, 1952, whereby he granted a decree of divorce in favour of the wife on her petition alleging desertion by the husband.

The husband appeared in person.

MacPherson for the wife.

SINGLETON, L.J.: I will ask HODSON, L.J., to give the first judgment.

HODSON, L.J.: This is an appeal from a judgment of [Mr. Commissioner GOODMAN ROBERTS, Q.C., dated July 29, 1952, in which he pronounced a decree of divorce in favour of the wife on the ground of the husband's desertion. The petition is dated May 12, 1951, and the charge of desertion is worded in this way:

"That the respondent has deserted the petitioner without cause for a period of at least three years and upwards immediately preceding the

presentation of this petition. Particulars—By reason of the respondent's conduct towards the petitioner, the petitioner was forced to leave the matrimonial home at . . . Cheltenham aforesaid. The respondent would refuse to provide the petitioner with money for household expenses and in July, 1947, when the petitioner informed him that it was necessary for her to be X-rayed because of chest trouble, he informed her that he would love to see her in a sanatorium and that she was neurotic and not fit to live with him. The respondent further informed the petitioner that he did not desire to live with her and that it was cheaper for him to provide her with an allowance. That since Oct. 17, 1947, the petitioner and the respondent have lived separate and apart."

A

By his answer the husband contented himself with denying the allegations which were made against him, and as part of his denial he denied that he had been guilty of cruelty, although the word "cruelty" was not actually used in the petition. It is to be remembered that he was not charged with cruelty; he was charged with desertion. It is true it is described as constructive desertion, which means that it is not suggested that he left his wife, but that somehow or other he forced her to leave him. The danger in this class of case is that a person who is alleging constructive desertion without charging cruelty may be, in effect, making allegations of the character of cruelty which do not amount to cruelty, and, having done that, may come to the court and say: "It is quite true I have made out no case on cruelty, but I have made out a case of constructive desertion, because the conduct of the other side was so bad that in the result there are grave and weighty reasons why I should not be compelled to live with him any longer". But, of course, the real issue is whether the married life has been brought to an end by one party driving the other out, and, if so, whether that desertion has continued for three years immediately preceding the presentation of the petition, so that one has always to consider, even if there has been a driving out, what has happened thereafter.

C

D

E

F

G

H

The parties were married in 1942, the husband being then thirty-one years of age, and the wife twenty-one years of age. The husband was serving in the Royal Air Force, and the wife stayed with her mother. He was stationed in Yorkshire for some time, and she stayed in Wales because she did not like the accommodation which he was able to offer in Yorkshire, and, according to him, she wanted to save up towards a home. In 1944, when he was moved to Malmesbury and was stationed there, the same situation continued; he was always wanting her to join him, and he was disappointed because she did not, so that the situation became strained between them. She became pregnant, and a child was born in July, 1946. At that time they had become reconciled. During the year 1946 the husband left the Royal Air Force and went back to his work as a civil servant working in Cheltenham. The wife at this time was still with her mother in Wales, and she remained there until January, 1947. During the whole of this time up to and after the time when the husband left the Royal Air Force, he was sending her £12 a month, as the commissioner finds in his judgment, so no question of privation, which is one of the matters alleged, could be said to exist up to that time. She was living of her own choice with her mother, and he was sending her this allowance for herself, and, when the baby came, for herself and the baby. From January, 1947, onwards there were further troubles because he obtained the lease of a house in Cheltenham, and he wanted her to come and live there. There was a dispute. He thought she was unreasonable in not coming, and she thought she had good reason for putting off coming, and, to show the state of tension in March, 1947, I refer to the fact that the husband consulted solicitors, who wrote a letter to the wife saying that the husband had got a house in Cheltenham, that he had repeatedly written asking her to join him with their son, and that, while she was not legally bound to live with her husband, there was a moral

obligation on her part to join him at the home which he had provided and to perform her duties as a wife. In the following month the wife, accompanied by her aunt, went with the child to the house. She stayed there until July, 1947, when it was arranged that she should go for a three weeks' holiday with her mother. I refer to that, because in the petition it was pleaded that she was driven away in July, 1947, in particular, by the unkind observation when it was necessary for her to be X-rayed because of chest trouble that he, the husband, would love to see her in a sanatorium and that she was neurotic and not fit to live with him. That allegation fell to the ground, because that was not the position. On Aug. 11, 1947, the husband received from the wife's solicitors a letter, complaining of the unhappy differences which had arisen between them, and complaining of the insufficient money on which she had had to live and the small contribution, namely, £1 a week, which the husband had made towards the maintenance of the home, and complaining of statements that he had made when he had visited her in Wales. On Aug. 14 he replied:

"Thanks for letter of 11.8.47. Most of the statements therein are travesties of the truth and would not be supported by facts that could be ascertained. My wife is aware that I am willing to maintain her at Cheltenham. She was informed last March by my solicitor that I could not keep her if she insisted on living with her mother."

On Aug. 18, 1947, the wife issued a summons in a court of summary jurisdiction on the ground of desertion, and that summons was due to be heard on Aug. 29, 1947. The husband determined to fight the summons. He instructed solicitors to help him, and he was told that the probation officer had been asked to intervene to see if he could effect a reconciliation, and I think the husband was told by the solicitors he must see the probation officer before he attempted to fight the case. The summons was adjourned generally, and never came before the court again, but an order of an interim nature was made directing the husband to make payments for the maintenance of his wife and child until the final determination of the case. The husband resented that, because, he says, he had already written out cheques, and there was no necessity for any order to be made. His attitude throughout was that he had not deserted his wife, and he was not prepared to submit to any order of any sort or kind on that basis. That was his attitude then, and it is so now.

On Oct. 14, 1947, the wife came back for three days and that was the last time that they were together. That return was, no doubt, brought about with the help of the solicitors and the probation officer. The husband described those last few days as pandemonium. They did not settle down again, and on Oct. 17, 1947, the wife left and went back to her mother. The commissioner expressed himself as satisfied that the wife ran from the house because she was terrified of her husband's attitude. After the wife left on Oct. 17 the husband consulted solicitors, and on Oct. 20 a letter, which has not been produced, was written to the wife's solicitors, with a view to the wife returning. On Oct. 21 the wife issued a second summons alleging desertion, and on Oct. 22 the husband's solicitors wrote a letter to the wife's solicitors saying:

"Dear Sir, We have your letter of yesterday's date. The facts as stated therein are not admitted. Our client is anxious that his wife should return to live with him and as she knows the house is open to her. We enclose a cheque from our client in respect of the maintenance of your client and the child, and to assist her in the payment of the travelling expenses."

The letter of Oct. 22 does not appear to have been answered, and the wife's case, as put by her solicitor, was that the husband's conduct during this period in October was such as to show that his expressed wish for the wife to return was not a genuine one.

The wife proceeded with her summons for desertion, which was heard on Dec. 12, 1947, by the justices, and resulted in an order being made in her favour.

The husband said that thereafter, when his wife came for her belongings, he asked her to return, and she refused. That was denied by her. She did not deal with any other specific request which he made to her to return. The commissioner found inferentially, if not expressly, that the husband's requests to the wife to return were not genuine, and, accordingly, he found that the husband had driven the wife from the house, and so was guilty of desertion. In my judgment, that decision cannot stand. The case of driving away made out by the wife was substantially different from that pleaded, both in substance and also in time. There was no evidence of privation, on which the commissioner relied in part. Apart from this, there was no other grave and weighty matter relied on as amounting to constructive desertion unless it consisted of cruelty. No cruelty was alleged in terms, and the serious allegation of threatening to choke the wife was not referred to at all in the petition, and, moreover, there was no corroboration of that charge.

I want to make it as clear as I can that when the case sought to be made is in the nature of a case of cruelty, it is not possible to build up a case of constructive desertion by what is really a case of unproved cruelty. That, of course, does not cover the whole area of constructive desertion, for grave and weighty matters might be alleged which are quite different in kind and quite as serious, if not more serious, than cruelty. One has in mind the well-known case of *Russell v. Russell* (1), where false charges were made, persisted in, and not withdrawn, or, of course, one can take the simple case of constructive desertion where there is an order or direction by one spouse to the other to leave. If that order is obeyed and the direction is followed and not withdrawn, then, again, desertion may run. This case was never made out on those lines. On that basis the finding cannot stand. If it should be said that there was a case of cruelty, and the matter, although not specifically raised, was dealt with between the parties, and, therefore, that the remedy open to the husband in this court is to obtain an order for a new trial, my answer is that in this case that is not the right way in which to proceed. A serious charge like a charge of cruelty which is, after all, the substantive case which the wife was trying to make, ought to be pleaded as such and dealt with as such, and no injustice could possibly be done to her, because if she has a case of cruelty, any finding of this court that she has not made out a case of desertion does not operate as an estoppel in any cruelty proceedings which she may, if so advised, bring in the future. No charge of cruelty has been disposed of either in the court below or in this court. For these reasons, I think that the appeal should be allowed.

DENNING, L.J.: This is yet another case in which the doctrine of constructive desertion has been allowed to run wild. A wife leaves the home, refuses to return to it, and then promptly charges her husband with constructive desertion. He asks her to come back, but she refuses. There are three letters of Aug. 14, 1947, Oct. 20 and 22, 1947, in which he made it clear that he wanted her to return, and she would not. No one can doubt that he was ready to take her back if she returned, but yet he has been held guilty of desertion. Her only justification for not returning is, as she said, his previous conduct. If he had previously treated her with cruelty, so much so that there was a reasonable apprehension of injury to her if she went back, she would, of course, be justified in refusing to go back, but, if his conduct was less than cruelty recognised by law, I do not think she was justified. There may be conduct different from cruelty—not less than it—which gives her reasonable cause for staying away, as in *Russell v. Russell* ([1895] P. 334), but even such conduct does not automatically make him guilty of desertion. To make the husband guilty of constructive desertion, there must be an intention by him to bring the matrimonial consortium to an end. Any other view would mean that,

under the guise of constructive desertion, there would be introduced new heads for divorce not authorised by the statute.

In the circumstances of this case, the husband's conduct was either cruelty or it was not. It was not something different from cruelty. For the wife to justify her refusal to return, the only thing she could rely on would be the husband's cruelty, and in such a case cruelty must be pleaded and proved. Just as in a civil action fraud must be distinctly alleged and as distinctly proved, so in this class of action cruelty must be distinctly alleged and as distinctly proved. In this case the particular allegations which the commissioner sets out in his judgment were not alleged in the petition, and no application to amend was ever made. I do not think the wife should be allowed, in those circumstances, to rely on new charges of cruelty which were never alleged. If her case had been that the request to her to return was not genuine in the sense that the husband never really wanted her to come back, that would be a different matter. In such a case, as we said in *Barnard v. Barnard* (2), the best way of seeing whether the offer is genuine is for the wife to accept it and see whether the husband will take her in, but the wife did not suggest here that the offer was not genuine in that sense. There is no doubt that the husband wanted her back. She only said she was justified in not going back because of his previous cruelty. That ought to be alleged and proved, and it was not even alleged. Her proper course would be to charge cruelty. It is open to her, no doubt, to bring another petition charging cruelty, but I certainly would not wish to encourage it. I agree that the appeal should be allowed.

SINGLETON, L.J.: I agree.

Appeal allowed. Decree nisi set aside.

Solicitors: *Sharpe, Pritchard & Co.*, agents for *T. D. Windsor Williams*, Neath, Glamorgan (for the wife).

[*Reported by A. T. HOOLAHAN, Esq., Barrister-at-Law.*]

DICKSON v. FLACK.

[QUEEN'S BENCH DIVISION (Havers, J.), November 11, 12, 13, 17, 18, December 19, 1952.]

Factory—Dangerous machinery—Cutter of vertical spindle moulding machine—
"Most efficient guard—Protection from contact with cutters or from flying
broken parts of machine—Woodworking Machinery Regulations, 1922
(S.R. & O., 1922, No. 1196), reg. 17.

A vertical spindle moulder in a factory was fitted with a Shaw guard. It was found as a fact that, to protect the operator from coming into contact with a cutter when the machine was being operated on a small section of straight wood, a guard of the Shaw guard type was the most effective, but that a cage guard would be more effective to protect him from broken pieces of the machine flying out. If both dangers had to be taken into account, since the former danger was by far the greater, the Shaw guard was the more effective. If the machine was being operated merely to make a test of the balance of the cutters, the danger of the operator coming into contact with the cutters was still very great, whereas the danger of being injured by a fragment of a broken part of the machine was remote. The plaintiff was injured by a piece of the machine which flew out while he was operating it in the defendant's factory to test the balance of the cutters before working on a section of straight wood. In an action by him for damages for breach of statutory duty,

HELD: the object of reg. 17 of the Woodworking Machinery Regulations, 1922, was to prevent an employee from coming into contact with

the cutters; therefore, the "most efficient guard" required by the regulation to be provided was the most efficient guard for that purpose having regard to the nature of the work being performed; and, accordingly, the plaintiff had not proved a breach of the regulation.

Harrison v. Metropolitan Plywood Co. ([1946] 1 All E.R. 243), not followed.

A Dicta of LORD THANKERTON and LORD MACMILLAN in *Nicholls v. Austin (Leyton), Ltd.* ([1946] 2 All E.R. 92, 96), and of LORD PORTER, LORD DU PARCQ and LORD NORMAND in *Carroll v. Andrew Barclay & Sons, Ltd.* ([1948] 2 All E.R. 390, 391, 393), considered.

Cases referred to:

- B (1) *Miller v. Boothman (William) & Sons, Ltd.*, [1944] 1 All E.R. 333; [1944] K.B. 337; 113 L.J.K.B. 206; 170 L.T. 187; 2nd Digest Supp.
- (2) *Nicholls v. Austin (Leyton), Ltd.*, [1946] 2 All E.R. 92; [1946] A.C. 493; 115 L.J.K.B. 329; 175 L.T. 5; 2nd Digest Supp.
- (3) *Hindle v. Birtwistle*, [1897] 1 Q.B. 192; 76 L.T. 159; 61 J.P. 70; *sub nom. Birtwistle v. Hindle*, 66 L.J.Q.B. 173; 24 Digest 909, 71.
- C (4) *Harrison v. Metropolitan Plywood Co.*, [1946] 1 All E.R. 243; [1946] K.B. 255; 115 L.J.K.B. 187; 174 L.T. 190; 110 J.P. 130; 2nd Digest Supp.
- (5) *Carroll v. Andrew Barclay & Sons, Ltd.*, [1948] 2 All E.R. 386; [1948] A.C. 477; [1948] L.J.R. 1490; 2nd Digest Supp.
- (6) *Paris v. Stepney Borough Council*, [1951] 1 All E.R. 42; [1951] A.C. 367; 115 J.P. 22; 2nd Digest Supp.
- D (7) *Morton v. William Dixon*, 1909 S.C. 807.

ACTION for damages for negligence and breach of statutory duty.

The plaintiff was a woodworking machinist of fifty-three years' experience and was employed by the defendant, a builder, being in charge of the joiner's shop occupied by the defendant for the purposes of his building contracts.

E He advised the defendant on the purchase, repair, state and condition of machines and on when any parts required repair or replacement, and he determined what type of machine should be used for particular work and whether any machine was safe to use. The ten or eleven machines in his charge included two vertical spindle moulders, one of which, a re-conditioned machine, was twenty-five to thirty years old and mechanically in a very fair condition.

F The motive power was electric with flat-belt transmission, the power controls being of press-button type and conforming to the regulations. The spindle head piece unit received and carried an interchangeable square cutter block with a groove, dovetail fashion, running lengthways on four sides. The grooves received cutter bolts and were the means, with washers and nuts, of securing the cutter to the block.

G On Mar. 29, 1950, the plaintiff had to set up the machine for the purpose of running a window sill in connection with a shop front, the piece of wood being a straight piece five inches wide, three inches thick and five feet, six inches long. He put two cutters on the cutter block, and, according to his evidence, tightened them up by the nut with a spanner, and started the machine to make a test run in order to ascertain whether the cutters were properly balanced before operating the machine on the wood. While the machine was working a bolt broke, one of the cutters flew off and either a nut or a nut and one portion of the bolt struck the plaintiff in his left eye and injured him. The machine at the time was fitted with a Shaw guard (spring guard (Shaw's patent) as shown in safety pamphlet No. 8, Fencing and other Precautions, Woodworking Machinery, 1928 ed., p. 54, fig. 69, issued by the Home Secretary).

H The plaintiff contended that it was the defendant's duty to provide a safe system of work, inter alia, by guarding the machine in accordance with s. 14 (1)

of the Factories Act, 1937, and reg. 17 of the Woodworking Machinery Regulations, 1922, and that he was negligent in providing a machine which was dangerous and defective, in failing to provide a safe machine, in failing to inspect the machine, and in failing to provide an efficient guard to prevent injury to the plaintiff from flying pieces of metal, contrary to the Woodworking Machinery Regulations, 1922. The defendant denied that s. 14 (1) of the Factories Act, 1937, applied to the machine, and he also denied negligence and any breach of duty under the Act or the regulations, and that the plaintiff's injuries were caused by any such alleged negligence or breach of statutory duty. The defendant died between the date of the issue of the writ and trial and his personal representatives had been substituted as defendants by an amendment.

F. Donald McIntyre for the plaintiff.

Jukes for the defendant.

Cur. adv. vult.

Dec. 19. **HAVERS, J.**, stated the facts, and, referring to the question of what was an appropriate guard, continued: I have come to the conclusion that the paragraph referred to on p. 7 of the safety pamphlet (Safety Hints on the Use of Woodworking Machinery: Form No. 279, 1947 ed., issued by Ministry of Labour and National Service) represents the true position. It is in these terms:

"Work done on the spindle moulding machine varies so much that no single guard can be relied upon to give the operator security on every job. Many satisfactory guards are available, but the best guard for one job does not necessarily give complete protection for other kinds of work."

That statement seems to me to be amply justified by the evidence which has been called. I find that the type of guard to be used is determined by the particular job which the operator has to perform, and I think it is for this reason that reg. 17 of the Woodworking Machinery Regulations, 1922, does not specifically describe the exact type of guard for vertical spindle moulding machines as it does in the case of similar machines, but uses more general language as follows:

"The cutter of every vertical spindle moulding machine shall when practicable be provided with the most efficient guard having regard to the nature of the work which is being performed."

Regulation 18 provides:

"For such work as cannot be performed with an efficient guard for the cutter, the wood being moulded at a vertical spindle moulding machine, shall, if practicable, be held in a jig or holder of such construction as to reduce as far as possible the risk of accident to the worker."

I find, therefore, that, where a machine of this type is going to operate on a small section of straight wood, the Shaw guard, or a guard of similar type, is the most effective guard, first, because it completely closes the aperture on the operator's side, and, secondly, because it exerts pressure on the wood and enables the operator to keep his hands away. I find also that it is a common practice in the trade to use this type of guard, the Shaw guard, when operating on a small section of straight wood. For curved work, on the other hand, the cage guard would be more suitable and more efficient. The cage guard could be used for a small section of straight wood, but, in my opinion, it would not be so effective.

In making these findings I have considered the effectiveness of the guard solely from the point of view of protecting the operator from coming into contact with a cutter. If, however, I have to consider effectiveness also from

A the point of view of protecting the operator from broken pieces of the machine flying out, then I find as follows. The Shaw guard, for the work which was about to be done, while the most effective guard to protect against what I will call danger 1, i.e., protecting the operator from coming into contact with the cutters, gives little, if any, protection against broken pieces of the machine flying out, which I will describe as danger 2. On the other hand, the cage guard, or a guard of a similar type, while not so effective to protect the operator against danger 1 during the work in question, would, in my view, be more effective to protect him against danger 2. If I have to take both dangers into account and assess the risk from each, I find that danger 1 is a far greater danger than danger 2, and I find that the Shaw guard is most effective for the work which was contemplated. I do not feel able to express any opinion whether any guard would be completely effective to protect the operator from a flying cutter. I do not know what sort of guard would be required to prevent a cutter, fitted in the way these cutters are, from flying off a machine going at 4,500 revolutions a minute. I think a cage guard would give some chance and would protect the operator from flying pieces if a part of the machine broke, such as a nut or a bolt.

B
C At the time of this accident the machine was not on load. It was merely being operated for a test which was being made for the balance of the cutters. It seems to me that there is little if anything to choose between the Shaw guard and the cage guard in such circumstances. It is not necessary to exert pressure as there is no wood on which the machine is being operated, and this advantage of the Shaw guard over the cage guard, therefore, disappears. From the point of view of convenience, the Shaw guard is more suitable as the operator may require to adjust the cutters, and also, as soon as the test for balance is over, the practice is then to make a test run on the wood, and for that I think the Shaw guard would be the most effective guard. Also, of course, the advantage remains of its completely covering up the aperture on the operator's side. While the machine is running purely for the purpose of making a test of the balance of the cutters, therefore, I am not satisfied that the Shaw guard is not the most effective to protect the operator from coming into contact with the cutters. If, however, I have got to take the possibility of the danger from both the two sources into account, namely, the risk of flying fragments being ejected from the machine and the danger of the operator coming into contact with the cutters, then the danger of the operator coming into contact with the cutters is still very great even if a test for balance only is being made, whereas the danger from being injured by a fragment of a broken part of the machine seems to me to be very remote. For these reasons, I am not satisfied that the Shaw guard is not the most effective guard in the circumstances.

E
F I turn now to consider s. 14 (1) of the Factories Act, 1937, and the Woodworking Machinery Regulations, 1922. In *Miller v. William Boothman & Sons, Ltd.* (1) the Court of Appeal held that the Woodworking Regulations modified the absolute obligation imposed on the occupier of a factory under s. 14 (1) by substituting a code for the duty under that section. In view of that decision, which, of course, binds me, counsel for the plaintiff conceded that he could not rest his case on s. 14 (1) of the Act, but must rely on the regulation, though he reserved the right to argue that *Miller v. William Boothman & Sons, Ltd.* (1) was wrongly decided in the event of this case reaching the House of Lords. That case was considered by the House of Lords in a later appeal [*Nicholls v. Austin (Leyton), Ltd.* (2)], but their Lordships arrived at their conclusion on another ground and expressed neither approval nor disapproval of the decision.

H
G *Hindle v. Birtwistle* (3) concerned a flying spindle. The occupier of a cotton factory was summoned under s. 5 (3) of the Factory and Workshop Act, 1878, as amended by s. 6 (2) of the Factory and Workshop Act, 1891 (by which

all dangerous parts of the machinery in a factory must be securely fenced or otherwise rendered safe), for neglecting to fence the shuttles of his looms. It appeared that shuttles occasionally in the process of weaving flew out from the bed on which they slid to and fro (called the shuttle-race) in circumstances which rendered them dangerous to any persons who happened to be in the line of flight. The flying out of the shuttles might be caused by the negligence of the weaver in charge of the machine, or by reason of some foreign substance getting accidentally into the shuttle-race, or by defect in the yarn. It was held that the obligation to fence under the section was not confined to machinery which was dangerous in itself in the ordinary course of careful working, but that the shuttles, even though not in themselves defective, were "dangerous parts of the machinery" if any of the above-mentioned causes of their flying out of the shuttle-race were likely to occur with any degree of frequency. The case came before the Divisional Court on a Case stated by the recorder of Blackburn and WILLS, J., said ([1897] 1 Q.B. 195):

"This case is one of considerable importance, but the enactment seems to be plain and intelligible, and I feel no difficulty in construing it. The learned recorder has supplied us with the keynote of his judgment in one sentence, in which he says that 'the manufacturer is only responsible for machinery which is in itself dangerous in the ordinary course of careful working'. He seems to think that no machinery can be said to be dangerous unless it is dangerous in itself, however carefully worked. I entirely disagree with such an interpretation, and think that it would limit most materially a very beneficial Act of Parliament. It seems to me that machinery or parts of machinery is and are dangerous if in the ordinary course of human affairs danger may be reasonably anticipated from the use of them without protection. No doubt it would be impossible to say that because an accident had happened once therefore the machinery was dangerous. On the other hand, it is equally out of the question to say that machinery cannot be dangerous unless it is so in the course of careful working. In considering whether machinery is dangerous, the contingency of carelessness on the part of the workman in charge of it, and the frequency with which that contingency is likely to arise, are matters that must be taken into consideration. It is entirely a question of degree. As the recorder has not dealt with the matter from that point of view, the case must go back to him for re-consideration."

WRIGHT, J., said (*ibid.*, 196):

"It seems to me that the chances that the workmen will be negligent, that foreign material will get in, or that the yarn may be of bad quality, must all be taken into consideration. The mere fact that the shuttle will sometimes fly out, and that when it flies out it is dangerous, is not enough. It is a question of degree and of fact in all cases whether the tendency to fly out is a tendency to fly out often enough to satisfy a reasonable interpretation of the word 'dangerous'."

Harrison v. Metropolitan Plywood Co. (4) involved the interpretation of reg. 17 of the Woodworking Machinery Regulations, 1922, which I have here to interpret. The headnote reads ([1946] 1 All E.R. 243):

"A part of the blade of a vertical spindle moulding machine, at the defendants' factory, broke away and the plaintiff, who was at work as a press operator at the next machine, was injured by one of the pieces which flew out of the holder. The plaintiff claimed damages from the defendants for, *inter alia*, the alleged breach of their statutory duty under the Factories Act, 1937, s. 14, and the Woodworking Machinery Regulations, reg. 17, which requires the provision, for that type of machine, of 'the most efficient guard' having regard to the nature of the work being performed.

It was contended on behalf of the defendants (i) that they had complied with the regulations, and (ii) if they had not, the plaintiff had no remedy for breach of the regulations because the provisions of the Factories Act, 1937, s. 14, were ousted by the regulations, which were for the protection only of the worker at a particular machine. The ring guard (said to be the 'usual' form of guard for that type of machine) employed at the time was a guard only against certain dangers to which the worker at the machine would be exposed, and there was a known form of cage guard, the subject of an illustration in a Home Office safety pamphlet, which would have fenced the major part of the circle round the vertical spindle with a wire-mesh screen without interfering with work on the machine:—
Held: (i) the guard employed at the time of the accident was not 'the most efficient guard' and there had been a breach of the regulations. (ii) the modification effected by the regulations was a modification of the standard of fencing and not an elimination of certain classes of workers in the factory from a right to such protection as the modified fencing would afford, and therefore the plaintiff had a right to maintain an action for damages resulting to him from a breach of the statutory regulations."

C HILBERY, J., said (*ibid.*, 246):

"The question that then remains is whether or not the plaintiff has established a breach of these regulations. Regulation 17 requires the provision for the machine in question of the most efficient guard having regard to the nature of the work being performed. It was proved that there was a known form of cage guard which would have fenced the major part of the circumference of a circle round the vertical spindle with a wire-mesh screen, and that the work in hand could have been performed with that guard in position. Such a guard is in fact the subject of an illustration in the safety pamphlet No. 8 issued by the Home Office. It was further clear from the evidence that the so-called ring guard employed at the time was only a guard against certain dangers to which the worker at the machine would be exposed if it were not there; but there was no evidence that it was 'the most efficient guard'. When asked whether it was, the expert called for the defendants replied that it was a 'usual' form of guard for such a machine. On the evidence on balance I think it is just established that the plaintiff probably would not have sustained his injury if the regulation had been complied with."

That case is a direct decision by HILBERY, J., on reg. 17, but it is less helpful than it might be because the point taken by counsel for the defendant here was not taken before HILBERY, J., and, secondly, because when it was delivered the decision of the House of Lords in *Nicholls v. Austin (Leyton), Ltd.* (2) had not been given.

G The headnote in *Nicholls'* case (2) reads ([1946] 2 All E.R. 92):

"The appellant, while employed in the respondents' factory at a wood-working machine known as a straight line edger, was injured by a piece or sliver of wood which flew out of the machine and struck her left hand. The machine consisted of a circular saw, fitted on a table and driven by an electric motor. The front edge of the saw was about two feet from the front of the table at which the operator stood. The wood to be worked was conveyed from the front of the table, which was three feet, two inches, from the floor level, towards the cutting edge of the saw, by a mechanical conveyor, driven by a separate gearing, and by rollers which assisted the conveyor. There was a metal hood over the whole of the rollers, conveyors and circular saw. In front of the machine there was a self-adjusting guard in the form of a row of metal fingers, which rested on the top of the ingoing wood. There was a space of about four inches between the bottom edge of

the wood and the surface of the table, which might be reduced by the depth of the ingoing slab. At the time of the accident the appellant was engaged in feeding wooden slabs about twelve to fifteen inches long, about nine inches in width and two inches in depth, which were being cut into strips. The appellant's hand was struck by an off-cut from the left hand side of the slab which flew out, probably through the space at the left hand side of the machine between the bottom of the hood and the surface of the table. In an action for damages in respect of personal injuries the main case of the appellant rested on an alleged breach by the respondents of a statutory duty imposed on them by the Factories Act, 1937, s. 14, in that they failed to fence the saw so as to prevent the danger of material which was being operated on being ejected by the machine and causing injury. Alternatively the appellant sought to impose liability on the respondents, at common law, in respect of their negligence in supplying improper plant, by supplying a machine which was dangerous and unsafe. The Secretary of State had made no regulations under the last paragraph of s. 14 requiring the fencing of materials or articles which were dangerous while in motion in the machine:—*Held*: (i) the obligation imposed by the Factories Act, 1937, s. 14, to fence securely every dangerous part of any machinery was an obligation so to screen or shield the dangerous part as to prevent the body of the operator from coming into contact with it, an obligation which in this case had been amply fulfilled; the obligation did not also extend to fencing the dangerous part so as to prevent any part of the material on which the machine was working from flying off and striking the operator, that matter depending solely on the making of regulations by the Secretary of State under the last paragraph of the section. (ii) there was no evidence of breach by the respondents of their common law duty to the appellant.”

LORD THANKERTON, who delivered the leading opinion, summarised the matter in this way (*ibid.*, 95):

“My Lords, on consideration of the terms of s. 14, I am of opinion that there is a simpler answer to the contention of the appellant, namely, that the obligation to fence imposed by sub-s. (1) is an obligation to provide a guard against contact with any dangerous part of a machine, and that it does not impose any obligation to guard against dangerous materials or articles ejected from the machine in motion, that matter depending solely on the making of regulations by the Secretary of State under the discretionary power conferred on him by the last paragraph of the section. This view appears to be amply confirmed by the language used.”

He deals with the other sub-section and continues (*ibid.*):

“I will only add that if sub-s. (1) was intended to include fencing against the ejection of materials or articles, I would not expect to have two separate provisions for the making of regulations, or to have the second one in a separate general paragraph at the end of the section, instead of in a sub-section of its own, for the last paragraph of the section is clearly not part of sub-s. (3). It being admitted that no regulations have been made under the last paragraph of s. 14, I am of opinion that there is no obligation imposed by s. 14 upon the respondents as regards these flying bits of wood, and, therefore, they are not in breach of any statutory obligation, and the appellant's main contention fails.”

Then he said that he was not going to express any opinion on *Miller's* case (1). LORD MACMILLAN came to the same conclusion. He said (*ibid.*, 96):

“They observed and indeed more than observed all the requirements of the Woodworking Machinery Regulations under the Act for the fencing of circular saws. But the fencing did not prevent a fragment of wood

flying off while the saw was working. Was it the statutory duty of the respondents so to fence the saw as to prevent this possibility? In my opinion, the statute imposes no such duty."

He referred to the power to make regulations under s. 14 (3), and continued (ibid.):

A "No such regulations have been made and in the absence of any such regulations there is no statutory duty to fence materials or articles which are dangerous while in motion in a machine."

LORD WRIGHT arrived at the same conclusion. LORD SIMONDS said (ibid., 98):

"The fence is intended to keep the worker out, not to keep the machine or its product in."

B *Carroll v. Andrew Barclay & Sons, Ltd.* (5) was a decision on the interpretation of s. 13 (1) of the Act. The headnote reads ([1948] 2 All E.R. 386):

C "On a true construction of s. 13 (1) of the Factories Act, 1937, the words: 'Every part of the transmission machinery shall be securely fenced' mean that every part of the transmission machinery shall be so fenced as to prevent any person employed or working on the premises from moving into contact with it, and not that every part of the transmission machinery shall be so fenced as to protect any person employed or working on the premises from injury due to flying parts of broken machinery. In the course of his duties a machinist, employed by a firm of engineers, operated a lathe in his employers' boiler shop. Immediately in front of the lathe at which he was standing and about 6½ feet away, the motor for driving the main shaft of the shop was placed and over this motor at a height of twenty-five feet the main driving shaft was situated. This shaft was operated from the motor by means of a balata belt, nine inches wide and ¼ inch thick, which ascended on the side remote from the position in which the workman was working, passed over a pulley attached to the driving shaft, and was pulled down on the side nearest to him by the motor. The belt did not ascend vertically, but sloped away at an angle from the spot in which the lathe was fixed. The motor, belt, shaft and pulley formed part of the transmission machinery within the meaning of the Factories Act, 1937. There was round the motor a fence five feet high, but between the top of that fence and the overhead driving shaft the belt was unprotected. While the workman was working at his lathe the belt broke, lashed out over the fence, and struck him, causing serious injury:—*Held*: the employers had not been guilty of a breach of s. 13 (1) of the Factories Act, 1937, and were not liable to the workman under that sub-section.

F LORD PORTER said (ibid., 390):

G "In my opinion, it is not necessary for your Lordships to consider in respect of any of these cases how far the facts support the decision. The principle is plain. Any risk arising from the working of a dangerous machine must be guarded against under s. 14 and any danger emanating from the working of transmission machinery must likewise be guarded against under s. 13. The working of transmission machinery is deemed to be dangerous; other machines need not be fenced unless they or some part are, in fact, dangerous. But in neither case does the Act aim at protection against breakage. In the present instance it was, no doubt, the duty of the employers to fence the transmission machinery. That part, however, which a workman could enter on was securely fenced and the belt was in such a position as to be as safe as it would be if securely fenced unless it broke. Had it been in such a position that the workman could come into contact with it, it would not have been so safe, and in that case it would have been necessary to fence it. Fencing, in my opinion, means

the erection of a barricade to prevent any employee from making contact with the machine, not an enclosure to prevent broken machinery from flying out."

LORD DU PARCQ agreed with the opinion of LORD PORTER and of LORD NORMAND, and added (*ibid.*, 391):

"I wish to add, however, that, while I agree with LORD NORMAND that the words 'securely fenced' must be given the same meaning in each of the three sections (s. 12, s. 13 and s. 14), I think that they may well mean 'so fenced as to give security from such dangers as may be reasonably expected.' If machines exist, or are hereafter invented and used, which are dangerous because fragments or loose parts of the machinery are sometimes ejected from them, then I am not prepared to say that s. 14 does not require such machines to be fenced for the purpose of protecting workmen against that danger. If the dictum of my noble and learned friend LORD SIMONDS in *Nicholls v. Austin (Leyton), Ltd.* (2) ([1946] 2 All E.R. 92, 98) is to be understood as meaning that such a machine need not be fenced, I respectfully doubt its accuracy, and must reserve my opinion on it."

LORD JOWITT said he did not dissent from the views of the other Law Lords and went on (*ibid.*, 387):

"... I should desire to leave open for further consideration the question which LORD DU PARCQ raises in his opinion."

The decision of HILBERY, J., in *Harrison v. Metropolitan Plywood Co.* (4) is referred to by several of the learned Law Lords in their opinions, but none of them expressed any opinion as to its correctness because in their view it was a decision on a regulation in different language from the section they were considering. LORD NORMAND took that view. He said (*ibid.*, 393):

"In *Harrison v. Metropolitan Plywood Co.* (4) the workman, who was injured when a piece of the cutter of a spindle moulding machine broke away, flew out of its holder and struck him, was held entitled to recover damages because the employers had been in breach of an obligation to fence under a regulation the wording of which is not identical with that of the Act. The point taken by the employers in the present case that there is no obligation to fence against parts of a machine which break and fly off was not taken. It is not necessary to consider whether that case was rightly decided, and I have already reserved my opinion on the effect of s. 14 in relation to cases resembling it."

The Woodworking Machinery Regulations, 1922, were made in pursuance of s. 79 of the Factory and Workshop Act, 1901, and were preserved by s. 159 (1) of the Factories Act, 1937. They are deemed to be made and have effect as if made under s. 60 (1) of that Act. They apply to certain particular types of machine. "Woodworking machine" is defined in the definitions clause as:

"a circular saw, plain band saw, planing machine, vertical spindle moulding machine or chain mortising machine operating on wood."

The first nine regulations are of a general character applying to all these wood-working machines. Regulation 10 deals with a circular saw and prescribes in detail the way in which a circular saw is to be fenced. Regulation 11 provides that where a circular saw is fed by hand, a suitable push-stick must be kept available. Regulation 12 prescribes with some particularity the way in which a plain band saw is to be guarded. Regulation 13 deals with a planing machine and reg. 15 prescribes the type of guard to be used for a planing machine. Regulation 16 deals with the feed roller of planing machines. In reg. 17 the difference in the language employed is very marked. It does not prescribe

in any detail the type of guard which is to be used for a vertical spindle moulding machine. It uses much more general language, as follows:

"The cutter of every vertical spindle moulding machine shall when practicable be provided with the most efficient guard having regard to the nature of the work which is being performed."

A Regulation 18 which I have read, deals with cases where work cannot be performed with an efficient guard for the cutter. Regulation 19 deals with the suitable spike or push-stick for this type of machinery. Regulation 20 deals with the chain of a chain mortising machine, and says that it

"shall be provided with a guard which shall enclose the cutters as far as practicable."

B Regulation 21 provides generally that:

"The guards and other appliances required by these regulations shall be maintained in an efficient state and shall be constantly kept in position while the machinery is in motion, except when, owing to the nature of the work being done, the use of the guards or appliances is rendered impracticable. The guards shall be so adjusted as to enable the work to be carried on without unnecessary risk."

C

Regulation 22 prescribes that:

"Regulations 10, 12, 15 and 16 shall not apply to any woodworking machine in respect of which it can be shown that other safeguards are provided and maintained which render the machine equally safe as it would be if guarded in the manner prescribed by these regulations."

D

Regulation 23 imposes a duty on the persons employed on the woodworking machines to "use and maintain" these guards and other appliances.

Harrison v. Metropolitan Plywood Co. (4) is the only decision on reg. 17. I pay the greatest respect to the decision of HILBERY, J., and, if the point now taken by counsel for the defendant had been taken before him and he had also had the advantage of reading the subsequent decisions of the House of Lords in *Nicholls v. Austin (Leyton), Ltd.* (2) and *Carroll v. Andrew Barclay & Sons, Ltd.* (5), I should have felt inclined to follow him. But, as the point was not taken, the decision is not of the weight which it would otherwise bear, and I feel, therefore, that I am bound to make up my own mind on this question.

E

To comply with a regulation which specifies in detail the guard which has to be used on a particular machine, it seems clear that that specific guard and nothing else must be provided, subject only to what is said in reg. 22. If, notwithstanding that the specific type of guard is fitted, a fragment or part of a machine flies out and injures the operator, it seems to me that he will have no right of action on the ground of a breach of the regulation. Nor would he under the section because of the decision in *Miller v. William Boothman & Sons, Ltd.* (1). Where the regulations do not specify in detail the particular guard to be provided, but use more general language, as in reg. 17, viz.:

G

"that the cutter is to be provided with the most efficient guard having regard to the nature of the work that is being performed,"

if there is any ambiguity, I think I am entitled to have regard to the general object of s. 14 (1) of the Act as interpreted by the House of Lords. The regulation specifies the cutters as being the part of the machine to be provided with a guard. It does not require either the machine as a whole or the spindle or any other part of it which may throw off a detached or broken part to be provided with a guard. The conclusion, therefore, at which I have arrived is that the object of reg. 17 is to prevent any employee from making contact with the cutters. In considering, therefore, what is the most efficient guard I have to decide what is the most efficient guard for the purpose of preventing

H

any employee from making contact with the cutters, having regard to the nature of the work which is being performed. On that interpretation, and in the light of the facts that I have found, I hold that a breach of reg. 17 has not been proved. It follows also that I am not satisfied that the plaintiff's accident and injury were caused by a breach of that regulation.

[HIS LORDSHIP found on the evidence that the machine was not in a defective condition and that nothing would have been revealed by any inspection of the machine and continued:] The plaintiff has also failed to satisfy me that the defendant did not provide a proper system of working, and in those circumstances I am not satisfied that the defendant was guilty of any negligence at common law or that this accident and the plaintiff's injuries resulted from any such negligence. The action, therefore, fails and there must be judgment for the defendant. [HIS LORDSHIP assessed the damages of the plaintiff at £2,660 13s., and gave judgment for the defendant with costs].

Judgment for the defendant.

Solicitors: *W. T. Donovan* (for the plaintiff); *J. S. Coules & Co.* (for the defendant).

[*Reported by F. A. AMIES, Esq., Barrister-at-Law.*]

SLATER v. SLATER.

[COURT OF APPEAL (Singleton, Birkett and Morris, L.JJ.), November 11, 12, 13, 14, December 17, 1952.]

Nullity—Approbation of unconsummated marriage—Knowledge of facts and law—Treatment by way of artificial insemination—Adoption of child by spouses.

The parties were married in 1945, but the marriage was never consummated owing to the husband's incapacity. In April, 1949, the wife underwent treatment by way of artificial insemination from a donor other than the husband. In the same month the parties took to live with them a boy aged two years with a view to adopting him. On Aug. 4, 1949, the parties filed in the county court a petition for the adoption of the child, in which it was asserted that the wife was married to the husband in January, 1945, and on Sept. 19, 1949, an adoption order was duly made. On Sept. 16, 1949, the artificial insemination treatment ceased. On Oct. 24, 1949, the wife was admitted to hospital as a voluntary patient suffering from a nervous breakdown. On Nov. 24, 1949, the wife had an interview with the medical superintendent and told him that she was then contemplating "divorcing" her husband for non-consummation. On Nov. 26, 1949, the wife left hospital and returned to her husband. In February, 1950, the wife went on holiday to Gibraltar and returned to the husband in June, 1950. In February, 1951, the wife took legal advice and was informed that, if she could prove the husband's impotence, there was available to her the remedy of a decree of nullity. On the wife's petition for a decree of nullity,

HELD: on Nov. 24, 1949, the wife was aware that the husband was incapable of consummating the marriage, and was aware, though her knowledge was hazy, that the law provided a remedy, but she had not that degree of knowledge before that date, i.e., either during the time of the treatment by way of artificial insemination or at the date of adoption of the child, and, accordingly, neither of those events amounted to approbation of the marriage; there was nothing in the wife's conduct in staying in the matrimonial home after Nov. 24, 1949, whereby she approbated the marriage; and, therefore, she was entitled to a decree.

W. v. W. ([1952] 1 All E.R. 858), distinguished.

Semble: if the wife had had sufficient knowledge of the facts and the law when she had the insemination treatment and adopted the child, either of those events might have amounted to approbation of the marriage.

AS TO GROUNDS FOR DECREE OF NULLITY, see HALSBURY, Hailsham Edn., Vol. 10, pp. 639-645, paras. 934-945; and FOR CASES, see DIGEST, Replacement Vol. 27, pp. 269-283, Nos. 2156-2267.

A Cases referred to:

(1) *Clifford v. Clifford*, [1948] 1 All E.R. 394; [1948] P. 187; [1948] L.J.R. 969; 27 Digest, Replacement, 417, 3462.

(2) *Tindall v. Tindall*, ante, p. 139.

(3) *G. v. M.*, (1885), 10 App. Cas. 171; 53 L.T. 398; 27 Digest, Replacement, 416, 3461.

B (4) *W. v. W.*, [1952] 1 All E.R. 858; [1952] P. 152.

APPEAL by the wife against an order of KARMINSKI, J., made on July 17, 1952, dismissing her petition for a decree of nullity on the ground that, although the marriage had not been consummated owing to the incapacity of the husband, she had approbated the marriage and was not entitled to the relief sought.

C The parties were married in January, 1945. The husband was then a serving soldier, and, after a short honeymoon, they lived together whenever he had leave, until his demobilisation in 1946. The husband had an accident when a small child which resulted in the failure of the genital organs to develop in the normal way at puberty. Attempts were made to consummate the marriage, but in the spring of 1948, the parties consulted a woman doctor who stated that the wife still bore all the signs of virginity. In November, 1948, the parties started negotiations with the Church of England Children's Society with a view to the adoption of a child, and in April, 1949, they took to live with them a boy aged two years. Also in April, 1949, the wife began a course of treatment, administered by the woman doctor, by way of artificial insemination from a donor other than the husband. On Aug. 4, 1949, the parties filed in the Lambeth County Court a petition, as required by the Adoption of Children Act, 1926, for the adoption of the child who was living with them, and in that petition it was asserted that the wife was married to the husband in January, 1945. On Sept. 16, 1949, the treatment by way of artificial insemination ceased, the wife not having become pregnant. On Sept. 19, 1949, an order was made by the learned judge at Lambeth County Court, allowing the adoption. On Oct. 24, 1949, the wife was admitted to hospital as a voluntary patient, suffering from a nervous disorder. On Nov. 24, 1949, she had an interview with the medical superintendent, and discussed her matrimonial affairs. She told him that she was then contemplating "divorcing" her husband for non-consummation. On Nov. 26, 1949, the wife returned to the husband and there was some discussion between them as to what she called divorce. In February, 1950, the wife went on a holiday to Gibraltar and stayed away until June, 1950. On her return she again suggested a divorce for mental cruelty or non-consummation. In February, 1951, the wife consulted a solicitor who told her that, if she could prove impotence on the part of the husband, there was the remedy of a decree of nullity. In March, 1951, the husband was sentenced to nine months' imprisonment, and from prison he wrote letters imploring her to keep the marriage alive. On July 12, 1951, the wife filed a petition for a decree of nullity on the ground of the husband's incapacity.

KARMINSKI, J., in his judgment, stated that he was satisfied (i) that the marriage had not been consummated, and (ii) that the failure to consummate it was due to the incapacity of the husband, at any rate, in respect of the wife, but, he continued, the real issue was whether or not the wife, by her conduct, had approbated the marriage. On this point the learned judge said he was satisfied

that at the time of the interview with the woman doctor in 1948 the wife had full knowledge of the husband's incapacity and that consummation of the marriage by him was virtually impossible, and that, in view of the wife's conversation with the medical superintendent on Nov. 24, 1949, he (HIS LORDSHIP) had come to the conclusion that at any rate by the autumn of 1949 the wife was aware that the husband was incapable of consummating the marriage, and was aware, though her knowledge was hazy, that the law provided an adequate remedy for her if she chose to avail herself of it, but that she deliberately chose to go on living with the husband and the adopted child and to make her life on that basis and on no other. KARMINSKI, J., therefore, held that the wife had approbated the marriage and dismissed her petition. The wife now appealed.

C. N. Shawcross, Q.C., and D. Henderson for the wife.
Ashe Lincoln, Q.C., and T. Dewar for the husband.

Cur. adv. vult.

SINGLETON, L.J., read a judgment in which he said: The wife sought a decree of nullity on the ground that at the time of the ceremony of marriage the husband was, and had ever since been, incapable of consummating the marriage. KARMINSKI, J., was satisfied that incapacity was proved, indeed, there was no dispute on that head, but he arrived at the conclusion that the wife by her actions had approbated the marriage, and that, therefore, she was not entitled to the relief sought. The wife appeals to this court against the decision of the learned judge.

[HIS LORDSHIP stated the facts and continued:] The picture I see is that of a sick woman who had done what she could to make a success of her marriage, but had begun to realise that the position was bad from the point of view of her health, though she was still anxious to do what was right towards the husband and the child whom they had adopted. She knew that the law provided a remedy, though her knowledge was hazy. The marriage had, as the judge said, become unhappy and distasteful to her, and the disgrace of her husband's conviction of dishonesty was the culminating matter which induced her to take the steps she took. It may well be that, but for that dishonesty, she would have put up with the position a little longer. I do not think that that affects the justice of the case. I am unable to find that anything which happened after Nov. 24, 1949, can be said to amount to approbation of the marriage, nor do I think that it ought to be regarded as adding to that which had gone before. It ought not to be counted against the wife that when she came out of hospital after a nervous breakdown she endeavoured to live with her husband, before and after she went to Gibraltar, and to look after the adopted child: see *Clifford v. Clifford* (1) and the words of TUCKER, L.J. ([1948] 1 All E.R. 397, 398). All the circumstances must be examined to determine whether there has been approbation of the marriage so that it is inequitable or against public policy that the petition should be granted. The matters on which most reliance was placed were the adoption of the child and the artificial insemination treatment of the wife. Both those took place before the wife had knowledge that she had any remedy. So far as I can see, there is nothing which occurred after she had that (somewhat hazy) knowledge which counts either way. True, the judge said:

"She deliberately chose to go on with this particular husband and with the adopted child",

but I cannot see that a woman who in such circumstances stays in the matrimonial home must thereby be said to have approbated the marriage. There is nothing in her conduct after Nov. 24, 1949, which makes it inequitable that she should be granted relief.

A In the course of a judgment delivered in *Tindall v. Tindall* (2) I read some passages from the speeches in *G. v. M.* (3). No good purpose would be served by repeating those citations here. It is sufficient to say that LORD SELBORNE, L.C., made it clear that before there can be approbation which would deprive a petitioner of the remedy which he, or she, otherwise would have, there must be knowledge of the facts and of the law. In *W. v. W.* (4) SIR RAYMOND EVERSHED, M.R., JENKINS, L.J., and HODSON, L.J., all refer to and lay emphasis on that factor. The petitioner in that case was a meteorologist and an officer in the Royal Air Force. After he realised his wife's incapacity to consummate the marriage, there had been, on his suggestion, the adoption of two children, the first of which had died before the adoption of the second. The court was of opinion that the petitioner knew both the facts and the law, and that, in view of all the circumstances, there was approbation of the marriage, and the petitioner was held not to be entitled to a decree of nullity. That decision is binding on us. It was submitted, however, that the present case is distinguishable in that there is a finding by the judge that the petitioner did not know the law at the time of the adoption of the child. This may be thought to be a fine, or a subtle, distinction, but, none the less, it is a real one. If, as the judge found, the wife did not know that she had a remedy for the wrong done to her, the adoption of the child did not amount to approbation of the marriage, nor had anything else up to November, 1949, any such effect. That which happened afterwards must be looked at in view of what had gone before, but, even so, I do not regard it as giving ground for refusal of relief. There are few reported cases in which it has been held that the petitioner in a nullity suit was deprived of the relief which might have been granted to her because of the doctrine of approbation. I do not think that this is such a case. B KARMINSKI, J., took great trouble, and he set out his findings of fact admirably. It would appear that he felt he must decide in the way he did because of the decision in *W. v. W.* (4), but, in my opinion, this case is, on its facts, distinguishable from that case. I do not consider that approbation of the marriage on the part of the wife was shown. I would allow the appeal and grant to the wife the decree which she seeks.

BIRKETT, L.J.: I have had the opportunity of reading and considering the judgment of my Lord which has just been delivered. It contains all that I would have wished to say for myself, both on the facts of the case and the law which is applicable thereto, and, recognising, as I do, the importance of the decision and yet feeling that the judgment of my Lord so completely covers all the material matters, I do not desire to add a separate judgment of my own. I am, therefore, content to say that I am entirely of the same opinion, and, in my view, this appeal should be allowed.

MORRIS, L.J.: I also have had an opportunity of reading and considering the judgment which SINGLETON, L.J., has delivered, and I am in full agreement with it.

Appeal allowed. Decree nisi in favour of the wife.

Solicitors: R. H. Marcus (for the wife); A. M. V. Panton (for the husband).

[Reported by C. N. BEATTIE, ESQ., Barrister-at-Law.]

BECKETT v. NEWALLS INSULATION CO., LTD. AND ANOTHER.

[COURT OF APPEAL (Singleton and Morris, L.JJ.), November 27, 28, December 1, 1952.]

Negligence—Dangerous goods—Gas—Cylinder introduced into ship by contractor—Leakage—Explosion—Liability of contractor.

The plaintiff was a plasterer's labourer employed by an insulation company. In May, 1950, the insulation company were doing some plastering in a ship in which a refrigeration company were constructing refrigeration chambers. For use in their work the refrigeration company took into the ship a cylinder containing calor gas. On the cylinder were a valve and a regulator, and, if either of them was securely shut, no gas could escape. If a mixture of the gas and the right proportion of air came into contact with a naked flame, it was likely to explode. On the evening of Friday, May 26, when the refrigeration company's men ceased work, their foreman put the cylinder in the outer room of the refrigeration chambers. The refrigeration company's men were not returning to the ship until the following Tuesday, but their foreman knew that the insulation company's men would be working there during the week-end. On Saturday and Sunday the plaintiff and E., another workman employed by the insulation company, did plastering work in the refrigeration chambers. On Sunday, after they had finished their work in the inner room, they started on the outer room, and, finding the cylinder in the way, E. moved it into the inner room. On Monday no work was done in the ship. On Tuesday morning, when the plaintiff went to continue his work in the refrigeration chambers, he found them in darkness as the electric light bulbs had been removed. Thinking that there might be a bulb in the inner room, he went into it and lit a match. There was an explosion owing to an escape of gas from the cylinder, and he was injured. The cylinder was not damaged and it was not known how the gas escaped. There was no negligence on the part of E. when he moved the cylinder. ✓

HELD: the refrigeration company, having taken into the ship an article which was so constructed that gas might escape from it if the regulator or valve were not securely turned, were under a duty to take special precautions; their foreman, in leaving the gas cylinder in the refrigeration chamber when he knew that other persons might be working there and that the cylinder might have to be moved, and in giving no warning of the danger of moving it and no instructions how it should be moved, did not take the care which a reasonable man would have taken in the circumstances; and, therefore, the refrigeration company were responsible for the explosion and were liable to the plaintiff in damages. ✓

AS TO CARE REQUIRED IN RESPECT OF DANGEROUS ARTICLES, see HALSBURY, Hailsham Edn., Vol. 23, p. 629, para. 883; and FOR CASES, see DIGEST, Vol. 36, p. 57, Nos. 354-364.

Cases referred to:

- (1) *Northwestern Utilities, Ltd. v. London Guarantee & Accident Co., Ltd.*, [1936] A.C. 108; 105 L.J.P.C. 18; 154 L.T. 89; Digest Supp.
- (2) *Rylands v. Fletcher*, (1868), L.R. 3 H.L. 330; 37 L.J.Ex. 161; 19 L.T. 220; 33 J.P. 70; *affg.* S.C. *sub nom.* *Fletcher v. Rylands*, (1866), L.R. 1 Exch. 265; 36 Digest 187, 311.
- (3) *Charing Cross Electricity Supply Co. v. Hydraulic Power Co.*, [1914] 3 K.B. 772; 83 L.J.K.B. 1352; 111 L.T. 198; 78 J.P. 305; 36 Digest 189, 315.
- (4) *Dominion Natural Gas Co., Ltd. v. Collins & Perkins*, [1909] A.C. 640; 79 L.J.P.C. 13; 101 L.T. 359; 36 Digest 28, 142.

- (5) *M'Alister (or Donoghue) v. Stevenson*, [1932] A.C. 562; 101 L.J.P.C. 119; 147 L.T. 281; Digest Supp.
- (6) *Hanson v. Wearmouth Coal Co., Ltd. & Sunderland Gas Co.*, [1939] 3 All E.R. 47; Digest Supp.
- (7) *Ball v. London County Council*, [1949] 1 All E.R. 1056; [1949] 2 K.B. 159; 113 J.P. 315; 2nd Digest Supp.
- A (8) *Rickards v. Lothian*, [1913] A.C. 263; 82 L.J.P.C. 42; 108 L.T. 225; 36 Digest 28, 143.
- (9) *Read v. Lyons (J.) & Co., Ltd.*, [1946] 2 All E.R. 471; [1947] A.C. 156; [1947] L.J.R. 39; 175 L.T. 413; 2nd Digest Supp.
- (10) *Dixon v. Bell*, (1816), 5 M. & S. 198; 105 E.R. 1023; 36 Digest 57, 354.

B APPEAL by the plaintiff from an order of STABLE, J., dated June 9, 1952, in an action for damages for negligence.

The plaintiff, who was twenty years of age at the time of the accident, was a plasterer's labourer employed by the first defendants, Newalls Insulation Co., Ltd. (referred to hereafter as the insulation company). In May, 1950, the second defendants, Lightfoot Refrigeration Co., Ltd. (referred to hereafter as the refrigeration company) were installing refrigeration insulation in a ship, the Gyrotoma, which was being fitted out at Sunderland, and the insulation company were doing some plastering work in the chambers of the ship in which the refrigeration insulation was in course of construction. For the purpose of their work, the refrigeration company's workmen took into the ship a cylinder containing calor gas which they used for brazing. According to the evidence, this was the safest kind of gas, but it was likely to explode if a mixture of the gas and the right proportion of air came into contact with a naked flame. On top of the cylinder was a valve which, if it was securely turned, would stop any escape of gas. When required for use, the gas passed through a regulator into a cable which was attached to the container. If the regulator was properly adjusted there could be no escape of gas even if the valve were open. The valve could be covered by a cap, which screwed on tightly and on the top of which was a handle by means of which the cylinder could be carried. If the cap was on, the regulator was taken off the cylinder. According to the evidence, there was no cap on the valve when the cylinder was taken into the ship.

The refrigeration chambers consisted of two rooms, the outer being the vegetable room and the inner the meat room. The dimensions of the meat room were nine feet six inches by six feet, it was about six feet high, and the only door to it was from the vegetable room. On the evening of Friday, May 26, 1950, when the refrigeration company's men ceased work, Spencer, their foreman engineer, took the cable off the cylinder and put the cylinder, with their other tackle, in a corner of the vegetable room. It being the Whitsun week-end, the refrigeration company's men were not returning to the ship till Tuesday morning, but Spencer knew that the insulation company's men would be working there during the week-end. On Saturday and Sunday the plaintiff and one Edmunds, who was also employed by the insulation company and was senior to the plaintiff, were working on the plastering in the refrigeration chambers. By about noon on Sunday they had finished their work in the meat room and started in the vegetable room. Finding that the tackle left by the refrigeration company's men was in their way, Edmunds moved it into the meat room. No work was done in the refrigeration chambers on Monday. On Tuesday, when the plaintiff went to continue his work, the refrigeration chambers were in darkness as the electric light bulbs had been removed on Saturday, and he and Edmunds had used candles on Sunday. Thinking that there might be some bulbs in the meat room, he went into it, and, as it was completely dark there, he struck a match. There was an explosion owing to an escape of gas from the cylinder, the plaintiff was blown into the vegetable room and

was severely burnt. The cylinder was not damaged in the explosion and there was no evidence how the gas escaped.

In an action against both defendants the plaintiff alleged that the insulation company were negligent in the way Edmunds handled the gas cylinder, and, alternatively, that the refrigeration company were negligent in that, inter alia, (a) they left the cylinder in the chamber in a defective and dangerous condition so that gas might escape from it, (b) they left it where it might have to be handled by others with the valve exposed and without a proper protective cap or other locking device fitted on it so that anyone handling it would be likely to take hold of the valve itself and turn it with the result that gas would be permitted to escape, and (c) they failed to give any adequate warning of the danger of taking hold of the valve to other persons who might have occasion to handle or approach the cylinder. By their defence the insulation company denied negligence and alleged that the accident was caused, or contributed to, by the negligence of the refrigeration company. The refrigeration company also denied negligence and alleged that the accident was caused by the negligence of the plaintiff and Edmunds in the way in which they had handled the cylinder. STABLE, J., held that no case was proved against either of the defendants and dismissed the action. At the request of counsel, he provisionally assessed the damages to which the plaintiff would have been entitled, had he succeeded, at £615. The plaintiff appealed from the decision of the learned judge. By consent of the parties the appeal was heard by two lords justices only.

Veale, Q.C., and *J. H. Robson* for the plaintiff.

Hylton-Foster, Q.C., and *Waller* for the first defendants, Newalls Insulation Co., Ltd.

Marven Everett, Q.C., and *N. Harper* for the second defendants, Lightfoot Refrigeration Co., Ltd.

SINGLETON, L.J., stated the facts, and said: The case for the plaintiff, as put forward in this court, was that the second defendants, the refrigeration company, were dealing with something of a dangerous character, to wit, gas, and they did not use sufficient care in the way they left the container. Counsel for the plaintiff referred us to some words of LORD WRIGHT in *Northwestern Utilities, Ltd. v. London Guarantee & Accident Co., Ltd.* (1), where the learned Law Lord dealt with dangerous things in general, and said ([1936] A.C. 118):

"That gas is a dangerous thing within the rules applicable to things dangerous in themselves is beyond question. Thus the appellants who are carrying in their mains the inflammable and explosive gas are prima facie within the principle of *Rylands v. Fletcher* (2), affirming *Fletcher v. Rylands* (2): that is to say, that though they are doing nothing wrongful in carrying the dangerous thing so long as they keep it in their pipes, they come prima facie within the rule of strict liability if the gas escapes: the gas constitutes an extraordinary danger created by the appellants for their own purposes, and the rule established by *Rylands v. Fletcher* (2) requires that they act at their peril and must pay for damage caused by the gas if it escapes, even without any negligence on their part. The rule is not limited to cases where the defendant has been carrying or accumulating the dangerous thing on his own land: it applies equally in a case like the present where the appellants were carrying the gas in mains laid in the property of the city (that is in the sub-soil) in exercise of a franchise to do so: *Charing Cross Electricity Supply Co. v. Hydraulic Power Co.* (3)."

LORD WRIGHT repeated the question put by LORD DUNEDIN ([1909] A.C. 647) in *Dominion Natural Gas Co., Ltd. v. Collins & Perkins* (4):

"... have the defendants been able to show affirmatively that the true cause of the accident was the conscious act of another volition, i.e., the tampering with the machines by the railway company's workmen?"

and went on to say ([1936] A.C. 120):

"It is not here intended to enumerate all the defences which might be available to a defendant in this class of action: but the two defences mentioned are both material in this case."

A [HIS LORDSHIP read passages from the judgment of STABLE, J., and referred, in particular, to a passage where the learned judge said: "I think it is imposing a fantastic standard to say that the regulator should have been dismantled and a cap fitted over the tap [of the cylinder]," and continued:] With all respect to the judge, I think that that must depend on whether or not it is easy for the tap or for the regulator, or for both, to be moved inadvertently when one is moving the container. STABLE, J., went on to say:

B "After all, that would not have obviated the possibility of trouble. To have completely obviated the possibility of trouble, the cylinder would have had to have been locked up somewhere where nobody could have touched it. Having regard to the evidence that these cylinders are in universal use in private houses, in caravans, and in motor boats all over the country, and that domestic gas is a feature of a vast number of dwellings, with switches, which let the supply of gas off and on, exposed C to a mischievous or inadvertent act, to hold that a duty is imposed, in relation to one of these cylinders, to put it where nobody can possibly get at it would be stating the duty too highly. In my view, it was a perfectly reasonable thing to leave the cylinder where it was ready for use when the men came to work on the Tuesday, with the gas properly and effectively turned off."

D That, again, I venture to point out, must depend on the risk involved in the legitimate moving of the container itself. In regard to Edmund's responsibility for the explosion, STABLE, J., said:

E "It is, I think, agreed (and, if it is not agreed, I am perfectly satisfied) that Mr. Edmunds, in removing the cylinder from the floor of this chamber where they were going to work . . . was acting perfectly properly, and nobody could have suggested that he was not. It is possible that in shifting this cylinder he may—I say 'he may'—have inadvertently twisted the tap and perhaps the regulator—although it is extremely difficult to see how he could twist the regulator inadvertently—and brought about an escape of gas."

F I agree with the learned judge that it is extremely difficult to see how anyone moving the container (which is not a very big thing) could inadvertently turn on the tap and also move the regulator so that it was in a position to allow the escape of gas. For both things to have happened inadvertently seems to me to amount almost to an impossibility.

G Counsel for the plaintiff referred to the words of LORD MACMILLAN in *M'Alister (or Donoghue) v. Stevenson* (5), as showing that in circumstances of this kind the persons who placed the dangerous gas there were practically subject to a guarantee of safety. He also referred us to the words of GODDARD, L.J. ([1939] 3 All E.R. 53) in *Hanson v. Wearmouth Coal Co., Ltd. & Sunderland Gas Co.* (6) and of TUCKER, L.J. ([1949] 1 All E.R. 1061) in *Ball v. London County Council* (7). The judgment of STABLE, J., amounts to this. Here is a man who, at his place H of work, suffers an accident of a most unusual kind, an accident which, prima facie, would not have happened without someone's negligence. The learned judge found that there was no negligence on the part of Edmunds, the only person who is said to have moved the container after it was placed in the vegetable room by the refrigeration company's foreman. He said that Edmunds might have moved the tap, and, perhaps, the regulator, inadvertently, though it was extremely difficult to see how he could twist the regulator inadvertently, and he, the judge, was by no means satisfied that Edmunds had done so.

He found, too, that, when dealing with a cylinder containing calor gas, what the refrigeration company's foreman did was quite reasonable, that it was imposing a fantastic standard to say that the regulator should have been dismantled and a cap fitted over the tap, and that it was a perfectly reasonable thing to leave the cylinder, with the gas properly and effectively turned off, where it was ready for use when the men came to work on Tuesday. I think, from that, it follows that the judge found that the gas was properly and effectively turned off. If all those findings are right, it is extraordinarily difficult, if not impossible, to understand how this accident came about. There was no suggestion that any other persons went to that part of the ship at the week-end, and no allegation of any unauthorised interference by any party outside. Therefore, one is faced, on the findings, with an accident of such a kind that one would think it was quite impossible it could happen if the container were in order and if the gas were properly turned off by the valve and the regulator, and in the absence of any interference with either.

It is necessary to consider the case somewhat closely, and in so doing I bear in mind the submissions made to us by counsel for the refrigeration company. In asking the court to uphold the judgment of STABLE, J., he referred us to the words of LORD MOULTON ([1913] A.C. 282) in *Rickards v. Lothian* (8), and to what was said in the House of Lords in *Read v. J. Lyons & Co., Ltd.* (9). In *Read v. J. Lyons & Co., Ltd.* (9) there was no allegation of negligence, but counsel for the refrigeration company used the report to draw our attention to the submissions of Sir Hartley Shawcross, then Attorney-General, who appeared for the respondents in that case. The following passage from the argument appears to me to summarise the law neatly and accurately:

"This case is not within the rule in *Rylands v. Fletcher* (2), which is really founded on the idea that the defendant did what he should not have done. It depends on negligence, though the greater the danger, the greater the care required of him. In the authorities the application of the standard of things called dangerous in themselves has no logic about it. The same thing has been held dangerous in itself in some circumstances but not in others: see SALMOND'S LAW OF TORTS, 10th ed., p. 518. The true question is not whether a thing is dangerous in itself but whether, by reason of some extraneous circumstances it may become dangerous. There is really no category of dangerous things; there are only some things which require more and some which require less care . . ."

That argument is in much the same terms as the opening paragraph of ch. XXI of WINFIELD ON THE LAW OF TORT, 5th ed. (p. 543), a chapter on dangerous chattels, where the learned author says:

"There is no doubt that the law as to liability for dangerous chattels is treated in legal literature and practice as a separate compartment of the law of tort, but it is not easy to explain why it is so or in what respect it is a species of 'strict' liability. In theory the law of negligence as a tort might be regarded as adequate to cover it. It is true that the law expects of a man a great deal more care in carrying a pound of dynamite than a pound of butter, or in keeping a bottle of poison than a bottle of lemonade. But that is only another way of saying that what is a reasonable amount of care in one set of circumstances is not so in another set of circumstances, and reasonable care is the sole test of negligence. And, passing to the decided cases of dangerous chattels, we have been unable to trace anything in the reports that is inconsistent with the view that the law of negligence is all that is needful for the purpose."

The learned author then refers to *Dixon v. Bell* (10) and sets out the words of LORD DUNEDIN ([1909] A.C. 646) in *Dominion Natural Gas Co., Ltd. v. Collins & Perkins* (4).

I propose to consider this case purely on the allegation of negligence which is made against the refrigeration company. I do not think that any case was proved against the insulation company. It was not argued in this court that there was any negligence on the part of the plaintiff himself. The only other employee of the insulation company who was concerned was Edmunds. There was no negligence on his part and none on the part of his employers. The case against the refrigeration company is different. They introduced on to the premises a cylinder containing calor gas which, if it escaped, might bring about an explosion, as it did. They left it on Friday night without any cap covering the valve. Their foreman, Spencer, removed the cable, and, according to his evidence, saw that the regulator was set right and that the tap was turned off, a practice which, he said, he had always followed. The contention of the refrigeration company was that the escape of gas was due to some interference. They did not suggest that there was any interference from outside, but they now seek to say that the escape was caused either by the act of Edmunds or in some other way which is left unexplained. Counsel for the refrigeration company said that the insulation company might be responsible, or, possibly, both the companies might be liable, in that it must have been the act of Edmunds that brought about this escape of gas.

I cannot see that on the evidence. Furthermore, the degree of care required from the refrigeration company, who introduced the gas cylinder, is to be measured by the danger involved in that which they brought into the ship. The law expects of a man a great deal more care in carrying a pound of dynamite than a pound of butter. The law expects greater care if there is introduced on to an enclosed space in a ship a cylinder containing gas which may escape if precautions are not taken. One precaution that could have been taken was to put on the cap, and, if that had been done, no movement of the cylinder would have interfered with the valve. Another precaution which might have been taken would have been to leave the cylinder in a safe place. The refrigeration company's foreman knew that the insulation company's men would be working in the ship during the week-end, but he left the cylinder in the vegetable room, not considering whether the men might be working there, or whether it would be necessary for them to move it. In the circumstances it would have been reasonable to inquire whether anyone was going to work there. If by the mere movement of the cylinder there was a chance that something in the apparatus might be moved so that there could be an escape of gas, it would have been reasonable to warn people not to touch or move it. If an article is so constructed that, when it is moved, a regulator, or valve can be affected so that an escape of gas may occur, it seems to me that the person who puts that article in a position where it may have to be moved, and does not give any warning of the danger of moving it, or of how it should be moved, is not exercising the care which he ought to exercise in regard to such an article. Negligence is a failure to take that care which a reasonable man would take in the circumstances. A reasonable man who has to leave something of that kind must take more care than Spencer, the refrigeration company's foreman, took. In my judgment, the refrigeration company did not take the care which they ought to have done in the circumstances, and, therefore, the plaintiff is entitled to recover damages against them. I would allow this appeal and enter judgment for the plaintiff against the refrigeration company for the sum of £615 provisionally assessed by the learned judge.

MORRIS, L.J.: I have reached the same conclusion. In approaching this case it is necessary to have in mind the nature of the article with which the inquiry is concerned, the place where the article was left, the time and date when it was left, and all the other relevant circumstances. In his speech in *Read v. J. Lyons & Co., Ltd.* (9), LORD MACMILLAN said ([1946] 2 All E.R. 476):

"In an address characterised by much painstaking research counsel for the appellant sought to convince your Lordships that there is a category of things and operations dangerous in themselves and that those who harbour such things or carry on such operations in their premises are liable apart from negligence for any personal injuries occasioned by these dangerous things or operations. I think that he succeeded in showing that in the case of dangerous things and operations the law has recognised that a special responsibility exists to take care, but I do not think that it has ever been laid down that there is absolute liability apart from negligence where persons are injured in consequence of the use of such things or the conduct of such operations. In truth it is a matter of degree. Every activity in which man engages is fraught with some possible element of danger to others. Experience shows that even from acts apparently innocuous injury to others may result. The more dangerous the act the greater is the care that must be taken in performing it. This relates itself to the principle in the modern law of torts that liability exists only for consequences which a reasonable man would have foreseen. One who engages in obviously dangerous operations must be taken to know that if he does not take special precautions injury to others may very well result."

The evidence showed that, if there were an escape from the container, there might be an explosive mixture of air and gas, and, if someone struck a match when the gas was leaking into the air, it would explode if there was an explosive mixture. The explosive mixture was a range between 1.8 and 8.41 per cent. calor gas to air. That was the nature of the gas which might escape from the cylinder which was left by Spencer, the refrigeration company's foreman, in the vegetable room. It is important also to see the dimensions of that place. The approach to the meat room is from the vegetable room. The inner dimensions of the meat room appear to be nine feet six inches by about six feet, and the height of the chamber is some six feet. There was a door leading from that inner meat room to the vegetable room, and then a door from the vegetable room which led to the outside air. When the plaintiff went on Tuesday morning he found the door of the vegetable room closed. There appears to have been no evidence whether the door between the vegetable room and the meat room was closed. The next circumstance is the time when Spencer left the calor gas cylinder. He left it on the Friday, with knowledge that he would not be returning until Tuesday and that others would be working there on Saturday and Sunday. In the circumstances, it seems to me that Spencer was leaving an article from which gas might escape if the tap was not fully turned. He was leaving it in a confined space, knowing that others would be there on later days, that there would be an interval before anyone came, and that it might be necessary for it to be moved. There is nothing to suggest that Edmunds did anything wrong in moving the cylinder, and, therefore, he was not guilty of any negligent act. I cannot see any sufficient or satisfactory evidence that any unauthorised person was present in the ship. That matter rests really on theory or speculation.

Having regard to all those features of the case, and there being the undoubted fact that there was at some time an escape of gas, and that, when the plaintiff went on the Tuesday morning to the inner chamber, the meat room, he acted without any negligence, any suggestion of contributory negligence on his part having been withdrawn during the hearing, the question arises whether it is shown that there was negligence on the part of someone for whom the refrigeration company are responsible. It is plain that Spencer could have done things in a different way. He might have moved the cylinder altogether from the chamber and placed it in some store. That was, perhaps, a course that would not have occurred to him, and I am not saying that it was one that should

necessarily have been adopted. He certainly might have put the cap on it. He says that no cap was supplied to him, but those who employed him could have supplied a cap for fitting on the cylinder. In my judgment, the refrigeration company are responsible, as the evidence leads me to the conclusion that either there was some escape of gas from the Friday afternoon onwards, or that the cylinder was left in such a state that when it was moved, and necessarily moved by someone who moved it without negligence, it would thereafter be in a condition in which there would or might be an escape of gas. On that basis, in my judgment, the facts lead to the conclusion that there was no liability in the insulation company, but that there was liability in the refrigeration company. I, therefore, agree that the appeal must be allowed to the extent mentioned by my Lord.

Appeal allowed against the second defendants.

Solicitors: *Isadore Goldman & Son*, agents for *Crute & Sons*, Sunderland (for the plaintiff); *Denis Hayes* (for the insulation company); *Barlow, Lyde & Gilbert* (for the refrigeration company).

[Reported by C. N. BEATTIE, ESQ., Barrister-at-Law.]

GETREIDE-IMPORT-GESELLSCHAFT m.b.H. v. CONTIMAR S. A. COMPANIA INDUSTRIAL COMERCIAL Y-MARITIMA.

[QUEEN'S BENCH DIVISION (Sellers, J.), December 11, 12, 1952.]

Arbitration—Ouster of jurisdiction of court—Term of contract that award condition precedent to proceedings—Dispute as to right of appeal against award—Action for declaration as to right—Competency—Service of notice of appeal—London Corn Trade Association contract—Foreign party “considered as ordinarily resident” in London—Validity of service at office abroad—Power of court to order provision making award condition precedent to bringing action to be of no effect—Exercise of discretion—Arbitration Act, 1950 (c. 27), s. 25 (4).

A contract for the sale of goods incorporated the terms of a London Corn Trade Association, Ltd., standard form of contract, which required all disputes arising out of the contract to be referred to arbitration, prohibited the bringing of any action in respect of any such dispute until it had been settled by arbitrators, or, on appeal, by the committee of appeal, and made the obtaining of an award “a condition precedent to the right of either contracting party to sue the other in respect of any claim arising out of this contract”. Notice of appeal against an award was required to be given to the secretary of the association and to the other party to the dispute within fourteen consecutive days from the date of the award. Notices were required “to be given in writing, and sent by post to, or left at, the place where the person, firm, or company to whom they are addressed is carrying on or (by reason of the provisions of the contract) is to be considered as carrying on business, and shall be deemed to have been received not later than twenty-four hours after the same are so sent or left.” Another clause, under which for the purpose of proceedings the making and performance of the contract were deemed to be in England and exclusive jurisdiction as to disputes was conferred on English courts and arbitrators appointed in England (except as to the enforcement of an award), provided that any party “residing or carrying on business elsewhere than in England or Wales, shall, for the purposes of proceedings at law or in arbitration, be considered as ordinarily resident or carrying on business at the office of the London Corn Trade Association, Ltd.”

On Aug. 11, 1952, the sellers of the goods, against whom an award on an arbitration under the contract had been made on July 30, 1952, sent

notice claiming an appeal against the award to the association, who notified the buyers at their head office in Duisburg, Germany, by a letter which was received by the buyers on Aug. 13. On Aug. 12 the sellers posted notice that the appeal had been claimed to the buyers at their branch office at Frankfurt-am-Main, but in error addressed it to "Friedrich-Ebert-Strasse 27, Frankfurt A.M." instead of to "Niedenau 59, Frankfurt," and the notice was not delivered until after Aug. 13. In an action by the buyers for a declaration that the award was valid and subsisting and final and conclusive and that the sellers had no right to appeal,

HELD: (i) (a) although, if addressed simply to the buyers at Frankfurt-am-Main, the sellers' notice of the appeal to them, being posted more than twenty-four hours before the expiration of the time for appeal, would have been valid under the clause deeming it to have been received within twenty-four hours, that clause validated only a notice sent with the proper address and not one with an address so misleading that the chances of receiving it in the ordinary course of post were remote, and, therefore, the notice was out of time; (b) in sending the notification of the appeal to the buyers the secretary of the association was not acting as agent for the sellers; but (c) the rule that the buyers were to be considered as carrying on business at the association's office in England allowed, but did not require, notices given to them to be served at that office and was a provision for the benefit of a party serving notice of which he need not avail himself, and, therefore, a notice served directly at the office of the buyers abroad, if otherwise good, would have been valid.

(ii) the action was brought in substance to enforce the award, which was, not something arising out of the contract, but something resulting from the arbitration proceedings, and, therefore, the obtaining of an award on the issue of the sellers' right to appeal was not a condition precedent to the bringing of the action and the court was not precluded from granting a declaration that there was no right of appeal.

(iii) if the effect of the contract had been that an award was a condition precedent to the bringing of the action, in all the circumstances the court, if it had power to do so in the exercise of its discretion under s. 25 (4) of the Arbitration Act, 1950, would order that condition to cease to have effect.

(iv) the sellers, therefore, had failed to comply with a condition as to serving notice of appeal and were not entitled to prosecute the appeal.

FOR THE ARBITRATION ACT, 1950, s. 25 (4), see HALSBURY'S STATUTES, Second Edn., Vol. 29, p. 111.

Cases referred to:

- (1) *Scott v. Avery*, (1856), 5 H.L. Cas. 811; 25 L.J.Ex. 308; 28 L.T.O.S. 207; 10 E.R. 1121; 2 Digest 350, 263.
- (2) *Heyman v. Darwins, Ltd.*, [1942] 1 All E.R. 337; [1942] A.C. 356; 111 L.J.K.B. 241; 166 L.T. 306; 2nd Digest Supp.
- (3) *Produce Brokers Co., Ltd. v. Olympia Oil & Cake Co., Ltd.*, [1916] 1 A.C. 314; 85 L.J.K.B. 160; 114 L.T. 94; 2 Digest 475, 1187.
- (4) *Attorney-General for Manitoba v. Kelly*, [1922] 1 A.C. 268; 91 L.J.P.C. 101; 126 L.T. 711; Digest Supp.
- (5) *Hirji Mulji v. Cheong Yue S.S. Co., Ltd.*, [1926] A.C. 497; 95 L.J.P.C. 121; 134 L.T. 737; Digest Supp.
- (6) *May v. Mills*, (1914), 30 T.L.R. 287; 2 Digest 338, 172.
- (7) *Dennehy v. Bellamy*, [1938] 2 All E.R. 262; Digest Supp.

ACTION for declarations and an injunction.

The plaintiffs carried on business at Duisburg, Germany, with a branch office at Frankfurt-am-Main, and the defendants carried on business at Buenos Aires. On Nov. 17, 1950, through the agency of one Franz Hagen, in Hamburg, acting for the two parties, the plaintiffs, as buyers, and the defendants, as

sellers, entered into a contract for the sale of a quantity of River Plate wheat. The contract was made subject to the London Corn Trade Association, Ltd., contract No. 41, rye terms, London arbitration, which contained the following terms:

A (A) "Buyer and seller agree that, for the purpose of proceedings, either legal or by arbitration, this contract shall be deemed to have been made in England, and to be performed there, any correspondence in reference to the offer, the acceptance, the place of payment or otherwise notwithstanding, and the courts of England or arbitrators appointed in England, as the case may be, shall, except for the purpose of enforcing any award made in pursuance of the arbitration clause hereof, have exclusive jurisdiction over all disputes which may arise under this contract. Such disputes B shall be settled according to the law of England whatever the domicile, residence, or place of business of the parties to this contract may be or become. Any party to this contract residing or carrying on business elsewhere than in England or Wales, shall, for the purposes of proceedings at law or in arbitration, be considered as ordinarily resident or carrying on business at the office of the London Corn Trade Association, Ltd., and C if in Scotland, he shall be held to have prorogated jurisdiction against himself to the English courts, or if in Northern Ireland to have submitted to the jurisdiction, and to be bound by the decision of the English courts".

D (B) "All disputes from time to time arising out of this contract, including any question of law appearing in the proceedings, whether arising between the parties hereto, or between one of the parties hereto and the trustee in bankruptcy of the other party, shall be referred to arbitration, according to the arbitration rule indorsed hereon, and this stipulation may be a rule of any of the Divisions of His Majesty's High Court of Justice in Northern Ireland, on the application of either contracting party, for the purpose of enforcing an award against a party residing or carrying on business in Northern Ireland. Neither buyer, seller, trustee in bankruptcy, nor any E other person claiming under either of them, shall bring any action against the other of them in respect of any such dispute until such dispute has been settled by arbitrators, or by the committee of appeal, as the case may be, and it is expressly agreed that the obtaining an award from either tribunal, as the case may be, shall be a condition precedent to the right of either contracting party to sue the other in respect of any claim arising F out of this contract . . . The arbitration to be held in London".

G (C) "In case any party to an award shall be dissatisfied with the award a right of appeal shall lie to the committee of appeal elected for that purpose in accordance with the rules and regulations of the London Corn Trade Association, Ltd., in force at the date of the contract, provided the following conditions are complied with . . . (b) Notice claiming appeal is given to the secretary of the association within fourteen consecutive days from the date of the award . . . (c) Within the said fourteen consecutive days, notice that the appeal has been claimed is given by the appellant direct to his seller or buyer, as the case may be".

A further clause of the rule provided:

H (D) "Notices under this rule to be given in writing, and sent by post to, or left at, the place where the person, firm, or company to whom they are addressed is carrying on or (by reason of the provisions of the contract) is to be considered as carrying on business, and shall be deemed to have been received not later than twenty-four hours after the same are so sent or left."

A claim made by the buyers against the sellers in respect of the performance of the contract was submitted to arbitration. The arbitrators disagreed and

appointed an umpire, and on July 30, 1952, the umpire made his award, finding the sellers in default under the contract and granting the buyers a substantial sum by way of damages. On Aug. 11, in pursuance of their right of appeal under the contract, the sellers, through their agents, Joseph Pyke & Sons (Liverpool), Ltd., notified the secretary of the London Corn Trade Association, Ltd., by letter that they claimed an appeal against the award and enclosed the appropriate amount for the fees of the appeal. On Aug. 12 the secretary of the association sent a letter to the buyers at Duisburg, notifying them and giving particulars of the appeal. The buyers received that letter on Aug. 13. On Aug. 12 the sellers sent from Buenos Aires to the buyers at Frankfurt-am-Main a letter notifying them that the sellers had, on Aug. 11, given notice of appeal against the award to the association. Owing to confusion of the name of the buyers with that of another company, the letter was addressed to the buyers at "Friedrich-Ebert-Strasse 27, Frankfurt A.M." instead of "Niedenau 59, Frankfurt A.M.", and, in consequence, it did not reach them at their Frankfurt or Duisburg office until after the time had expired for giving notice of appeal under the contract. A

The buyers claimed a declaration that the award was valid and final and conclusive as between the parties, that the sellers had no right to prosecute an appeal from the award, and that the appeal committee had no power to hear or entertain any such appeal or to vary or reverse the award. They also claimed an injunction which in the event was not asked for. They contended that the notice of the appeal sent by the sellers to them was not addressed to any address at which they carried on or were considered to be carrying on business and was not received within the correct time, and that it should have been sent to the office of the association at which the buyers were deemed to carry on business under cl. (A) of the terms incorporated in the contract. The sellers submitted that under cl. (D) the notice was deemed to be received not later than twenty-four hours after being sent, and, therefore, it was received within the fourteen days of the award; that the notification sent by the secretary of the association to the buyers was a valid notice sent on their behalf; and that the right to maintain the action was excluded by cl. (B), under which the dispute as to the right of appeal should first have been the subject of an award. The buyers denied that cl. (B) applied, contending that this dispute did not arise out of the contract, and, since it related to matters of jurisdiction, was within the jurisdiction of the court, and they asked, alternatively, for the clause to be ordered to cease to have effect for the purpose of the dispute under s. 25 (4) of the Arbitration Act, 1950. B C D E F

T. G. Roche for the buyers.

E. W. Roskill for the sellers.

SELLERS, J., stated the facts, said that, the question submitted to arbitration not being one of law which could be referred to the court, but one on the merits relating to the contract of sale, the right of appeal from the award arose only from the contract, and continued: The question arises of the combined effect of rules (A), (B), (C) (c), and (D) on the time within which the notice had to be given. The provision that the notice shall be deemed to have been received not later than twenty-four hours after it was sent or left is not without its ambiguities and difficulties. To be effective, the notice should have been actually received by the buyers within the fourteen days of the date of the award specified, i.e., as I think it was agreed and I certainly find, before midnight of Aug. 13. If it was left instead of being posted, one would have thought that it could have been left at any time up to midnight. If it was posted, the provision would seem to indicate that posting twenty-four hours before the time of expiry of the fourteen days, i.e., up to midnight on Aug. 12, would be a good compliance with the notice, whether or not the document was actually delivered on the following day, because it was to be deemed G H

to have been received during the following twenty-four hours. The notice given to the secretary of the London Corn Trade Association, Ltd., was clearly in time. The sellers' letter to the buyers did not reach the buyers before the material date, but it was posted on Aug. 12, and, if the posting of it can be regarded as sufficient, i.e., if it can be deemed to have been received within twenty-four hours afterwards, it will have complied with the rules. If the notice had been sent to the buyers simply at Frankfurt-am-Main, I should have been prepared to find that that would have sufficed and that the provision deeming it to have been received within twenty-four hours would have been effective, since the buyers are a well known company who could have been discovered in Frankfurt and that would have been an adequate address. But I have come to the conclusion that I cannot regard this letter as an adequate notice. The deeming clause for receipt within twenty-four hours can, I think, only cover a notice sent with the proper address. A notice cannot be redeemed from every fault. An address may be a little inadequate, but not wrong and misleading so that its chances of being received in the ordinary course of post are remote.

The sellers also contended that the letter sent by the association on Aug. 12 and received by the buyers on Aug. 13 constituted a sufficient compliance with the rule, on the ground that it was written by the secretary as agent for the sellers, following receipt of the notification from Messrs. Pyke of the appeal. The buyers say that it was not a notice given by the sellers direct to them, or, indeed, given by the sellers at all. Attractive in some ways as the argument is, I do not feel that I can find that, when he sent this letter, the secretary was either acting as or purporting to act as the agent of the sellers. The letter appears to be in common form, intimating to the other party and to the arbitrators that the notice of appeal has been given. It does not fall within any provision in the rules, and there is no indication that the sellers in any way ratified it, except when amending their pleadings in court. I do not think that can be regarded as a compliance with condition (C) (c), which must be complied with in addition to the condition as to notice to the association.

The buyers contended that there was in any case a fundamental error in these letters, in that they were addressed, the one merely to a branch of the buyers in Frankfurt and the other to their main office in Duisburg, when the contract required that they should be addressed to the buyers at the London Corn Trade Association, Ltd., in London. That submission is derived from cl. (D) requiring notices under the rule to be "in writing, and sent by post to, or left at, the place where the . . . company to whom they are addressed is carrying on or . . . is to be considered as carrying on business". It is said that the place where the buyers, a German company, are to be considered as carrying on business is at the office of the association in London, by virtue of the provisions relating to jurisdiction in cl. (A), which provides that any party who resides outside England and Wales shall, for the purposes of proceedings at law or arbitration, be considered to be ordinarily resident or carrying on business at that address. That clause refers substantially to the law of the contract, which is to be that of England, and the forum of a dispute, which is to be either the courts of England or arbitration in England. That is emphasised by the further provision that those who are outside England and those who may be in Scotland or in Ireland shall be treated as being resident in England. Counsel has submitted that the effect of these provisions is that where a party wishes to give notice of appeal to a party who is to be considered as carrying on business in London at the London Corn Trade Association, Ltd.'s office he must give the notice to that party at that address. I can see no reason for that and it does not seem to me desirable that it should be enforced if it can be avoided. Nothing can be more satisfactory in the interests of everybody than for the party seeking an appeal to be able to give notice direct to the actual

place of business of the other party. It would be unreasonable to say that a notice so given is wrong and that it ought to have been sent to the office of the association without, apparently, there being any regular recognised procedure for their transmitting it directly to the party concerned. I do not so construe this contract. It may be difficult, as a matter of construction to substitute the word "may" for "shall" at the end of clause (A) where it is provided:

"Any party to this contract residing or carrying on business elsewhere than in England or Wales, shall, for the purposes of proceedings at law or in arbitration, be considered as ordinarily resident or carrying on business at the office of the London Corn Trade Association, Ltd.",

but the wording would seem to lend some support for that construction. I do not think that that is altogether an easy construction, but I am prepared to hold that, in view of the latter part of cl. (D) with regard to notice in writing, there are two alternatives. The appellant can give notice either at the address where the other party is carrying on business, or he can avail himself of the provision that the party is to be considered as ordinarily resident at the office of the London Corn Trade Association, Ltd., and give notice there if he so desires. If I am wrong in that construction, it seems to me that this is a provision which exists for the benefit of a party who has to give a notice to a foreign party who may be inaccessible. I should hold, therefore, in any event, that it is a provision which could be waived by the appellants if they wished, and that they could give their notice direct to the other party. I would not entertain a submission that such a direct notice was not a fulfilment of the conditions because it was not sent to the office of the London Corn Trade Association, Ltd.

I am not, therefore, in a position to find that the notice required by cl. (C) (c) has been given, so that the grounds which alone entitled the sellers to pursue an appeal have not been established. Counsel for the sellers submits that, nevertheless, I cannot give effect to that view because the arbitration provisions in the contract require that there should be an award on the matter in issue before me as a condition precedent to the buyers having a right to bring it before the court, or, in other words, that there is a *Scott v. Avery* (1) clause which ousts the jurisdiction of the court and to which I must give effect by holding that this proceeding is misconceived. [HIS LORDSHIP read cl. (B) and continued:] The claim in this action is for two declarations that the award of July 30, 1952, is a valid award and is final and conclusive between the parties, and that the appeal tribunal of the London Corn Trade Association, Ltd., has no right to hear the appeal. In substance, I find that this action brought by the buyers is to enforce the award. They ask for a declaration, but the award has been obtained and it is binding unless it is to be subject to an appeal, there being no other complaint against it. The award is not something which arises out of the contract. It is something which has been achieved by the arbitration proceedings and gives a separate and distinct right to the party in whose favour it is given. I think that is a sufficient answer to the sellers' technical claim that this matter cannot be considered by this court because it is a dispute arising out of the contract and so is subject to arbitration between the parties. The arbitration clause in its terms only makes it a condition precedent to the right of either contracting party to sue the other in respect of a claim arising out of contract, and I do not regard this as a claim arising out of the contract.

Counsel for the buyers also raised the broader point that what was in issue here was not a matter for arbitration at all, on the ground that the jurisdiction of the appeal tribunal is in question and that the law is clear that arbitrators or an arbitration tribunal cannot decide their own jurisdiction. That is a matter essentially for the court. I was referred to the decision of the House of Lords in *Heyman v. Darwins, Ltd.* (2), to some remarks of LORD PARKER OF WADDINGTON in *Produce Brokers Co., Ltd. v. Olympia Oil & Cake Co., Ltd.* (3)

([1916] 1 A.C. 327, 328), and to *Attorney-General for Manitoba v. Kelly* (4), a case before the Judicial Committee of the Privy Council. In the last case LORD PARMOOR said ([1922] 1 A.C. 276):

- A “Whenever there is a difference of opinion between the parties as to the authority conferred on an umpire under an agreed submission, the decision rests ultimately with the court and not with the umpire: *Produce Brokers Co., Ltd. v. Olympia Oil & Cake Co., Ltd.* (3). It would be impossible to allow an umpire to arrogate to himself jurisdiction over a question which, on the true construction of the submission, was not referred to him. An umpire cannot widen the area of his jurisdiction by holding, contrary to the fact, that the matter which he affects to decide is within the submission of the parties.”
- B Then he seeks to apply that to the facts of that case. In *Hirji Mulji v. Cheong Yue S.S. Co., Ltd.* (5) LORD SUMNER refers ([1926] A.C. 504) to *May v. Mills* (6). That is a formidable array of authority to support the proposition of learned counsel that, where, as here, a question of jurisdiction arises, the matter is essentially one for the court and not for the arbitrator, and if the appeal tribunal were being called on here to adjudicate on its own jurisdiction, I think that
- C submission would be unanswerable and that the question would be a matter for the court, but the position here is rather different. The arbitration has taken place on the merits and an award has been given. The contract alone provides the circumstances of an appeal and sets out the requirements. It is not the appeal tribunal which, on the submission of the sellers, would have to decide whether it had jurisdiction or not—i.e., whether all these requirements have been complied with—but the arbitrators appointed in accordance with the provisions of the contract. But it does not seem to me that that is of much practical importance because, if either party wish to say that this is a matter which must go for arbitration, their appropriate course would be to apply to the court to stay the action which had been brought. If they applied for a stay, the court would have to adjudicate on the matter in its discretion, and, subject to the *Scott v. Avery* (1) clause, decide whether it was an appropriate case in which to grant a stay or not. The issues that would come to the court, if the arbitrators were to decide this matter, would be entirely issues on questions of law. I apprehend that the court would be reluctant to grant a stay because, if I made an order now that this court had no jurisdiction to hear this action or could not give effect to its decision because of the arbitration clause, the
- F matter would go to the arbitrators, whose findings, being so wrapped up with law, if not entirely a question of law, would come back to the court for decision. If that was the position, evidently the court would not normally grant a stay where it had a discretion. Taking the view that I do that this condition precedent clause only applies to a claim and not to such an issue as this, it would be in the discretion of the court to say whether effect should be given
- G to the arbitration clause or not. But there do seem to be observations which support the view that arbitration would prevail where a contract made it abundantly clear that matters going to jurisdiction should be referred to arbitration. On the other hand, the authorities to which I have referred make it clear that, unless there is the clearest agreement that the parties had intended to refer matters of jurisdiction to an arbitrator, the jurisdiction of the court
- H prevails.

Reference was also made to the power of the court to treat as non-existent a clause providing that an award is a condition precedent to a right to sue or to recover, and reliance was placed on s. 25 (4) of the Arbitration Act, 1950, which provides:

“Where it is provided (whether by means of a provision in the arbitration agreement or otherwise) that an award under an arbitration agreement shall be a condition precedent to the bringing of an action with

respect to any matter to which the agreement applies, the High Court, if it orders (whether under this section or under any other enactment) that the agreement shall cease to have effect as regards any particular dispute, may further order that the provision making an award a condition precedent to the bringing of an action shall also cease to have effect as regards that dispute."

Although the buyers would wish to rely on that clause only if I had found that the condition precedent clause assisted the sellers, I will indicate what my discretion would have been if I had felt empowered to apply that section. In *Dennehy v. Bellamy* (7) the corresponding clause in the Arbitration Act, 1934 (s. 3 (4)) was considered in relation to a claim under an insurance policy in which the plaintiff relied on the effect of the Third Parties (Rights against Insurers) Act, 1930. The Court of Appeal made certain observations which were wide in their terms and may have at some time to be considered in relation to the section as a whole in other circumstances. I am inclined to think that the power of the court to make an order under that section is not unlimited, but would arise only in the circumstances set out in RUSSELL ON ARBITRATION, 15th ed., p. 80, i.e.:

- "1. Where the authority of an arbitrator or arbitrators or umpire is revoked by leave of the court. This would seem to cover any case where either the *Scott v. Avery* (1) clause is contained in a submission proper, and leave is given to revoke this, or it is contained in an agreement to submit and leave is given to revoke a submission made pursuant to the agreement.
2. Where the whole arbitral tribunal is removed by the court: i.e., for misconduct or delay.
3. Where the dispute involves charges of fraud."

If the discretion is limited to these matters, I would not have a discretion in the present case to make the clause ineffective, but another view may be taken of that. How to exercise the discretion would be a matter of difficulty because the buyers are taking advantage of a very slight mistake committed by the sellers without any prejudice resulting to them (the buyers), because they had full knowledge of this appeal within the fourteen days. Therefore, the court would not readily grant them any indulgence. On the other hand, if the condition precedent clause was retained, the matter would, apparently, have to be adjudicated on by the arbitrators and would eventually come back to the court. That would be very unsatisfactory, and in itself would be strong ground for exercising discretion in the other way. I think on the whole that I would exercise a discretion if I had it under s. 25 (4) and let the matter be decided once and for all by the court. Indeed, it may be that counsel for the buyers is right in his submission that, notwithstanding the rather complicated circumstances of this contract and the matter arising after an award and relevant to an appeal, the cases are strong enough to entitle the court to deal with this matter to the exclusion of the arbitrators, it being a matter of jurisdiction.

In those circumstances, I find that the buyers are entitled to their declaration that the award is valid and is final and conclusive, and I am prepared to grant the second declaration that in the circumstances the sellers have no right to prosecute an appeal from the award to the London Corn Trade Association, Ltd.'s appeal committee.

Declarations accordingly.

Solicitors: *Richards, Butler & Co.* (for the plaintiffs); *Thomas Cooper & Co.* (for the defendants).

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

FLOYD v. BUSH.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Croom-Johnson and Pearson, JJ.), January 15, 1953.]

Street Traffic—"Motor vehicle"—Dual purpose vehicle—Bicycle fitted with auxiliary engine—Use as pedal cycle—No removal of essential parts of engine—Need of third-party insurance and driving licence—Road Traffic Act, 1930 (c. 43), s. 1, s. 4 (1), s. 35 (1).

The respondent was charged with using on a road a motor vehicle in relation to the user of which there was no policy of insurance and with driving a motor vehicle, not being the holder of a licence, contrary to the Road Traffic Act, 1930, s. 35 (1) and s. 4 (1) respectively. The vehicle in question was a pedal cycle fitted with an auxiliary motor which was in efficient working order.

HELD: in view of the fact that the motor was in working order, the cycle was a "motor vehicle" within the meaning of the Road Traffic Act, 1930, and, therefore, the respondent was guilty of the offences with which he was charged.

Lawrence v. Howlett ([1952] 2 All E.R. 74), distinguished.

FOR THE ROAD TRAFFIC ACT, 1930, s. 1, s. 4 (1), s. 28 (1) and s. 35 (1), see HALSBURY'S STATUTES, Second Edn., Vol. 24, pp. 572, 575, 598 and 602, respectively.

Cases referred to:

(1) *Lawrence v. Howlett*, [1952] 2 All E.R. 74; 116 J.P. 391.

(2) *Shimmell v. Fisher*, [1951] 2 All E.R. 672; 115 J.P. 526; 2nd Digest Supp.

CASE STATED by Lancaster justices.

At a court of summary jurisdiction sitting at Liverpool the appellant, Robert Cecil Floyd, preferred informations against the respondent, Charles Robin Bush, charging that he (i) did use a motor vehicle on a road without there being in force in relation to the user of the vehicle by him a policy of insurance in respect of third-party risks, contrary to s. 35 (1) of the Road Traffic Act, 1930; (ii) did drive a motor vehicle without holding a licence, contrary to s. 4 (1) of the Act; (iii) did take and drive away a motor assisted pedal cycle without the consent of the owner, contrary to s. 28 (1) of the Act.

It was proved that the respondent took and rode away a motor assisted pedal cycle without the owner's consent, that he held no driving licence, and that he had no policy of insurance covering the cycle. It was also proved that he made no attempt to start or to use the engine of the cycle, but pedalled it along the highway for a mile and a half. It was contended on behalf of the appellant that the cycle was a "motor vehicle" within s. 1 of the Act and that *Lawrence v. Howlett* (1) could be distinguished. On behalf of the respondent it was contended that the cycle was not a "motor vehicle" within the Act and that *Lawrence v. Howlett* (1) applied. The justices dismissed the informations.

Nicklin for the appellant.

Pain for the respondent.

LORD GODDARD, C.J.: This is a Case stated by justices for the county of Lancaster before whom the respondent was charged with three offences. The vehicle in question is one of those bicycles which have an auxiliary motor fitted to them so that they can be used either as a motor cycle or as a pedal cycle. The respondent had taken away this cycle without the consent of the owner, and when he was stopped he was pedalling it. Apparently, he had pedalled it for a mile and a half, but he had not started the motor. The justices, having considered *Lawrence v. Howlett* (1), were of opinion "that the said motor assisted pedal cycle, as being used at the material time, was not a mechanically

propelled vehicle within the meaning of s. 1 of the Road Traffic Act, 1930", and they dismissed the informations.

In my opinion, they were wrong in so doing. I do not think they thoroughly appreciated the decision in *Lawrence v. Howlett* (1). That case gave this court a great deal of trouble. We came to our conclusion with some hesitation, and GORMAN, J., in his judgment, said it was an exceptional case and must not in any way be extended beyond its particular facts. That case also was concerned with one of these dual purpose vehicles, but the motor had been dismantled and

"... certain vital parts, namely, the cylinder, piston and connecting rod, had been removed by the appellant, though there was some petrol in the tank."

In other words, he dismantled his motor so that, in the opinion of the court, it was no longer a mechanically propelled vehicle, that is to say, a vehicle which was capable of being propelled by mechanical power. But in the present case I think we are bound to assume from the way the Case is stated that this was a cycle in which the auxiliary motor was in working order. We are entitled to assume that because the justices appear to have applied their minds, not to the question whether the vehicle could have been mechanically propelled, as it obviously could have been, but to whether at the moment when the respondent was stopped he was using it as a motor cycle or, as they put it, as a pedal cycle. The definition of motor cycles in the Road Traffic Act, 1930, s. 2 (1) (f), is

"... mechanically propelled vehicles ... with less than four wheels and the weight of which unladen does not exceed eight hundredweight."

I think the only sensible construction of "mechanically propelled vehicles" is vehicles constructed so that they can be mechanically propelled, and I think it would be going far beyond *Lawrence v. Howlett* (1) if we were to hold that one of these vehicles, when possessing an efficient motor, was not a mechanically propelled vehicle.

For these reasons, I think that *Lawrence v. Howlett* (1) does not apply. I would also call attention to the fact that this court decided in *Shimmell v. Fisher* (2), that any movement of a car without the consent of the owner is enough to bring the person who moves it within the ambit of s. 28 (1), which makes it an offence to take and drive away a motor vehicle without the consent of the owner. It does not matter whether he drives it for one hundred yards or for miles. If he is driving the car, that is to say, causing the car to be moved without the consent of the owner, he is committing an offence. It may be that in certain cases, if he was prosecuted for doing it, the justices would say it was a trivial matter and would give an absolute discharge, but that is not the sort of case we are dealing with here. Here is a man who, without any right, has taken a vehicle capable of being used as a motor cycle and equipped to be used as a motor cycle without the consent of the owner. He has driven it along the road, and I say he has driven it because he caused it to move, and whether he caused it to move by pedalling or starting the motor seems to me to be immaterial. At the material time the vehicle was provided with a motor and could be used as a motor cycle. For these reasons, I think the case must go back to the justices with an intimation that all three offences have been proved.

CROOM-JOHNSON, J.: I agree. There is no finding by the justices that this vehicle had in any sense ceased to have the engine by which it could be mechanically propelled still in existence. The justices seem to have become confused by considering the particular use to which the vehicle was being put by the alternative method of propulsion and to have thought that, on that being shown, the machine ceased to be a mechanically propelled vehicle. Speaking for myself,

but for the decision to which the justices have come, I should have thought this was a self-evident case.

PEARSON, J.: I agree.

Case remitted.

Solicitors: *Norton, Rose, Greenwell & Co.*, agents for *Sir Robert Adcock*, clerk of the county council, Preston (for the appellant); *Helder, Roberts & Co.*, agents for *John A. Behn, Twyford & Reece*, Liverpool (for the respondent).

[*Reported by* MICHAEL MALONEY, ESQ., *Barrister-at-Law.*]

CLARKE v. CHERRY.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Croom-Johnson and Pearson, JJ.), January 14, 1953.]

Street Traffic—Licence—Goods vehicle—Carriage of goods for trade or business—

Van used by window cleaner—Carriage of ladders, buckets, and articles for cleaning—Road and Rail Traffic Act, 1933 (c. 53), s. 1 (1) (b), s. 2 (4), s. 36 (1).

The respondent, a window cleaner, was using on a road for the purposes of his trade a motor van in respect of which he did not hold a C licence. He carried buckets, washing cloths, and leathers inside the van, and he had adapted the van so that he could carry ladders on the top, attached to a permanent fixture. He was charged with having unlawfully used the van without a licence, contrary to s. 1 (1) (b) of the Road and Rail Traffic Act, 1933. The justices found that the articles carried in the van were solely and exclusively the tools of his trade and were not goods carried for sale, and that, therefore, the van was not being used for the carriage of goods for or in connection with any trade or business within the meaning of s. 1 (1) (b), and they dismissed the information.

HELD: the buckets, washing cloths, and leathers were "goods" within the meaning of s. 36 (1) of the Act of 1933; under s. 1 (2) a "goods vehicle" meant a motor vehicle constructed or adapted for use for the carriage of goods; and, therefore, within s. 1 (1) (b) the respondent's van was a "goods vehicle" used for the carriage of goods; the carriage was for or in connection with a trade or business carried on by him; and, accordingly, he required a C licence under s. 2 (4) to entitle him so to use the vehicle.

FOR THE ROAD AND RAIL TRAFFIC ACT, 1933, s. 1 (1), s. 2 (4), and s. 36 (1), see HALSBURY'S STATUTES, Second Edn., Vol. 24, pp. 675, 678 and 707.

CASE STATED by Lincolnshire justices.

At a court of summary jurisdiction sitting at Sleaford on Aug. 18, 1952, the appellant, Cecil Clarke, a police officer, preferred an information against the respondent, Arthur Herbert Ernest Cherry, charging that, on May 27, 1952, contrary to s. 1 (1) (b) of the Road and Rail Traffic Act, 1933, he unlawfully used a goods vehicle, namely, a motor van, for the carriage of goods for or in connection with a certain trade or business carried on by him, otherwise than under a licence granted under Part I of the Road and Rail Traffic Act, 1933. It was proved or admitted that the respondent, who was engaged in the trade or business of a window cleaner, was the owner of a motor van. On May 27, 1952, he was using the motor van at High Street, Martin, in connection with his trade or business, it having been adapted by the addition of a permanent fixture to carry ladders used in connection with the trade or business. Buckets, washing cloths and leathers, also used in connection with the trade or business, were being carried inside the motor van, and on the top thereof two ladders were carried, attached to the fixture. He was not in possession of a carrier's licence as required by s. 1 (1) (b) of the Act.

It was contended on the part of the appellant that the motor van was a goods vehicle as defined by s. 1 (2) of the Act, that it was being used for or in connection with a trade or business carried on by the person using it, and that, therefore, the respondent was guilty of an offence under s. 1 (1) (b). It was contended on behalf of the respondent that the ladders, buckets and other articles could not be classed as "goods" because they were not for sale, and, consequently, it was not necessary that the respondent should be in possession of a carrier's licence. The justices dismissed the information and the appellant appealed.

Swanwick for the appellant.

The respondent did not appear.

LORD GODDARD, C.J.: This is a Case stated by justices for the county of Lincoln before whom the respondent, who carries on business as a window cleaner, was charged with unlawfully using a goods vehicle for the carriage of goods for or in connection with a certain trade or business carried on by him otherwise than under a licence granted under Part I of the Road and Rail Traffic Act, 1933. The respondent has a Jowett van which he uses for carrying his buckets, washing cloths and leathers, and, in addition to that, he has placed a fixture on the roof of the van so that he can carry two ladders on it. The justices dismissed the information because they found that the motor van was used exclusively for carrying the tools of the respondent's trade and not goods carried for sale, and so they held that the motor van was not being used for the carriage of goods for or in connection with any trade or business within the meaning of the Road and Rail Traffic Act, 1933, s. 1 (1) (b).

I am not surprised that the justices tried to find a way to avoid a conviction in a case of this sort, but I am afraid that they cannot do it by reading into the statute words which are not there. The statute does not say anything about the goods carried being goods for sale. It says (s. 36 (1)) : "' Goods ' includes goods or burden of any description", and it would seem that buckets, washing leathers, and ladders are goods within that definition. Section 1 (1) provides:

" Subject to the provisions of this Part of this Act, no person shall use a goods vehicle on a road for the carriage of goods—(a) for hire or reward; or (b) for or in connection with any trade or business carried on by him, except under a licence."

And, under s. 1 (2), a goods vehicle means a motor vehicle constructed or adapted for use for the carriage of goods. The respondent, therefore, required a C licence to entitle him to carry goods for or in connection with any trade or business carried on by him. The case must go back to the justices with an intimation that an offence within s. 1 (1) (b) has been committed, but, of course, it is open to them to give a conditional discharge to the respondent if they think it right to do so.

CROOM-JOHNSON, J.: I agree, and for the same reasons.

PEARSON, J.: I agree.

Appeal allowed.

Solicitors: *Cunliffe & Airy*, agents for *Ernest H. Godson & Co.*, Sleaford (for the appellant).

[Reported by G. A. KIDNER, Esq., Barrister-at-Law.]

BOYER AND OTHERS v. WARBEY.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Denning and Romer, L.JJ.),
October 9, 10, 13, 14, 17, November 3, 1952.]

Rent Restriction—Termination of statutory tenancy—Premises vacated by tenant—Failure to give notice—Liability for rent—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (c. 17), s. 15 (1).

Rent Restriction—Statutory tenant—Retention of possession after end of contractual tenancy—Agreement by contractual tenant to pay on expiration of tenancy “£40 towards re-decoration”—Incorporation of agreement in statutory tenancy—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (c. 17), s. 15 (1).

By a written agreement dated Mar. 7, 1945, A. let an unfurnished flat to B. for three years from Feb. 8, 1945, at a rent of £175 per annum. On Jan. 30, 1948, B., with the consent of A., assigned the remaining nine days of the term to C., who, on the expiration of the term, remained in possession as statutory tenant. On Aug. 30, 1951, C. vacated the flat without notice to A., and on Sept. 29, 1951, he sent the keys to A., who did not accept a surrender of the tenancy. A. re-let the flat as from Nov. 21, 1951.

HELD: C., having failed to give A. the notice required by the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 15 (1), remained liable to pay rent (either as such or as damages for breach of his statutory obligation) to A. until Nov. 21, 1951, when C.'s tenancy came to an end by operation of law.

The agreement of Mar. 7, 1945, provided by cl. 2 that the tenant agreed to make good any damage done to the interior of the flat, and by cl. 7: “Provided always and the tenant for herself and her assigns hereby agrees with [the landlord and his assigns] that she the tenant will on her or their quitting the said premises at the end of the term hereby granted (but without prejudice to the provisions, agreements and conditions hereinbefore contained) pay to [the landlord or his assigns] immediately after the expiration or determination of the tenancy whenever it shall happen the full sum of £40 towards the re-decoration of the said suite of rooms or flat, which sum shall be accepted by [the landlord] in full satisfaction and discharge of all claims against the tenant for repairs to or decoration of the said premises subject to and without prejudice to the liability of the tenant to make good any damage caused by unfair wear and tear of the said premises”. A. claimed £40 from C.

HELD: the £40 was not a penalty; (SIR RAYMOND EVERSLED, M.R., dissentiente) the agreement to pay £40 touched and concerned the thing demised, and, therefore, ran with the land so as to bind C. as soon as he entered into possession, notwithstanding that the agreement was under hand only; and, on the determination of the contractual tenancy, the agreement to pay £40 was incorporated in the statutory tenancy.

Vernon v. Smith (1821) (5 B. & Ald. 1), *Lord Howard De Walden v. Barber* (1903) (19 T.L.R. 183), and *Moss' Empires, Ltd. v. Olympia (Liverpool), Ltd.* ([1939] 3 All E.R. 460), applied.

AS TO STATUTORY TENANT, see HALSBURY, Hailsham Edn., Vol. 20, pp. 334, 335, paras. 400, 401; and FOR CASES, see DIGEST, Replacement Vol. 31, pp. 692-695, Nos. 7829-7870.

Cases referred to:

(1) *Brown v. Brash & Ambrose*, [1948] 1 All E.R. 922; [1948] 2 K.B. 247; [1948] L.J.R. 1544; 31 Digest, Replacement, 660, 7619.

- (2) *Moss' Empires, Ltd. v. Olympia (Liverpool), Ltd.*, [1939] 3 All E.R. 460; [1939] A.C. 544; 108 L.J.K.B. 721; 161 L.T. 98; 31 Digest, Replacement, 372, 5027.
- (3) *Howard De Walden (Lord) v. Barber*, (1903), 19 T.L.R. 183; 31 Digest, Replacement, 154, 2917.
- (4) *Re Hunter's Lease*, [1942] 1 All E.R. 27; [1942] Ch. 124; 111 L.J.Ch. 102; 166 L.T. 75; 31 Digest, Replacement, 67, 2238.
- (5) *King's College, Cambridge v. Kershman*, (1948), 64 T.L.R. 547; 31 Digest, Replacement, 695, 7870.
- (6) *Vernon v. Smith*, (1821), 5 B. & Ald. 1; 106 E.R. 1094; 31 Digest, Replacement, 400, 5295.
- (7) *Elliott v. Johnson*, (1866), L.R. 2 Q.B. 120; 36 L.J.Q.B. 44; 31 J.P. 212; 31 Digest, Replacement, 411, 5415.

APPEAL by the tenant against an order, dated June 26, 1952, of His Honour JUDGE REID, sitting at West London County Court.

By an agreement under hand dated Mar. 7, 1945, the landlords granted to a Mrs. Crossley the tenancy of a flat for a term of three years from Feb. 8, 1945, at a rent of £175 per annum, later increased to £200 5s. 2d. owing to increases in the rates. On Jan. 30, 1948, Mrs. Crossley, with the consent of the landlords, assigned the remainder of the term to one, Warbey (herein called "the tenant"). On Aug. 30, 1951, the tenant left the flat, and on Sept. 29, 1951, he sent the keys to the landlords without giving the notice required by the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 15 (1). The landlords re-let the premises from Nov. 21, 1951. The landlords claimed (i) £78 11s. 11d. being one quarter's rent to Sept. 29, 1951 (£50 1s. 4d.) and fifty-two days' rent to Nov. 20, 1951 (£28 10s. 7d.), on the ground that this sum was rent owed by the tenant by reason of his failure to give notice of his giving up possession as required by s. 15 (1); and (ii) £40 which, it was alleged, became payable by the tenant on his leaving the premises under the agreement of 1945. The county court judge gave judgment for the landlords.

A preliminary point relating to the question whether certain arguments were open to the tenant is reported [1952] 2 All E.R. 976.

Platts-Mills for the tenant.

L. A. Blundell for the landlords.

Cur. adv. vult.

Nov. 3. The following judgments were read.

SIR RAYMOND EVERSLED, M.R. (having stated the facts): The main point by the tenant is that the giving up by him of possession automatically ended the statutory tenancy, and for that proposition reliance is placed on the well-known case in this court of *Brown v. Brash & Ambrose* (1). According to him, on the happening of that event, rent as such ceased, and if he had, as is now conceded that he had, failed to comply with the statutory obligation to give three months' notice imposed by the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 15 (1), all he did was to commit a breach of the statutory obligation, for which he would be liable for damages, and, being so liable, the landlords must, on general principles, mitigate the damages, which they failed to do. Having regard to the fact that there is no reference to this matter of mitigation in the judgment of the county court judge and no material finding of fact, counsel for the tenant candidly admits that he could not now ask for more than a reference back of this point on the ground that there was some evidence of failure on the landlords' part to mitigate the damages.

What is the precise effect of a statutory tenant's "giving up possession", without more? The effect of *Brown v. Brash* (1) is stated in Mr. MEGARRY'S book, *THE RENT ACTS*, 6th ed., pp. 176, 177, where it is said:

"It has been said that 'There are, we think, only two ways by which a tenant whose contractual tenancy has come to an end can lose the protection of the Acts. One is . . . by giving up possession. The other is by an order against the tenant for recovery of possession'."

A But the mere fact that a tenant absents himself from the premises is not necessarily enough, since he may come back the next day. On the other hand, if the landlords re-enter in fact, may there not have been a surrender or its equivalent, so as to end the tenant's liability for rent or for damages, or for whatever it be properly called, notwithstanding the absence of any notice on the tenant's part? The point, however, does not, I think, arise here, because at all material times the tenant appears to have claimed, albeit intermittently, that as regards these premises he had a right under the contract, and (particularly having regard to the nature of the tenant's claim), I think it clear that there was nothing equivalent to surrender until Nov. 21, 1951, the date of the subsequent letting, apart from the effect of two letters of Oct. 11, 1951, and Oct. 16, 1951. From what I have said it follows that the tenant is liable for this first item of £78 11s. 11d., apart from the questions, first, on the two letters I have just mentioned, and secondly, on this matter of mitigation, if open. On the latter matter I am, however, satisfied that no sufficient case is, in any event, shown for any reference back. Parliament has incorporated into the Act the conception of "rent" payments and the words of s. 15 (1), so far as material, are to be noted: "A tenant . . . shall be entitled to give up possession . . . only on giving such notice . . ." It may, therefore, well be that an obligation to pay "rent" continues in the case of a statutory tenant in the same way as it does in the case of a contractual tenant who has an estate. Nor am I satisfied (though I am not expressing any view one way or the other) that the effect of failure to give notice and, therefore, of a breach of the statutory obligation, is to give rise merely to a claim for damages. [HIS LORDSHIP considered the two letters, found that they did not alter his conclusion, and continued:]

E I, therefore, think that the appeal fails on the first head or branch of the claim, but, if it has involved some matters of difficulty, the second matter, to my mind, is more difficult still. I must first refer to three clauses of the agreement of Mar. 7, 1945. Clause 2 contained the tenant's obligations as to repair. It provided that the tenant agreed

F "to make good any damage which may be done to the interior of the said premises and keep the water closets free, unstopped and in proper acting order and to renew and reinstate any cracked or broken stoves, fire grates or any part or parts thereof, or sashlines requiring renewal and as often as need or occasion shall require to thoroughly sweep and cleanse all chimneys and flues and clean all the windows and glass in or belonging to the said flat and also to reinstate and repair any broken windows or glass, and to keep all locks and fastenings perfect and generally to keep the interior of the said flat, rooms and premises, and all stoves, bells, cupboards, fixtures and things thereto belonging in as good repair and condition as the same are now respectively in and will so leave the same at the end of the tenancy."

H That comprehends a great many words which, I should assume, were taken from some book of precedents, perhaps without any particular reflection as to their applicability to the particular matter in hand. Clause 7, which is the principal ground of difficulty, is framed in the following obscure language :

"Provided always and the tenant for herself and her assigns hereby agrees with the landlords and their assigns that she the tenant will on her or their quitting the said premises at the end of the term hereby granted (but without prejudice to the provisions, agreements and conditions hereinbefore contained) pay to the landlords or their assigns immediately after the

expiration or determination of the tenancy whenever it shall happen the full sum of £40 towards the re-decoration of the said suite of rooms or flat, which sum shall be accepted by the landlords in full satisfaction and discharge of all claims against the tenant for repairs to or decoration of the said premises subject to and without prejudice to the liability of the tenant to make good any damage caused by unfair wear and tear of the said premises."

Clause 10 contained a provision that, if the rent restriction legislation were varied in a particular way, then the landlord was given a right to serve a notice terminating the agreement and a notice of increase of the rent to a permitted figure, and then the clause ends:

"and in such a case a new tenancy shall be deemed to be constituted for a term equal to the unexpired portion of the three years hereinbefore referred to at the increased rent . . ."

It is to be noted, therefore, that in no circumstances, as I read it, was any expiration beyond the fixed term of three years in contemplation.

The question arises out of the first part of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 15 (1):

"A tenant who by virtue of the provisions of this Act retains possession of any dwelling-house to which this Act applies shall, so long as he retains possession, observe and be entitled to the benefit of all the terms and conditions of the original contract of tenancy, so far as the same are consistent with the provisions of this Act, and shall be entitled . . ."

The question is: Was the tenant liable to pay the £40 stipulated for by cl. 7 of the lease when he, in fact, left the premises in the autumn of 1951, being then a statutory tenant? It was first said on the tenant's part (and it was so pleaded) that this sum of £40 was a "penalty", and, therefore, its payment would not be enforced by the courts. By that pleading, I understand, is meant that the sum in question was in the nature of a fine exacted on the happening of some event, or, more particularly, the breach of some obligation. In my judgment, this sum was not a "penalty", as I understand the word. The obligation was to pay the sum of £40 "towards re-decoration", and it has not been suggested before us that the sum of £40 was an exorbitant figure. But it has also been argued before us that the obligation is not of a nature which could or would be carried over into the statutory tenancy.

When the appeal was first before this court, the argument proceeded on the basis that the obligation did bind the tenant when he became contractual assignee, so that as contractual assignee he would have been bound to pay the sum if the event occurred on which, according to the meaning, whatever it might be, of the relevant clause, it became payable. After the argument had concluded it seemed to us that the hypothesis that it did bind an assignee of the original tenant was open to some doubt, and the case was, therefore, restored for further argument, for, if the tenant could not have been bound to pay the £40 as assignee, it was obviously difficult to see how the obligation could be carried over into the statutory tenancy.

On the question whether the tenant was bound by this obligation as a contractual assignee, I assume (notwithstanding an observation in WOODFALL'S LAW OF LANDLORD AND TENANT, 24th ed., p. 551) that it does not matter that there was here only an agreement under hand and not a lease by deed, since the tenant took possession in fact under the agreement. The law seems to be that a mere covenant by a lessee to pay a sum of money to the lessor will not *prima facie* "touch and concern" the land, and, therefore, will not run with the land, but such a covenant may be part and parcel of or bound up with other covenants, for example, a covenant to repair, so as to produce the opposite result. The covenants will then be "inextricably bound together": see, for example, *Moss' Empires, Ltd. v. Olympia (Liverpool), Ltd.* (2), and also *Lord Howard De*

A Walden v. Barber (3), where the obligation in question was said to be "an annexe to the general covenant"; see also the general discussion of the cases in SMITH'S LEADING CASES (13th ed., vol. 1, p. 51, and *Re Hunter's Lease* (4), decided by UTHWATT, J., where it was laid down that the question affecting such covenants is the same whether the covenants are covenants by a lessor or by a lessee. Thus, if there were a covenant to repair and decorate and deliver up repaired and decorated, with a proviso that payment of the sum of £x (being a reasonable sum) should be paid (if demanded) in lieu and satisfaction of the latter part of the covenant, I should assume that the whole covenant would run with the land, and, undoubtedly, such a covenant would be convenient and, I think, sensible, but, as later appears, I am unable, for my part, to construe the present covenant so favourably to the landlords.

B If I am wrong so far, then the landlords' difficulties, in my judgment, are still by no means at an end. The character of the statutory tenancy, I have already said, is a very special one. It has earned many epithets, including "monstrum horrendum", and, perhaps, it has never been fully thought out by Parliament. It is clear, however, that purely personal covenants cannot persist into a statutory tenancy, for ex concessis the contract is finished (though, of course, the contracting party may still be sued as such). It is also clear that C covenants to deliver up possession are inconsistent with a statutory tenancy, from which it would appear to me to follow that covenants to pay money "inextricably bound up with" covenants to deliver up possession would cease with the latter. There are other difficulties, including (i) one statutory tenant may succeed another, e.g., under s. 12 (1) (g) of the Act of 1920, and (ii) such a covenant, D if it does persist into the statutory tenancy, would, presumably, become immediately enforceable if an order were made by the court under, for example, para. (h) of sched. I to the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933. I, therefore, feel the gravest doubt whether, on the most favourable construction of cl. 7 possible to the landlord, it could survive into the statutory tenancy. But, in any case, what does the covenant in cl. 7 mean? It bristles, E to my mind, with difficulty and obscurity. [HIS LORDSHIP considered the construction of cl. 7, and continued:] For my part, I am not prepared to re-draft this muddled cl. 7 so as to create in favour of the landlords a provision which other people might think convenient or sensible and which might survive into the statutory tenancy. In face of all the many difficulties on this head of claim, I would conclude the matter on the broad ground that the landlords have failed F to discharge the onus of satisfying me that the tenant owes him £40, and I would allow this part of the appeal. I have dealt at length and with some diffidence with this aspect of the matter because I regret to find that my conclusion differs not only from that of the trial judge, but also from that of both my brethren. Having regard to their view, the whole appeal must be dismissed.

G DENNING, L.J.: By an agreement under hand dated Mar. 7, 1945, Mrs. Boyer and others let to Mrs. Crossley a flat in Kensington for three years from Feb. 8, 1945, at a rent of £175 a year. The agreement contained a clause by which the tenant agreed to repair and another clause by which she agreed that when she left at the end of the three years she would pay £40 towards re-decoration. Shortly before the three years expired, Mrs. Crossley assigned the last nine days of the term to Mr. Warbey and he entered into possession of the flat. The term H expired on Feb. 8, 1948, and thereafter Mr. Warbey stayed as a statutory tenant. In August, 1951, he bought another house and wanted to leave the flat, but he did not give the requisite three months' notice to quit. He left the flat on Aug. 30, 1951, and sent the keys to the landlords on Sept. 29, 1951, but the landlords did not accept a surrender of the tenancy. They tried to re-let the flat, and eventually succeeded in re-letting it as from Nov. 21, 1951.

The first question is whether the landlords are entitled to rent up to the time they re-let. I think they are. As a statutory tenant, Mr. Warbey was not

entitled to give up possession except on giving not less than three months' notice to quit: see s. 15 (1) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920; and that means a valid notice: see *King's College, Cambridge v. Kershman* (5). He did not give any valid notice. He went out of possession, it is true, and thereupon the landlords would have been entitled to recover possession, if they had so wished, but they did not so wish. They were not bound to accept possession whenever he chose to offer it. They were entitled to hold him to the tenancy until he gave a valid three months' notice to quit. Very sensibly, they did try to re-let, and, as soon as they re-let, the statutory tenancy came to an end by surrender by operation of law, but, until it came to an end by valid notice to quit or by surrender, they were entitled to hold the tenant liable for rent.

The second question is whether the tenant is liable to pay £40 towards re-decoration. This raises several matters on which my views are as follows:

(i) The agreement to pay £40 was not a penalty. It was a very convenient provision whereby the parties agreed that the original tenant, Mrs. Crossley, should pay a lump sum of £40 instead of paying damages for fair wear and tear. The reason for such a provision is fairly plain. When an outgoing tenant leaves the premises, he does not in practice do any decorative repairs, even though the tenancy agreement says he should do. He usually pays the landlord an agreed sum instead of doing the decorations. This suits both sides. It suits the outgoing tenant because he avoids the cost of a survey to ascertain the dilapidations. It suits the landlord because he has to re-decorate before a new tenant goes in, and the sum will help towards the cost. Such being the practice, the parties in the present case simply agreed the sum in advance. They agreed in advance that a sum of £40 should be payable by the tenant at the end of the term for everything except "unfair wear and tear", leaving unfair wear and tear, if any, to be assessed and paid for separately. I see nothing wrong, but everything to the good, in so doing. The parties know in advance exactly where they stand. The sum is not a penalty, but an agreed payment in lieu of damages. I have had the benefit of reading what ROMER, L.J., has to say on this point and I entirely agree with it.

(ii) The agreement to pay £40 does, in my opinion, touch and concern the thing demised. It concerns the re-decoration of the flat. It is true that the landlords are not bound in law to apply the £40 towards re-decoration, but they will, as a matter of practice, so apply it. The case falls within the authority of *Vernon v. Smith* (6), *Lord Howard De Walden v. Barber* (3), and *Moss' Empires, Ltd. v. Olympia (Liverpool), Ltd.* (2).

(iii) Seeing that the agreement touched and concerned the thing demised, it ran with the land so as to bind the assignee, Mr. Warbey, as soon as he entered into possession. I know that before the Supreme Court of Judicature Act, 1873, it was said that the doctrine of covenants running with the land only applied to covenants under seal and not to agreements under hand: see *Elliott v. Johnson* (7), but since the fusion of law and equity, the position is different. The distinction between agreements under hand and covenants under seal has been largely obliterated. There is no valid reason nowadays why the doctrine of covenants running with the land—or with the reversion—should not apply equally to agreements under hand as to covenants under seal, and I think we should so hold, not only in the case of agreements for more than three years which need the interposition of equity to perfect them, but also in the case of agreements for three years or less which do not.

(iv) When the term of three years came to an end, the tenant remained on as statutory tenant, subject to all the terms and conditions of the original contract of tenancy "so far as the same are consistent with the provisions of the Act". In my opinion, the agreement to pay £40 was incorporated into the statutory tenancy. I see nothing in the clause which is inconsistent with the provisions of

the Act except, possibly, the words "at the end of the term". This phrase is, I think, synonymous with the phrase "at the end of the tenancy". The clause itself uses the two phrases interchangeably. The clause could not and did not operate "at the end of the term" of three years, because the tenant did not then quit the premises. But why should it not operate at the end of the statutory tenancy when he does quit? I see no reason why not. If the clause did not operate at the end of the statutory tenancy, it would mean that the tenant would escape payment of the £40 altogether and, what is more, he would not have the benefit of it. It seems to me clear that, if the tenant stays on by right, either on a contractual holding over or as a statutory tenant, he is liable, on quitting the premises, to pay the £40. In the result, I find myself in agreement with the county court judge on all points, and I would dismiss the appeal.

B ROMER, L.J.: In my opinion, the appeal should be dismissed. With regard to the sum of £78 11s. 11d. awarded to the landlords in respect of arrears of rent due down to Nov. 20, 1951, I have little to add to what my brethren have said. The tenant argued before us that any sum that might be recoverable from him after he abandoned possession of his flat could be regarded, not as rent, but as damages for breach of his obligation to give three months' notice to quit. I am not satisfied that he did not continue liable for rent as such. The point is, however, immaterial, for the amount of damages payable by him for failing to give the proper notice would be quantified by the amount of rent that he would have had to pay if he had continued in possession, and the tenant's argument to the effect that the landlords could have mitigated the damages seems to me to be without foundation. It was sought to base the argument on the footing that the landlords ought, at the earliest opportunity, to have re-let the flat at a rackrent, as they had done before, instead of waiting until they could find a tenant who was willing to pay a capital premium but a lower rent. A tenant who goes out of possession without giving due notice has no right to dictate to his landlord how he shall deal with his property, and why the landlords here should have disposed of the flat in a manner disadvantageous to themselves merely in order to save the tenant from the full consequences of his wrongful act, I am at a loss to conceive.

The next point to consider is as to the sum of £40 which the original tenant, Mrs. Crossley, agreed to pay on her quitting the premises at the end of the term of three years granted by the tenancy agreement. Before considering whether this *prima facie* liability devolved on the tenant as the assign from Mrs. Crossley, it is necessary to inquire whether it would have been binding on Mrs. Crossley herself or whether, as the tenant contends, it was unenforceable as being a penalty or as being a payment which was of the nature of a penalty. In support of the contention that the landlords could not, in law, have recovered this sum from Mrs. Crossley, it was argued that under cl. 7 of the agreement she became bound to pay the £40 in discharge, or part discharge, of her covenants to repair under cl. 2 notwithstanding that her liability for the due performance of all those covenants was expressly reserved, and from this it would necessarily follow that, as she was to remain liable under the whole of her repairing covenants, then, if she had to pay the landlords an additional £40 in respect of the same subject-matter, that sum can only be regarded as a penalty. I would agree that, if in a lease a lessee covenants to repair and the lease then provides that, at the end of the tenancy, the lessee is to pay full damages for any breaches of the covenant together with an additional sum of £x in respect of the same breaches, then this sum could not be recovered as well as the damages, for it would, in effect, be a penalty and the promise to pay it would not be enforced by the courts. On the other hand, if the £x can fairly be regarded as compounding the tenant's liability under a specified part of the repairing covenant, it would not, if reasonable in amount, be irrecoverable as being a penalty, for damages could only be recovered for failure to

perform the remainder of the covenant. The question whether or not the sum now in issue falls within the one aspect of the matter or the other seems to me to be one of construction of cl. 2 and cl. 7 of the tenancy agreement. This question is far from easy of solution because of the extreme obscurity of the language in which cl. 7 is couched. It is, however, clear that the parties mutually intended that the tenant should pay £40 on quitting at the end of the tenancy, and, in my opinion, the subject-matter of the payment is ascertainable with a reasonable degree of certainty. A

Clause 2 imposes on the tenant a threefold obligation. First, he is to use and occupy the premises in a fair and tenantable manner. Secondly, he undertakes a general obligation to make good any damage which might be done to the interior of the premises and generally to keep the interior and all stoves, bells, cupboards, fixtures and things thereto belonging in as good repair and condition as the same were at the beginning of the tenancy and so to leave the same at the end thereof. Thirdly, the tenant is to perform certain specified acts of reparation or renewal in relation to a number of varied articles which are therein enumerated. In addition to noting these three heads of obligation, two points call for comment. The first is that there is no exemption from liability in respect of what is commonly called "fair wear and tear". This omission is not surprising, for it is, in fact, to general depreciation of this character that the second obligation is, in my opinion, directed. The tenant is to be liable even for the fair wear and tear that might normally be expected to occur during a period of three years' occupation. The second point is that the general depreciation to which I have referred does not expressly exclude matters of decoration and I can find no sufficient warrant for excluding them by implication. The interior of a flat at the end of a tenancy (whatever care a tenant may take) is not in as good condition as it was at the beginning if, for example, the parts of it that were painted or distempered have been subjected over a period of three years to ordinary usage and to the fogs and smuts of the London air. Accordingly, in approaching cl. 7, I do so on the footing that the lessee, at the end of the lease, was to be responsible for depreciation due to fair wear and tear of the flat, including deterioration in the condition of the interior decorations. In so doing, it seems to me that the clue to the parties' intention in cl. 7 lies in the use of the word "unfair" in the phrase "unfair wear and tear of the said premises" which appears in the last line of the clause. In my judgment, this word, although an unusual one to find in a lease or tenancy agreement, confines the ambit of the "wear and tear" in relation to which it is used to wear and tear other than that which is attributable to ordinary user. B
C
D
E
F

Accordingly, as I think, the concluding part of the clause—

"subject to and without prejudice to the liability of the tenant to make good any damage caused by unfair wear and tear of the said premises"

—leads to the following results: (i) Notwithstanding anything contained in the earlier part of the clause, the tenant's liability for wear and tear other than ordinary wear and tear is preserved; (ii) any outstanding liability in respect of fair wear and tear is impliedly released; and (iii) if regard be paid to that sentence alone, the lessors receive no compensation in respect of such release. Turning, then, to the earlier part of the clause and bearing in mind these effects of the concluding sentence, one finds that, on quitting at the end of the demised term, the lessee will, "but without prejudice to the provisions agreements and conditions hereinbefore contained" (which, in my judgment, include those contained in cl. 2), G
H

"pay to the landlords or their assigns immediately after the expiration or determination of the tenancy whenever it shall happen the full sum of £40 towards the re-decoration of the said suite of rooms or flat, which sum shall be accepted by the landlords in full satisfaction and discharge of all claims against the tenant for repairs to or decoration of the said premises".

In my judgment, this £40 fills in the gap which is left in the concluding provision by reason of the omission, which I have already mentioned, to compensate the lessors for impliedly releasing the lessee from outstanding liability for fair wear and tear. The sum of £40 is to be paid and is to be accepted by the landlords in full satisfaction and discharge of all claims against the tenant in respect of such general and inevitable deterioration of the interior of the flat, including decoration, as is attributable to ordinary user. On this interpretation, an effect can be reasonably given to the whole of the clause. On the tenant quitting the flat at the end of the term, the tenant is to pay the landlords £40 in final satisfaction of her liability under what I have earlier described as her second obligation under cl. 2. The payment of that sum, however, is to be without prejudice to her liability under the first and third obligations imposed by cl. 2 which (and which alone) remain binding on her. As, therefore, the £40 is payable in satisfaction of a particular part of her liabilities under cl. 2 (and the judge held that sum to be a reasonable amount) and she remains answerable only for the rest, the argument to the effect that that sum was a penalty fails, in my view, for want of the necessary foundation to support it.

On the view above expressed that the agreement to pay the £40 would have been binding on Mrs. Crossley had she continued in possession, I am of opinion, for the reasons stated in the judgment of DENNING, L.J., that the covenant ran with the land so as to bind the tenant as assignee of the term and that it continued to operate as a term of his statutory tenancy. As to the latter point, I would add that a contrary decision might operate very hardly on a landlord at the instance of an unconscientious tenant, for a covenant to pay a sum of money in respect of dilapidations at the end of a contractual tenancy which imposed no express obligation to repair could be readily avoided by the tenant remaining on as statutory tenant and giving notice to quit immediately afterwards. The tenant cannot, in my opinion, escape liability on the ground that cl. 7 provided that the sum was only payable on the tenant quitting "at the end of the term granted" by the agreement. That phrase meant no more than quitting on the expiration of the tenancy, as is shown a few lines later on in cl. 7 itself, and compare, for example, cl. 2 and cl. 10 of the agreement, in each of which the word "tenancy" is used as the equivalent of "the term hereby granted".

Appeal dismissed.

Solicitors: *Silverman, Miller & Fraser* (for the tenant); *Coode, Kingdon, Cotton & Ward* (for the landlords).

[*Reported by F. GUTTMAN, Esq., Barrister-at-Law.*]

Re BANQUE DES MARCHANDS DE MOSCOU
(KROUPETSCHESKY).

[CHANCERY DIVISION (Vaisey, J.), December 18, 1952.]

Company—Winding-up—Payment ex gratia by liquidator—Authorisation by court.

A
B
C
D
A bank, which had its head office in Moscow and a branch office in Petrograd, but no branch office in England, was dissolved, according to Russian law, on or about Dec. 14, 1917, by a decree of that date of the Soviet government by which the bank, in common with other banks, was nationalised, its assets and liabilities being taken over by the State Bank. Between March, 1930, and May, 1932, when a winding-up order was made in England in respect of the bank, W., an expert in Russian law, assisted in various legal proceedings relating to the bank, and, largely owing to his advice with regard to a claim made in respect of assets of the bank by the Deutsche Bank, that claim was finally defeated. W. claimed in the winding-up of the bank in respect of his expenses and for a sum by way of remuneration. The liquidator rejected his proof and his rejection was upheld by the court. The liquidator then applied for leave to pay to W. £420 *ex gratia* in respect of his claim. Distribution to creditors had not been made, and it was anticipated that they would receive 10s. in the pound.

D
HELD: in ordinary circumstances the application would be premature, but W. had been of great assistance in the winding-up, and his help might be of value to the liquidator in future, and, therefore, the payment would be authorised on W.'s undertaking to continue to serve as a member of the committee of inspection unless prevented by ill health or other unavoidable cause or until excused from service by the court.

E
MOTION by the liquidator of the Banque des Marchands de Moscou to discharge an order made by the registrar dismissing an application for leave to make an *ex gratia* payment to Mark Wilenkin.

F
The decision of VAISEY, J., rejecting the proof of the said Mark Wilenkin in the winding-up, is reported [1952] 1 All E.R. 1269. His LORDSHIP suggested that the question of a gratuitous payment to the said Mark Wilenkin should be considered by the registrar. On the application being made to him, the registrar expressed the view that it was premature and that the proper course was to postpone any such payment until the views of the creditors had been ascertained.

Raymond Walton for the liquidator.

G
VAISEY, J.: This is an application by the liquidator in the winding-up of the Banque des Marchands de Moscou (Kroupetschesky) for leave to pay to Mr. Mark Wilenkin the sum of £420, or such other sum as this court should direct, as and by way of an *ex gratia* payment in respect of that gentleman's claim as set out in his proof of debt sworn more than twenty years ago—on Sept. 23, 1932.

H
The facts on which this application is based are sufficiently set out in the judgment which I delivered in regard to Mr. Wilenkin's legal claims and other matters on Feb. 28, 1952 ([1952] 1 All E.R. 1269), and I need not repeat or enlarge on what I there said, only observing that Mr. Wilenkin's claim to have his proof admitted was rejected by me and the liquidator was satisfied that, if it came to a matter of gratuitous payment, £850 would not be incommensurate with the services rendered for which the claim was put forward. If I had admitted Mr. Wilenkin's proof he would, of course, have had to come in with the other creditors and would have had to wait until the time had arrived for a distribution among the creditors. It is anticipated that the amount

which the creditors are likely to receive is something in the nature of 10s. in the pound.

A At the hearing in February, 1952, I suggested that, if it was a case of gratuitous payment, it should be dealt with by the registrar, who, when asked to sanction the payment which I am now asked to sanction, expressed the view, and I think the view was well founded, that it was a premature application, the application being in substance to pay approximately fifty per cent. of the £850, not as of right but by way of gratuitous payment. The registrar suggested that the proper course would be to wait and see what the creditors thought because, after all, the proof had been rejected and it was their money which was to be depleted for the purpose of making this proposed *ex gratia* payment. I agree with, and I think in normal circumstances I should have upheld, the decision of the learned registrar, but it does seem to me that here B we are dealing with a personal problem. Mr. Wilenkin, who became qualified as an advocate in Russia many years ago, has, undoubtedly, been of great assistance in this winding-up, and, indeed, it is suggested that, but for his activities, this matter would never have progressed at all. He laid the foundation for it. However, I am looking not only at the past. It must be remembered C that the liquidator has told me that he considers £850 a fair sum, and I have also to look to the future. I have to realise, and I think it is beyond question, that Mr. Wilenkin's help may be of value in the future as it has been of value to the liquidator in the past. I think that if my decision on this application is not going to be made (and I do not intend it to be made) the basis for future claims—claims for *ex gratia* or other payments—I am justified in allowing this D payment to be made, but I shall only make it on Mr. Wilenkin's undertaking to continue to serve as a member of the committee of inspection unless prevented by ill health or other unavoidable cause or until he is excused further service by the court. I think an undertaking of that kind will secure to the liquidator, so far as it is possible to secure anything in the nature of a contract of personal service, the continuance of Mr. Wilenkin's valuable assistance.

E On that undertaking being given to the court, and it is an undertaking which I am sure Mr. Wilenkin will observe not only in the letter, but also in the spirit, I will authorise the liquidator to pay Mr. Wilenkin £420 by way of an *ex gratia* payment, such payment to be made against Mr. Wilenkin's receipt in writing acknowledging the payment to have been made in full satisfaction of all his claims for remuneration or compensation or expenses in connection with the liquidation down to the present date. If a receipt is signed by him in that form, F and if he gives an undertaking in the way in which I have suggested, I will authorise the payment to be made and the liquidator's costs should be the liquidator's costs in the winding-up.

Order accordingly.

Solicitors: *Slaughter & May* (for the liquidator).

[Reported by R. D. H. OSBORNE, ESQ., *Barrister-at-Law.*]

CARPENTER v. CAMPBELL AND ANOTHER.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., *Croom-Johnson and Pearson, JJ.), January 16, 1953.]

Street Traffic—Licence—Goods vehicle—Offence—Prosecution of driver as well as owner—Undesirability—Road and Rail Traffic Act, 1933 (c. 53), s. 1 (1)—Vehicles (Excise) Act, 1949 (c. 89), s. 13 (1).

Where a motor vehicle is used at a time when it is not properly licensed the owner alone should be prosecuted for an offence against the Road and Rail Traffic Act, 1933, or the Vehicles (Excise) Act, 1949. Although it is technically correct for a summons to be issued against the driver of the unlicensed vehicle, this course tends to be oppressive and is undesirable where the driver is the employee of the owner and not responsible for the licensing of the vehicle.

FOR THE VEHICLES (EXCISE) ACT, 1949, s. 13, see HALSBURY'S STATUTES, Second Edn., Vol. 21, p. 1444; and FOR THE ROAD AND RAIL TRAFFIC ACT, 1933, s. 1, see *ibid.*, Vol. 24, p. 675.

CASE STATED by Devon justices.

At a court of summary jurisdiction sitting at Honiton on July 9, 1952, the appellant, William John Carpenter, preferred an information against the first respondent, James Campbell, that he did use a goods vehicle without the appropriate licence, contrary to s. 13 (1) of the Vehicles (Excise) Act, 1949, and two further informations against the second respondents, C. D. L. Construction Co., Ltd., (i) that they did use the same vehicle without a proper licence contrary to s. 13 (1) of the Vehicles (Excise) Act, 1949, and (ii) that they did use the said vehicle for the carriage of goods in connection with a business carried on by them without a licence granted under Part I of the Road and Rail Traffic Act, 1933, contrary to s. 1 (1) of that Act.

It was proved or admitted that the second respondents were the owners of goods vehicles, namely, a lorry and a flat-bottomed four-wheeled trailer attached, which, on Apr. 7, 1952, were each laden, the lorry with a compressor, timber and rubber hose and the trailer with another compressor, two pneumatic drills, and rubber air hose, none of which was built in or permanently attached to the trailer; that there was exhibited in the lorry a road fund C licence showing that the sum of £35 had been paid, being the appropriate duty payable in respect of the lorry; that the first respondent was an employee of the second respondents and was engaged as a driver in charge of the lorry and trailer; that the second respondents were under contract with the Post Office authorities to lay telephone cables, which necessitated breaking up the highway and thereafter filling in and leaving the same in a safe state, and that the load on the trailer was being conveyed from Honiton, where the second respondents were engaged in laying cables, to Axminster for similar works; and that the compressor, pneumatic drills, and rubber air hose on the trailer were used to dig trenches for the purpose of laying the cables.

It was contended on behalf of the appellant (i) that the road fund C licence exhibited in the lorry did not cover the trailer attached thereto, the appropriate duty being £35 for the lorry and £15 for the trailer, and (ii) that the trailer was used for a purpose other than in connection with the construction, maintenance, or repair of roads in that it was not properly constructed for such purpose and was not licensed. It was contended on behalf of the respondents (i) that the first respondent was the servant and acting under the directions of the second respondents, and (ii) that the second respondents could rely on the Road and Rail Traffic Act (Exemption) Regulations, 1951 (S.I., 1951, No. 1641), reg. 2 (e), on the ground that the trailer was carrying goods used for the breaking up of the road and thereafter for the "construction . . . or repair of roads", so that

no licence was required, and, further, that the Vehicles (Excise) Act, 1949, s. 7 (1) (h), relating to the conveyance of road construction machinery applied, and that no additional duty was payable. The justices dismissed the informations.

W. M. F. Hudson for the appellant.

The respondents did not appear.

A **LORD GODDARD, C.J.:** This case must go back to the justices with an intimation that their decision was wrong, and that it is their duty to convict on both summonses, but the court desires to express its strong disapproval that for an offence of this sort the lorry driver was summoned. The duty to take out the proper licences in respect of vehicles is the duty of the employers, who own the vehicles. This is a well-known company engaged in construction work for the Post Office, and, whether by accident or design, they had not taken out the proper licences, and so made themselves liable to certain excise penalties, but what possible reason—good, bad or indifferent—there was for summoning the lorry driver, I cannot conceive. To multiply summonses in this way and to serve them on the driver, who is no more responsible for the fact that the licence has not been taken out than I am, is an abuse and it is oppressive, and, although we cannot say that, within the technical words, he did not “use” the vehicle, it is most undesirable that he should have been summoned. In sending this case back to the justices to convict the company, we are going to direct them to give an absolute discharge to the driver, and I hope that persons who are responsible for these prosecutions will not in similar cases multiply summonses in this way, but will serve the people responsible and not the people who are not responsible. To indicate our disapproval of what has been done we shall not grant any costs in this case.

B

C

D

CROOM-JOHNSON, J.: I agree.

PEARSON, J.: I agree.

Appeal allowed.

E Solicitors: *Wontner & Sons*, agents for the *County Prosecuting Solicitor for Devon* (for the appellant).

[*Reported by F. GUTTMAN, Esq., Barrister-at-Law.*]

CARNILL v. EDWARDS AND OTHERS.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Croom-Johnson and Pearson, JJ.), January 19, 1953.]

Criminal Law—Vagrancy—Prostitution—Wandering in a public highway—Indecent behaviour in stationary motor car—Vagrancy Act, 1824 (c. 83), s. 3.

A man who was driving a motor car in the centre of Sheffield picked up two prostitutes and drove them to some waste land off a lane in the suburbs of Sheffield, where he stopped and acts of indecency took place in the car. The two prostitutes were acquitted by justices on a charge of wandering in a public highway and behaving in an indecent manner, contrary to s. 3 of the Vagrancy Act, 1824.

HELD: at the time when the women committed the acts of indecency they were in the car and could not be said to be wandering in a public highway, and, therefore, they were rightly acquitted.

FOR THE VAGRANCY ACT, 1824, s. 3, see HALSBURY'S STATUTES, Second Edn., Vol. 18, p. 202.

CASE STATED by Sheffield justices.

At a court of summary jurisdiction sitting at Sheffield on June 27, 1952, the appellant, George Alfred Carnill, a superintendent of police, preferred an information against the respondents, Eunice Edwards, Renée Craig, and Albert Aldene Bramall, charging that on Apr. 23, 1952, the respondents Edwards and Craig, being common prostitutes wandering in the public highway, behaved in an indecent manner in a public highway, called Claywheels Lane, contrary to s. 3 of the Vagrancy Act, 1824, and that the respondent Bramall on the same day unlawfully aided, abetted, counselled or procured the respondents Edwards and Craig in the commission of the said acts of indecency, contrary to s. 5 of the Summary Jurisdiction Act, 1848.

By the Vagrancy Act, 1824, s. 3:

" . . . every common prostitute wandering in the public streets or public highways, or in any place of public resort, and behaving in a riotous or indecent manner . . . shall be deemed an idle and disorderly person . . . "

It was proved or admitted that Edwards and Craig were common prostitutes. On the evening of Apr. 23, 1952, they got into Bramall's motor car in Cambridge Street, in the centre of Sheffield, and were driven by him to Claywheels Lane, a lane in the suburbs of Sheffield, which was not much frequented at that time of the night, arriving there shortly before 11.20 p.m. There, the respondent Bramall drove the car off the roadway for about six yards to waste land at the side of the lane. Acts of indecency took place between Bramall and the two female respondents in the motor car. These acts were not observable except by a person who shone a torch on to the motor car, as did the appellant.

It was contended on behalf of the appellant that Edwards and Craig were common prostitutes wandering in a public highway and behaving indecently within the meaning of s. 3 of the Vagrancy Act, 1824, even though, at the material time, they were in a motor vehicle and that Bramall aided and abetted them in the commission of those offences. It was contended on behalf of Edwards and Craig that as, in fact, they had entered the motor car in Cambridge Street and had journeyed direct to Claywheels Lane and the car had then left the lane and stopped on spare land adjacent thereto, the word "wander" (which must be interpreted "rambling here and there"), being an essential part of the charge, could not apply, since the journey was a fixed one throughout and the two respondents had never alighted from the motor car until ordered to do so by the police after the alleged commission of the acts of indecency. The justices dismissed the information and the appellant appealed.

Leslie for the appellant.

Cumming-Bruce for the respondents.

LORD GODDARD, C.J.: This is a Case stated by justices for the city of Sheffield, before whom three people, two prostitutes and a man, were charged under the Vagrancy Act, 1824. The two women, who were common prostitutes, were charged with wandering in Claywheels Lane and committing an indecent act, and the man was charged with aiding and abetting.

In my opinion, the justices came to a proper decision. I cannot see how it can be said, if a woman accepts an invitation and gets into a motor car, that when she gets to her destination, she is wandering in the street. She is not wandering in the street; she is sitting in the motor car. The justices, therefore, seem to have dismissed this case properly, but I am not sure that I follow their grounds. Their finding was:

“We being of opinion that in the circumstances of the case the prostitutes could not be held to be wandering in a specific street within the meaning of s. 3 of the Vagrancy Act, 1824, dismissed the said informations.”

If they had said: “We were of opinion that the prostitutes could not be said to be wandering in Claywheels Lane”, I should have agreed, because they were not. They were sitting in a motor car in Claywheels Lane. My only doubt was whether the justices thought a woman must wander in a specific street, but I do not think they did because the section talks about a common prostitute wandering “in the public streets or public highways”, and it does not matter whether she wanders up and down one street or more than one. What, I think, the justices meant to find, and what commends itself to the court, is that in the case of the specific street mentioned in the information, these women were not wandering at all. For these reasons I think that the justices came to a correct determination in point of law and the appeal must be dismissed with costs.

CROOM-JOHNSON, J.: I think the justices have arrived at the right conclusion for the wrong reasons.

PEARSON, J.: I agree.

Appeal dismissed.

Solicitors: *Sharpe, Pritchard & Co.*, agents for *John Heys*, town clerk, Sheffield (for the appellant); *Jackson & Jackson*, agents for *Irwin Mitchell & Co.*, Sheffield (for the respondents).

[Reported by G. A. KIDNER, Esq., Barrister-at-Law.]

SPICER *v.* WARBEY.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Croom-Johnson and Pearson, JJ.), January 16, 1953.]

Case Stated (by Justices)—Amendment—Delay in application—Need of affidavit in support of application—Need to submit draft of Case to respondent.

On July 7, 1952, justices dismissed an information preferred by the appellant against the respondent charging him with the dangerous driving of a motor vehicle, contrary to the Road Traffic Act, 1930, s. 11 (1). On Sept. 22, 1952, on the application of the appellant, the justices stated a Case, a copy of which was received by the respondent on Sept. 30, 1952. At the hearing of the appeal on Jan. 16, 1953, the respondent complained that the Case was drafted by the appellant, that the draft was not submitted to him before being signed by the justices, and that it omitted essential findings of facts. There was no affidavit by the respondent to support these allegations.

HELD: there was no obligation on the clerk to the justices to submit to the respondent the draft of the Case which had been prepared by the appellant if the justices were satisfied that the facts were fully stated in accordance with their findings; if the respondent thought that the facts, as found by the justices, had not been properly stated in the Case, he should have made an application, supported by an affidavit, to the Divisional Court without delay, asking that the Case might be sent back to the justices for amendment; and, having regard to the delay on the part of the respondent and the absence of an affidavit in support of his allegations, the court would not send the Case back for amendment.

AS TO CASE STATED BY JUSTICES, see HALSBURY, Hailsham Edn., Vol. 21, p. 727, para. 1257; and FOR CASES, see DIGEST, Vol. 33, p. 417, Nos. 1278-1280.

CASE STATED by Hertfordshire justices.

On July 7, 1952, at a court of summary jurisdiction sitting at Hatfield, an information was preferred by the appellant, a superintendent of police, charging the respondent with an offence against the Road Traffic Act, 1930, s. 11 (1), in that, on May 10, 1952, he drove a motor vehicle in Hatfield in a manner dangerous to the public. The justices dismissed the information, and, on Sept. 22, 1952, on an application by the appellant, stated a Case, a copy of which was received by the respondent on Sept. 30, 1952. At the hearing of the Case, the respondent complained that certain facts had been omitted from it.

R. M. O. Havers for the appellant.

H. H. V. Forbes for the respondent.

LORD GODDARD, C.J.: This is a Case stated by justices for the county of Hertford before whom the respondent was charged with driving a motor vehicle in Green Lanes, Hatfield, on May 10, 1952, in a manner dangerous to the public, contrary to the Road Traffic Act, 1930, s. 11 (1). The information was heard and dismissed on July 7, 1952, and the Case was stated on Sept. 22, 1952. Counsel for the respondent now complains that the Case is not properly stated. He says that the clerk to the justices asked the prosecution to draft the Case and did not submit the draft to the respondent for revision. I do not think that there was any obligation on the clerk to submit the draft to the respondent, although it is done in many cases. If the justices see that the facts are properly and fully stated in accordance with their findings, I do not think that any further revision of the Case is necessary.

If, however, a respondent thinks that certain facts found by the justices—and not merely evidence which was submitted to them—have been omitted from the Case, he can apply to this court for a re-statement of the Case on stating in an affidavit the findings of fact which, in his opinion, have been omitted. The court

will then consider whether it should send the Case back to the justices, asking them to re-state it if the facts, which are alleged to have been found by them and omitted from the Case, were, in fact, found by them. But a copy of this Case has been in the possession of the respondent or his advisers since Sept. 30, 1952, and there has been no affidavit by him alleging that any fact found by the justices has not been stated in the Case. We are concerned, not with the evidence given in the case, but with the facts found by the justices, and, unless we are

A satisfied that the justices did find, or must have found, certain facts which they have not put into the Case, we should not send it back to them for amendment. As the Case has been in the hands of the respondent's advisers all these months, we cannot now send it back to the justices for amendment merely on a statement on behalf of the respondent that certain facts have been omitted. It was the

B respondent's duty to act promptly in the matter, and, in the circumstances, the court will not send the Case back for amendment. [After reviewing the facts found by the justices, HIS LORDSHIP held that their finding that the respondent was not guilty of dangerous driving was a perverse finding which the court would not support, and that the Case should be remitted to the justices with an intimation that, on the facts found by them, it was their duty to convict the respondent.]

C CROOM-JOHNSON, J., and PEARSON, J., concurred.

Appeal allowed.

Solicitors: *Pothecary & Barratt*, agents for *T. Ottaway & Son*, St. Albans (for the appellant); *N. G. Maclean* (for the respondent).

[*Reported by F. GUTTMAN, ESQ., Barrister-at-Law.*]

D

PERRY v. GARNER.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Croom-Johnson and Pearson, JJ.), January 19, 20, 1953.]

E *Pests—Rats and mice—Destruction—Notice to owner of land—Validity—Instruction to carry out “poison treatment or other work of no less effectual character”—Prevention of Damage by Pests Act, 1949 (c. 55), s. 4 (1).*

The respondent was charged under s. 5 (2) of the Prevention of Damage by Pests Act, 1949, with failing to take the steps required by a notice served on him by the local authority under s. 4 (1) of the Act for the

F destruction of rats on land owned and occupied by him. In the notice the following steps were set out for the destruction of the rats and for keeping the land free from rats: “Poison treatment of infested land, such measures to be carried out to the approval of the local authority, or other work, of a not less effectual character, to be executed for the

destruction of the rats.”

G HELD: the notice, in prescribing, not only the poison treatment, but also the performance of “other work” (which was not particularised), did not require the respondent to take any “specified” steps within s. 4 (1), and, therefore, it was not a valid notice within the sub-section.

FOR THE PREVENTION OF DAMAGE BY PESTS ACT, 1949, s. 4 (1) and s. 5 (2), and the PUBLIC HEALTH ACT, 1936, s. 290 (3), (4) and (5), see HALSBURY'S

H STATUTES, Second Edn., Vol. 19, pp. 536, 537, and pp. 468, 469, respectively.

CASE STATED by Buckingham justices.

At a court of summary jurisdiction sitting at Princes Risborough the appellant, John Percival Perry, chief sanitary inspector of the Wycombe Rural District Council, preferred an information against the respondent, Charles Aubrey Garner, charging him that he failed to take the steps set out in a notice served by the rural district council of Wycombe and requiring him, as occupier of certain land, to take such steps as were specified in the notice for the destruction of rats on the

land and for keeping the land free from rats, contrary to the Prevention of Damage by Pests Act, 1949, s. 5 (2).

It was proved or admitted that the respondent was the occupier of a field on which were a straw rick and the remnants of a corn rick. The appellant inspected the land on dates in December, 1951, and found severe infestation by rats. He informed the respondent of his duties and liabilities under the Prevention of Damage by Pests Act, 1949, both orally and by letter. In January, 1952, after threshing the corn rick and baling and taking away the straw from the straw rick, the appellant ignited the remains of both ricks, but the fire was put out by the fire brigade before the two ricks were completely destroyed. On Feb. 4 the notice mentioned above was served on the respondent. It expired on Feb. 20, and during the intervening period the respondent did not carry out any poison treatment. On Feb. 20 the appellant visited the land and found evidence of infestation by rats, and there was further evidence of infestation on dates up to Mar. 14.

It was contended on behalf of the appellant that the respondent had failed to take any of the steps required by the notice within the time specified, and, therefore, an offence had been committed. On behalf of the respondent it was contended that it was dangerous to use poison on the land in question; that he had taken other no less effectual steps prior to the service of the notice; that the rat holes were old and disused; and that any rats seen on the land came from adjoining land for which he was not responsible. The justices dismissed the information.

Widgery for the appellant.

The respondent did not appear.

LORD GODDARD, C.J.: This is a Case stated by justices for the county of Buckingham before whom the respondent was summoned for failing to take steps to destroy rats and to keep land free from rats, pursuant to a notice served under the Prevention of Damage by Pests Act, 1949.

The facts show that the local authority were satisfied that for some period these premises had been infested with rats, and I daresay they were right. They served a notice on the respondent requiring him to take certain steps, to which I will refer in a moment. He did not appeal against this notice, and he was subsequently prosecuted because, it was said, he had disregarded the notice that was served on him. Section 5 (2) of the Act provides that, if a person fails to take steps which the local authority can require him to take under s. 4, he shall be

"liable on summary conviction to a fine not exceeding in the case of a first offence £50, and in the case of a second or any subsequent offence £100."

I do not think the actual point which the court has taken in this matter was argued below, but whether it was argued below or not, it is a point that arises on the face of the Case. The justices, having stated the facts proved before them, say:

"We, being of opinion that the prosecution had failed to discharge the onus of proof, dismissed the said information",

and they ask us whether or not they were right in dismissing the information. The point that the court has taken in this matter is this. Section 4 provides:

"(1) If in the case of any land it appears to the local authority, whether in consequence of a notice given in respect of the land under the last foregoing section or otherwise, that steps should be taken for the destruction of rats or mice on the land or otherwise for keeping the land free from rats and mice, they may serve on the owner or occupier of the land a notice requiring him to take, within such reasonable period as may be specified in the notice, such reasonable steps for the purpose aforesaid as may be so specified . . .

(5) Sub-sections (3) to (5) of s. 290 of the Public Health Act, 1936 (which

provide for an appeal to a court of summary jurisdiction against certain notices requiring the execution of works under that Act) shall apply to any notice served under this section requiring the carrying out of any structural works as they apply to any such notice as is mentioned in sub-s. (1) of that section . . .”

A That only applies to structural works and not to such a notice as this. Therefore, the owner must comply with the notice or else he commits an offence, and he has no means of appealing against the notice. The notice in this case requires the owner to take the following steps (for the destruction of rats on the said land and for keeping the said land free from rats), that is to say,

B “poison treatment of infested land, such measures to be carried out to the approval of the local authority, or other work, of a not less effectual character, to be executed for the destruction of the rats.”

C In the opinion of this court, that is not specifying the steps which are to be taken. It specifies a step which the owner may take and it tells him he may take other steps which they do not specify. The thing required to be done at once becomes unspecified because it says the owner is to do a particular thing or something else and the something else is left completely at large. I do not think, therefore, it can be said that this notice complies with the section. If it had confined itself to poison treatment, it would have complied with the section, but as it does not confine itself to poison treatment, but says that the owner is to put down poison or do something else which it does not specify, in my opinion, this is not a good notice under the Act. Accordingly, I think the prosecution fails
D in limine, and the justices were right in not convicting.

CROOM-JOHNSON, J.: I agree, for the same reasons.

PEARSON, J.: I agree.

Appeal dismissed.

Solicitors: *Preston, Lane-Claypon & O’Kelly*, agents for *Reynolds, Parry-Jones & Crawford*, High Wycombe (for the appellant).

[*Reported by* MICHAEL MALONEY, ESQ., *Barrister-at-Law.*]

PRESCOTT v. LANCASHIRE UNITED TRANSPORT CO., LTD.

[COURT OF APPEAL (Singleton, Birkett and Morris, L.J.J.), December 16, 1952.]

Negligence—Omnibus—Passenger injured while alighting—Omnibus stopping short of request stop—No warning by conductor.

The plaintiff and her husband were travelling on the defendants' omnibus. The plaintiff's husband told the conductor that they wished to alight at the next request stop, and the conductor rang the bell and told him to wait until the bus stopped. Owing to road works and traffic conditions the bus stopped twenty or twenty-five yards short of the request stop, as the driver was waiting for an oncoming vehicle to pass. Unknown to the driver and conductor, but known to the plaintiff and her husband, it had for some time been customary for other buses to stop for passengers to alight at that point, on account of the road works, and the plaintiff and her husband, assuming that the bus had stopped for them to alight, proceeded to do so. As the plaintiff was alighting, the bus re-started as the road was then clear, and the plaintiff was thrown to the ground and injured. The conductor took no step to warn the plaintiff that the stop had not been reached.

HELD: the conductor had been negligent in not warning the plaintiff that the stop had not been reached or in not taking steps to ensure either that she be prevented from alighting or that the bus be prevented from re-starting, and, accordingly, the defendants were liable in damages.

AS TO DEGREE OF CARE TO BE EXERCISED BY CARRIERS OF PASSENGERS, see HALSBURY, Hailsham Ed., Vol. 4, pp. 60-62, paras. 91-95; and FOR CASES, see DIGEST, Vol. 8, pp. 71-75, Nos. 479-513, and pp. 80-85, Nos. 554-585.

Case referred to:

(1) *Mottram v. South Lancashire Transport Co.*, [1942] 2 All E.R. 452; 2nd Digest Supp.

APPEAL by the plaintiff, Mrs. Prescott, from an order of His Honour JUDGE RHODES, made at Leigh County Court, on Sept. 19, 1952, whereby he dismissed the plaintiff's claim against the defendants for damages for negligence.

Pigot for the plaintiff.

R. H. Forrest for the defendants.

SINGLETON, L.J. : I will ask MORRIS, L.J., to give the first judgment.

MORRIS, L.J. : This is an appeal from the judgment of His Honour JUDGE RHODES given at Leigh County Court in a remitted action in which the plaintiff, Mrs. Prescott, claimed damages against the owners of a motor omnibus in which she was travelling on the evening of Dec. 16, 1950. The plaintiff was with her husband, and they intended to alight at a stop in Church Street almost opposite to the Manor Arms Hotel. Owing to certain work which was being done in Church Street there were obstructions in the road, and those obstructions were marked by red lights. The bus was a single-decker bus, and it was full; the conductor said that all the seats were occupied and that five or eight people were standing. The bus was of the kind access to which, and egress from which, is by means of a door near the front. The case for the plaintiff was that, a signal to stop having been given, the bus did stop; that the plaintiff's husband alighted and did so in safety; and that the plaintiff was proceeding to follow her husband when the bus re-started and she was thrown to the ground and received injuries. Because of the work that was being done in Church Street, it had happened that buses approaching the stop almost opposite the Manor Arms Hotel had over a period of time stopped somewhat short of the official stopping place. That circumstance was known to the plaintiff and to her husband. It was, however, in fact, not known to the driver and the conductor on this particular bus.

It was the case for the defendants that the bus never stopped at all. It was

A said that the bus slowed down and was being driven at a very moderate speed, described as a crawl, but that it never came to a stop. That was a very important issue on the facts, and the learned judge resolved that issue by deciding that the bus did stop. There is no doubt that what happened was that the plaintiff's husband intimated that he and his wife wished to alight at the stop opposite the Manor Arms Hotel, and so informed the conductor. The conductor said in his evidence that after leaving the Red Lion, which was the last stop, he closed the door, and then he said that the plaintiff's husband told him that he was wanting to get off at the next stop, and the conductor said, "I rang the bell and told him to wait until the bus stopped." On the judge's findings, there is no doubt as to what did happen, and it was a most unfortunate occurrence. Because of the work that was being done on the road, and because of the obstruction, it was not possible, or not desirable, for two vehicles to pass at a certain place. As B the driver of the bus proceeded in the direction of the Manor Arms Hotel stop, some vehicle approached him and he, doubtless very wisely, thought it better to give way to the other vehicle, and in the result he stopped, and he stopped at a point some twenty to twenty-five yards from the official stop, and according to the plaintiff's husband when he stopped he was right into the kerb. In fact, he C had stopped because of the oncoming vehicle, and when the road was clear, without receiving any further bell, he went on and then stopped at the official stop. The driver said that he was not aware of any accident until he was informed when the bus stopped.

D It seems to me that once the crucial question of fact is decided as to whether the bus did or did not stop, that then the issue as to liability is made very much clearer in this case. In no sense, in my view, did the plaintiff do anything wrong. She, through her husband, had intimated her desire to get off the bus and asked that the bus should stop at the next stopping place, and she, with her husband, was told by the conductor, who rang the bell at their request, to wait until the bus stopped. The bus did stop; the husband got off; the wife proceeded to do so, not unnaturally; and then the bus proceeded to move on. The conductor, E being in a single-decker bus, doubtless had the difficulties that are inevitable when the bus is crowded, but the conductor does not say in his evidence that he did not know the position of the bus at the time of stopping; he, apparently, did not do anything in the way of calling out. He says that he knew that the door was closed before the bus left the Red Lion because he closed it, and thereafter having heard someone shout "Oh" he saw that the door was open; he, apparently, F had not noticed anyone opening the door.

F The learned judge, according to the notes of his judgment taken by counsel for both parties, having found very definitely that the bus stopped, went on to say, according to the note of counsel for the plaintiff, as follows: "The bus stopped and the plaintiff's husband made a genuine mistake." By that he means that the plaintiff's husband thought that that was the stop that was being used that day by the bus in lieu of the official stop, because other buses for some time, on account of the work being done, had chosen a stop some yards away from the official stop. The learned judge went on, according to counsel's note: G

"I cannot see the driver was in any way to blame. He was entrusting the safety of passengers to the conductor. It was a genuine mistake; the plaintiff has failed to show negligence."

H Then he went on to assess damages.

The learned judge does not appear, from the notes of the judgment which are before us, to have dealt with the allegation that there was negligence in the conductor. In my judgment, it is not shown that the driver in these circumstances did anything that he ought not to have done, or omitted to do anything that he should have done; but, in my judgment, it is shown that there was a failure on the part of the conductor. When the conductor said to the plaintiff's husband, "Wait until the bus stops", having been asked to ring the bell, that

seemed a very clear invitation to the plaintiff and her husband to alight when the bus did stop. When the bus did stop and when it stopped short of the stopping place, the conductor, in my judgment, ought either to have warned the passengers, or ought to have communicated with the driver in some way. It would be easily possible to inform the driver that passengers were getting off the bus. The conductor ought, in my judgment, to have taken control. The conductor could clearly have seen that the plaintiff's husband had got off the bus. There were others waiting to get off. That could have been seen by the conductor. The plaintiff was following her husband. In my judgment, the conductor ought to have given a warning, or ought to have taken charge of the situation so as to ensure either that the plaintiff should be prevented from getting off the bus or that the bus should be prevented from going on while passengers were in the act of alighting.

We were referred by counsel for the plaintiff to a number of authorities. Many of the cases must depend on their own particular facts. One of the cases to which we were referred is the case of *Mottram v. South Lancashire Transport Co.* (1). In that case:

"The respondent was a passenger on one of the appellants' trolley buses. She was following another passenger off the bus at a request stop, at the time when the conductress was collecting fares on the upper deck of the bus. The other passenger rang the bell once and the bus slowed down, but just as he was getting off, thinking he was acting in the interest of everyone, he rang the bell twice as a signal for the bus to proceed. The respondent proceeded to alight after him, but, the bus picking up speed at that moment, she was thrown to the ground and injured. In an action for damages for such injuries, it was contended that the conductress was negligent in not coming to the platform as soon as she heard the bell ring once, so that she might supervise the re-starting of the bus,"

and it was held that there was no negligence on the part of the conductress.

In the course of his judgment, GODDARD, L.J., said this ([1942] 2 All E.R. 453):

"After the man had given the signal for the bus to stop, and if the bus had stopped, it would have been the duty of the conductress to see that no one else was getting off before giving the signal for the bus to start again. In this case the bus never did stop. Before it could stop, the officious passenger gave the signal for the bus to start again."

On the facts in the present case, once the bus did stop the plaintiff was acting quite properly in alighting; she was alighting pursuant to the invitation of the conductor to alight when the bus stopped, and the conductor should thereafter have seen what was happening. He should have given some warning; he should so have directed and controlled the whole situation that the bus would not proceed to move off while another passenger was alighting from it.

I consider, therefore, that on the finding of the learned judge the result should have followed that there was liability in the defendants, and that there should have been judgment against the defendants for the amount of the damages assessed by the learned judge.

BIRKETT, L.J. : I am of the same opinion and have nothing to add.

SINGLETON, L.J. : I agree.

Appeal allowed.

Solicitors: *Gregory, Rowcliffe & Co.*, agents for *Frank Platt, Wigan* (for the plaintiff); *William Charles Crocker*, agent for *T. R. Dootson, Leigh* (for the defendants).

[Reported by C. N. BEATTIE, Esq., Barrister-at-Law.]

LLOYD v. SINGLETON.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Croom-Johnson and Pearson, JJ.), January 20, 1953.]

Street Traffic—Driving uninsured motor vehicle—Permitting motor vehicle to be used on road without policy of insurance being in force—Permission by person in charge of vehicle, not the owner—Road Traffic Act, 1930 (c. 43), s. 35 (1).

The respondent was charged with permitting a person to use on a road a motor vehicle, in relation to the user of which by that person there was not in force a policy of insurance in respect of third-party risks, contrary to the Road Traffic Act, 1930, s. 35 (1). The vehicle in question belonged to a company, by whom the respondent was employed, and there was in force in relation to it a policy of insurance in the name of the managing director of the company which covered persons who had his permission to drive. The respondent had been given full discretion himself to use the vehicle for his work or to allow other employees of the company to use it in the course of the company's business. The respondent permitted his brother, who was neither an employee of the company nor engaged on the company's business, to drive the vehicle.

HELD: the offence of permitting a person to use a motor vehicle contrary to s. 35 (1) could be committed by anyone who was in charge of the vehicle, and not only by the owner, and, therefore, on the facts stated the respondent was guilty of the offence charged.

DICTUM of MACKINNON, L.J., in *Goodbarne v. Buck* ([1940] 1 All E.R. 616), explained and not applied.

FOR THE ROAD TRAFFIC ACT, 1930, s. 35 (1), see HALSBURY'S STATUTES, Second Edn., Vol. 24, p. 602.

Cases referred to:

- (1) *Goodbarne v. Buck*, [1940] 1 All E.R. 613; [1940] 1 K.B. 771; 109 L.J.K.B. 837; 162 L.T. 259; 2nd Digest Supp.
(2) *Williamson v. O'Keefe*, [1947] 1 All E.R. 307; 176 L.T. 274; 111 J.P. 175; 2nd Digest Supp.

CASE STATED by Southport justices.

At a court of summary jurisdiction sitting at Southport the appellant, William Herbert Lloyd, deputy chief constable of Southport, preferred an information against the respondent, Orme Fitzgerald Singleton, charging that on Sept. 9, 1951, the respondent did permit Charles Eric Singleton to use on a road a motor vehicle in relation to the user of which by the said Charles Eric Singleton there was no policy of insurance in force in respect of third-party risks, contrary to the Road Traffic Act, 1930, s. 35 (1).

It was proved or admitted that on the night of Sept. 8/9 the respondent, who was feeling unwell, asked his brother, Charles Eric Singleton, to drive a motor vehicle, JTE 488, from Birkdale to the place where it was usually kept. On that journey the driver was stopped and could not produce a certificate of insurance covering his use of the vehicle. The vehicle was owned by a company called Axforde, Ltd., of which the respondent was the assistant general manager, and on Sept. 8 and 9 there was in force a policy of insurance in the name of Jack Rubin, managing director of Axforde, covering any person driving the vehicle with Rubin's permission. The respondent used the vehicle for his work and drove it with the permission of Rubin. He was in general charge and control of the vehicle, and had full discretion as to its use, provided it was being used in the company's business or by the company's employees. Charles Eric Singleton was not an employee of the company and had not been given permission to drive the car by Rubin.

It was contended on behalf of the appellant that any person who had control of a motor vehicle was in a position to forbid or to permit another person to use the vehicle within the meaning of the Road Traffic Act, 1930, s. 35 (1), and that certain obiter dicta in *Goodbarne v. Buck* (1) ([1940] 1 All E.R. 613) did not apply. *Williamson v. O'Keefe* (2) ([1947] 1 All E.R. 307) was also cited. On behalf of the respondent it was contended that dicta in *Goodbarne v. Buck* (1) applied.

The justices dismissed the information.

Boydell for the appellant.

Binney for the respondent.

LORD GODDARD, C.J.: It is clear that the justices came to a wrong decision, although I can well understand their difficulty because of a passage in a judgment of *MACKINNON, L.J.*, which with I shall deal in a moment.

The charge against the respondent was permitting his brother to use a certain motor vehicle without an insurance policy being in force in relation to that user. The facts found by the justices show that this car belonged to a company called Axfords, Ltd. It was insured by a Mr. Rubin, who was the managing director of Axfords, Ltd. The respondent was the assistant manager, and he was allowed to drive the car on the company's business, and had full discretion as to permitting the use of the car and who was to drive the car so long as it was being used for the business of the company or another company of which Mr. Rubin was also managing director. So long as the car was being used by persons in the employment of the company on the company's business, it was a lawful user which the respondent was entitled to permit, and one which would be covered by the insurance policy. On the night in question the respondent seems to have been taken ill, and he asked his brother, who had nothing to do with the companies, to drive the car home. The brother had no policy of insurance, and Mr. Rubin's policy of insurance would not cover him because he was not employed by the company and was not driving on the service of the company.

The justices dismissed the charge because a dictum of *MACKINNON, L.J.*, in *Goodbarne v. Buck* (1) was cited to them which, it is clear, the learned lord justice uttered per incuriam. It was only a dictum, and obviously he went further than he need have done and was not thinking of the particular circumstances that arose in the present case. In *Goodbarne v. Buck* (1) two brothers were engaged in a very disreputable transaction. W. E. Buck was short of money, and he borrowed some money from his brother, H. A. Buck. H. A. Buck lent his brother the money, no doubt to buy a car, but, when W. E. Buck had bought the car, it was his car and not H. A. Buck's car. W. E. Buck was driving the car and ran over and killed somebody. The dead person's representative sought to recover damages from H. A. Buck on the ground that he had permitted his brother to drive the car which would have been covered by a policy which he, H. A. Buck, had taken out. This policy had been taken out in the name of H. A. Buck when he was not the owner of the car, but W. E. Buck was, and the insurance company repudiated the policy, so the car was wholly uninsured. The reason why H. A. Buck was not liable in that case was because he was not the owner of the car, but his brother, who was driving the car, was the owner, and was driving his own car. Therefore, it could not be said that H. A. Buck was permitting his own brother to drive the car because it was his brother's and he could drive it without any permission. In giving judgment *MACKINNON, L.J.*, said ([1940] 1 All E.R. 616):

"In order to make a person liable for permitting another person to use a motor vehicle, it is obvious that he must be in a position to forbid the other person to use the motor vehicle."

Everybody would agree with that, and, if the learned lord justice had stopped there, no difficulty would have arisen, but he said (*ibid.*):

“As at present advised, I can see no ground on which anybody can be in a position to forbid another person to use a motor vehicle except . . . where the person charged is the owner of the car.”

If this had been a reserved judgment, which it was not, no doubt either the
A learned lord justice or the other members of the court would have pointed out that, of course, the situation can arise which arose here, namely, that the car is entrusted by the owner to a driver authorised by him who has the care, management and control of the car, and that person is entitled to permit certain people to drive but not others. In the present case the respondent was entitled to permit employees of the companies to drive, but he was not entitled to
B permit any other persons to do so. In the course of the argument I put the illustration of a man, owning a car and employing a chauffeur, who leaves his car in the care of the chauffeur. If, when the master is not in the car, the chauffeur allows somebody else to drive it, the chauffeur is permitting the use of it. The master is not permitting the use of it because he does not know it is being used. He has given no authority to the chauffeur to allow other people
C to drive. In the ordinary way he would forbid the chauffeur to allow anybody else to drive, but, whether the chauffeur is actually forbidden or not, he is the person who permits the driving, and that case was not in the lord justice's mind when he uttered the dictum. When giving an *ex tempore* judgment, he did not think of all the various permutations which could arise.

In the present case, though I can well understand that the justices thought
D they were bound to follow that dictum, the court feels obliged to say that they do not agree with it. They do agree with what he said, that

“In order to make a person liable for permitting another person to use a motor vehicle, it is obvious that he must be in a position to forbid the other person to use the motor vehicle.”

In this case it is clear that the respondent was in a position to forbid his brother
E to drive, but instead of that he requested him to drive. This case must go back to the justices with an intimation that they did not come to a correct determination in point of law, and they must now consider the policy and come to a conclusion whether or not the car was insured.

CROOM-JOHNSON, J.: The Road Traffic Act, 1930, s. 35 (1),
F provides:

“Subject to the provisions of this Part of this Act, it shall not be lawful for any person to use, or to cause or permit any other person to use, a motor vehicle . . .”

which, to put it shortly, is uninsured against third party risks—in this case
G the respondent did permit somebody else to do this, and the sheet anchor of counsel for the respondent is some of the observations of **MACKINNON, L.J.**, in *Goodbarne v. Buck* (1). Those observations were clearly obiter, and I concur in my Lord's view that they must have crept into that judgment, which is not a reserved judgment, *per incuriam*.

Counsel's other argument is that in this case what was done did not amount
H to “permission”, but he did not convince me. I agree with the judgment which has been proposed by my Lord.

PEARSON, J.: I agree.

Case remitted.

Solicitors: *Sharpe, Pritchard & Co.*, agents for *R. E. Perrins*, town clerk, Southport (for the appellant); *Hancock & Scott*, agents for *Bellis, Son & Co.*, Southport (for the respondent).

[*Reported by* **MICHAEL MALONEY, Esq.**, *Barrister-at-Law.*]

R. v. MELVIN AND ANOTHER.

[COURT OF CRIMINAL APPEAL (Lord Goddard, C.J., Croom-Johnson and Pearson, JJ.), January 19, 1953.]

Criminal Law—Appeal—Substitution of verdict—Substitution of verdict of guilty of offence of which appellant acquitted—Criminal Appeal Act, 1907 (c. 23), s. 5 (2).

Where, on an indictment containing a count charging breaking and entering and stealing and another count charging receiving, the jury returned a verdict of not guilty of breaking and entering and larceny, but guilty of receiving, the Court of Criminal Appeal has no power, under s. 5 (2) of the Criminal Appeal Act, 1907, to substitute a verdict of guilty of breaking and entering and larceny for that of guilty of receiving.

AS TO THE POWER OF THE COURT OF CRIMINAL APPEAL TO ALTER THE VERDICT OF A JURY, see HALSBURY, Hailsham Edn., Vol. 9, p. 278, para. 405; and FOR CASES, see DIGEST, Vol. 14, pp. 548, 549, Nos. 6216-6232.

Cases referred to:

(1) *R. v. Evans*, (1916), 85 L.J.K.B. 1176; 114 L.T. 616; 14 Digest 519, 5833.

(2) *R. v. Smith*, (1923), 17 Cr. App. Rep. 133; 14 Digest 548, 6229.

APPEAL against conviction.

The appellants, Charles Melvin and Clement Eden, were convicted at the Central Criminal Court on a count in an indictment which charged them with receiving stolen property. They were acquitted on a count charging breaking and entering.

At about 10.40 p.m. on Aug. 22, 1952, the police, who had received information that the offices of British European Airways at Ruislip had been broken and entered, were waiting at a yard close to King's Cross. A lorry drove up containing three men (two of whom were the appellants) and also three safes and certain housebreaking tools.

The ground of the appeal was that in the court below the case against the appellants had been put as one of breaking and entering and larceny and not as one of receiving, and that there had been no direction as to receiving.

J. C. G. Burge for the appellants.

E. Clarke for the Crown.

LORD GODDARD, C.J., delivered the following judgment of the court. In the opinion of the court this appeal must succeed. In giving that decision the court gives it with the same reluctance that the court expressed in *R. v. Evans* (1). We cannot, in fact, distinguish this case from *R. v. Evans*, which, with all respect, we think was rightly decided.

The difficulty is that the case was put forward to the jury simply as being that these men were the people who had broken into the offices in question and had driven away with the property in possession of which they were found. Their defence was an alibi, certainly not of a very satisfactory character, and, if the jury had believed it, it is difficult to understand how they could even have found the appellants guilty of receiving. But, the case having been presented from first to last as a case in which the appellants were the actual thieves and the learned commissioner having summed up the case exceedingly well and carefully on that footing, for some reason or another the jury came back with a verdict of not guilty of breaking and entering, but guilty of receiving. No one had said anything about receiving from beginning to end. The learned commissioner had said a word in the course of his summing-up about the charge of receiving, but only for the purpose of telling the jury to disregard it.

The only question that arises is whether this court has power to substitute a verdict of guilty of breaking and entering and larceny which, if the jury had thought that the appellants were the criminals, was the verdict they ought to have found instead of the verdict which they did find. In our opinion, the court has no such power. Section 5 (2) of the Criminal Appeal Act, 1907, provides:

- A "Where an appellant has been convicted of an offence and the jury could on the indictment have found him guilty of some other offence, and on the finding of the jury it appears to the Court of Criminal Appeal that the jury must have been satisfied of facts which proved him guilty of that other offence, the court may, instead of allowing or dismissing the appeal, substitute for the verdict found by the jury a verdict of guilty of that other offence, and pass such sentence in substitution for the sentence passed at the trial as may be warranted in law for that other offence, not being a sentence of greater severity."
- B

- In our opinion, that sub-section would enable the court, for instance, in a case where a jury have returned a verdict of guilty of obtaining by false pretences and the evidence shows that it really should have been a verdict of guilty of larceny, to substitute the latter verdict for that relating to false pretences,
- C or, if a person has been found guilty of larceny as a bailee, it may be that he ought to have been convicted of fraudulent conversion. In *R. v. Evans* (1) we get an exactly parallel case to the present case. In that case there was a count for larceny and a count for receiving, and the jury acquitted of larceny, but convicted of receiving. The court said they could not substitute the alternative verdict because that would be to substitute for themselves a verdict
- D which the jury not only refused to find but which was one of acquittal. I think that must be the explanation of the decision in *R. v. Smith* (2) where the jury returned a verdict of receiving in a case in which the only possible verdict was one of stealing. The prisoner had been seen to steal the goods, and yet the jury found him guilty of receiving. We think that in that case, although LORD HEWART, C.J., referred to a verdict which the jury refused
- E to find, the jury had not found a verdict of not guilty on the larceny count in the indictment. They seem not to have found a verdict on that at all. I suppose they simply came back and said that they found the prisoner guilty of receiving. The court there did substitute a verdict of guilty of larceny.

- If we could substitute a verdict in the present case, we should undoubtedly do so because the court cannot feel any doubt as to the guilt of these men,
- F but, the jury having returned a verdict of not guilty of larceny and guilty of receiving, we are of opinion that, as the verdict relating to receiving cannot stand, we have no option to take any course but to quash the conviction, although we do so with great reluctance.

Appeal allowed.

Solicitors: *Kingsley, Napley & Co.* (for the appellants); *Solicitor, Metropolitan Police* (for the Crown).

[Reported by G. A. KIDNER, ESQ., Barrister-at-Law.]

R. v. POTTER AND ANOTHER.

[LEEDS ASSIZES (Cassels, J.), November 24, 25, 1952.]

Criminal Law—Conspiracy—Agreement to do an unlawful act—Payment by third party to debenture holder for support of scheme of arrangement.

An indictment charged the defendants with conspiracy, the particulars alleging that they conspired together and with one S. to enter into an unlawful, corrupt and secret bargain with S. whereby, in consideration of a firm of chartered accountants guaranteeing the payment to S. of £900 in discharge of his claim for £1,200 as a debenture holder against the R. Co., Ltd., S. agreed to support the scheme offered to the debenture holders of the company whereunder they were to receive 8s. in the £ on their debentures.

HELD: the indictment disclosed an offence known to the law, namely, conspiracy.

Cases referred to:

- (1) *R. v. Rowlands*, (1851), 17 Q.B. 671; 21 L.J.M.C. 81; 18 L.T.O.S. 346; 16 J.P. 243; 117 E.R. 1439; 14 Digest 115, 844.
- (2) *R. v. Warburton*, (1870), L.R. 1 C.C.R. 274; 40 L.J.M.C. 22; 23 L.T. 473; 35 J.P. 116; 14 Digest 113, 822.
- (3) *R. v. Whitaker*, [1914] 3 K.B. 1283; 84 L.J.K.B. 225; 112 L.T. 41; 79 J.P. 28; 14 Digest 117, 864.
- (4) *Re Patrick & Lyon, Ltd.*, [1933] Ch. 786; 106 L.J.Ch. 300; 149 L.T. 231; Digest Supp.
- (5) *Mogul S.S. Co. v. McGregor, Gow, & Co.*, (1889), 23 Q.B.D. 598; 58 L.J.Q.B. 465; 61 L.T. 820; 53 J.P. 709; *affd.* H.L., [1892] A.C. 25; 61 L.J.Q.B. 295; 66 L.T. 1; 56 J.P. 101; 15 Digest 763, 8195.
- (6) *Mulcahy v. R.*, (1868), L.R. 3 H.L. 306; 14 Digest 111, 810.
- (7) *Cockshott v. Bennett*, (1788), 2 Term Rep. 763; 100 E.R. 411; 5 Digest 1141, 9267.
- (8) *Jackson v. Lomas*, (1791), 4 Term. Rep. 166; 100 E.R. 953; 5 Digest 1140, 9260.
- (9) *Jackman v. Mitchell*, (1807), 13 Ves. 581; 33 E.R. 412; 5 Digest 1143, 9279.
- (10) *Knight v. Hunt*, (1829), 5 Bing. 432; 7 L.J.O.S.C.P. 165; 130 E.R. 1127; 5 Digest 1138, 9246.
- (11) *Higgins v. Pitt*, (1849), 4 Exch. 312; 18 L.J.Ex. 488; 15 L.T.O.S. 139; 154 E.R. 1231; 5 Digest 1144, 9283.
- (12) *Mare v. Sandford*, (1859), 1 Giff. 288; 1 L.T. 183; 65 E.R. 923; 5 Digest 1140, 9256.
- (13) *McKewan v. Sanderson*, (1875), L.R. 20 Eq. 65; 44 L.J.Ch. 447; 32 L.T. 385; 5 Digest 1140, 9258.
- (14) *Re Milner. Ex p. Milner*, (1885), 15 Q.B.D. 605; 54 L.J.Q.B. 425; 53 L.T. 652; 5 Digest 1120, 9119.
- (15) *Re McHenry*, [1894] 3 Ch. 365; 64 L.J.Ch. 13; 71 L.T. 502; 4 Digest 195, 1795.
- (16) *Quinn v. Leatham*, [1901] A.C. 495; 70 L.J.P.C. 76; 85 L.T. 289; 65 J.P. 708; 14 Digest 112, 814.
- (17) *R. v. Bassey*, (1931), 47 T.L.R. 222; 22 Cr. App. Rep. 160; Digest Supp.
- (18) *R. v. Porter*, [1910] 1 K.B. 369; 79 L.J.K.B. 241; 102 L.T. 255; 74 J.P. 159; 14 Digest 116, 860.
- (19) *R. v. Turner*, (1811), 13 East, 228; 104 E.R. 357; 14 Digest 113, 817.

MOTION to quash an indictment.

The defendants, Cyril Aubert Potter and Wilfred Burgon Gowers, were charged on an indictment with conspiracy, the particulars being:

“Cyril Aubert Potter and Wilfred Burgon Gowers on divers days

between Mar. 20 and 25, 1949, in the West Riding division of the county of York conspired together and with one John George Saint to enter into an unlawful, corrupt and secret bargain with the said Saint whereby, in consideration of the firm of Wilfred B. Gowers and Co., chartered accountants, guaranteeing the payment to the said Saint of £900 in discharge of his claim for £1,200 as a debenture holder against the Rockingham Plate & Cutlery Co., Ltd., the said Saint agreed to support the scheme offered to the debenture holders of the said company whereunder they were to receive 8s. in the £ on their debentures."

Veale, Q.C., and *R. W. Payne* for the Crown.

Drabble for the defendant, Potter.

G. D. Roberts, Q.C., and *Leslie* for the defendant, Gowers.

Before the arraignment of the defendants their counsel moved to quash the indictment.

Roberts, Q.C.: The indictment should be quashed because the facts alleged in the particulars do not constitute any offence known to the law. There is no allegation of fraud or dishonesty or an intent to injure anyone or that anyone has been injured or lost money, or that there was an inequitable distribution of the company's assets, or that there was a public mischief or a perversion of public justice or any breach of public morality. It is alleged that a recalcitrant debenture holder was guaranteed an additional 7s. in the £ on his debentures, not from the company's assets but from an outside source, on condition that he agreed to support a scheme whereby all the debenture holders were to agree to a composition of 8s. in the £. It is not suggested that Saint received the money at the expense of any creditor or debenture holder of the company. There has been no prosecution remotely resembling this before. The classifications of conspiracy are set out in ARCHBOLD'S CRIMINAL PLEADING, EVIDENCE AND PRACTICE, 32nd ed., at pp. 1442 et seq. The indictment does not allege either the first or second class, namely, a conspiracy to commit any offence punishable by law or to cheat and defraud. As regards the third class, although there are many dicta in old books and cases to the effect that an agreement to do an unlawful act is a criminal conspiracy (e.g. *R. v. Rowlands* (1) where the dicta of LORD CAMPBELL, C.J., are far too wide), modern text-books and writers agree that such an agreement is not a criminal conspiracy unless it is fraudulent or done with intent to injure. The debenture holders could upset the agreement if they did not know of the money paid from the outside source, but an agreement to do merely an unenforceable or void act is not indictable. ARCHBOLD (op. cit.) states it is enough if the acts agreed to be done are wrongful, i.e., amount to a civil wrong, but, as regards the cases cited in support of this proposition, *R. v. Warburton* (2) was a case of fraud and in *R. v. Whitaker* (3), LAWRENCE, J. ([1914] 3 K.B. 1299) states that it is clear that where the tort is one of fraud or corruption an agreement to commit it is a crime at common law. Neither tort nor fraud is alleged here. It is alleged that the bargain was corrupt, but it does not say who was the corruptor and who was corrupted. Corruption is largely a creation of statute: see ARCHBOLD op. cit. pp. 1417-1440; and it is not suggested that there was any agent or any principal or that any agent was corrupted not to do his duty. It may be sought to support the indictment on the basis that a fraudulent preference is alleged in which case the act in fraud of the law is to prevent the distribution of the bankrupt's property rateably among all his creditors. A fraudulent preference may not involve moral blame: (*Re Patrick & Lyon, Ltd.* (4) [1933] Ch. 790), and the use of the word "fraudulent" is misleading because fraud is not a necessary ingredient and from the point of view of accuracy the phrase "voidable preference" is to be preferred: see WILLIAMS ON BANKRUPTCY, 16th ed., at p. 361. "Unlawful" has various meanings, but an agreement

which is merely unlawful because it is void or unenforceable is not a conspiracy. The word does not mean "indictable": see *Mogul S.S. Co. v. McGregor, Gow & Co.* (5) (23 Q.B.D. 626 and [1892] A.C. 39, 46, 51 and 58). (He also referred to HARRISON'S LAW OF CONSPIRACY (1924), at p. 96 and STROUD'S JUDICIAL DICTIONARY, 3rd ed., and WHARTON'S LAW LEXICON, 14th ed., at p. 239 *sub. tit.* "Conspiracy".) The present case clearly does not fall within either ARCHBOLD'S fourth or fifth class and the indictment discloses no offence known to the law. A

Drabble: The Bankruptcy Acts do not make a fraudulent preference criminal and it is not a common law fraud. If two partners agree inter se to break a contract entered into between themselves and another party, such an agreement is void, but they are not guilty of a tort or a crime. [CASSELS, J., referred to *Mulcahy v. R.* (6)]. This agreement was not unlawful save in the sense that it was unenforceable and voidable. (He referred to ROSCOE'S CRIMINAL EVIDENCE, 16th ed., *sub. tit.* "Conspiracy", and KENNY'S OUTLINES OF CRIMINAL LAW, 16th ed., at pp. 341, 342). B

Veale, Q.C.: The indictment alleges a conspiracy to do an unlawful act. If the word "fraud" had been used it would have been contended that I had to prove dishonesty as in a charge of false pretences. There is a long line of cases which describe this sort of conduct. *Cockshott v. Bennett* (7) (2 Term Rep. 765) states that such an agreement "is bottomed in fraud, which is a species of immorality". [CASSELS, J.: In that case the debtor entered into the bargain]. *Jackson v. Lomas* (8), *Jackman v. Mitchell* (9), *Knight v. Hunt* (10), *Higgins v. Pitt* (11), *Mare v. Sandford* (12), *McKewan v. Sanderson* (13), *Re Milner. Ex p. Milner* (14) and *Re McHenry* (15) ([1894] 3 Ch. 371, 375), are authorities for describing such an agreement as "a fraud", "a cheat", "bribery", "corrupt", "vicious", and "a matter in which the public are interested". A man who enters into a composition is not to be deceived as the creditors are influenced by the supposition that all of them are to suffer equally. In *Knight v. Hunt* (10) and in *Re Milner* (14) the consideration came from an outside source. Such an agreement is unlawful in the sense of being contrary to law, and it is also wrongful and harmful and, therefore, a conspiracy as defined by LORD BRAMPTON in *Quinn v. Leathem* (16) ([1901] A.C. 528). It is also an agreement to commit a criminal offence as tending to the public mischief: cf. *Jackman v. Mitchell* (9), *Mare v. Sandford* (12), *R. v. Bassey* (17) and *R. v. Porter* (18). It is also an agreement to commit a civil wrong: *R. v. Whitaker* (3) ([1914] 3 K.B. 1299). See also RUSSELL ON CRIME, 10th ed., vol. 2, p. 1822. C
D
E
F

Roberts, Q.C., replied, and referred to *R. v. Turner* (19).

Drabble replied.

CASSELS, J.: The court is being asked, before the defendants are arraigned on this indictment, to quash the indictment on the ground that it discloses no offence according to the law. I have listened to arguments on both sides and many authorities have been cited. In my opinion, this indictment does disclose an offence which is known to the law, namely, conspiracy. I, therefore, hold that I cannot accede to the application of the defendants to quash this indictment, and, therefore, the defendants must be arraigned on this indictment. G
H

The trial proceeded, both defendants pleaded "Not Guilty", and both were acquitted.

Solicitors: *Solicitor, Board of Trade* (for the Crown); *Irwin Mitchell & Co.*, Sheffield (for the defendant Potter); *Wing, Keer & Bolsover*, Sheffield (for the defendant Gowers).

[Reported by G. M. SMAILES, Esq., Barrister-at-Law.]

DAWSON v. EUXINE SHIPPING CO., LTD.

[QUEEN'S BENCH DIVISION (McNair, J.), January 14, 15, 1953.]

Dock—Safe means of access to ship—Gangway—Docks Regulations, 1934 (S.R. & O., 1934, No. 279), reg. 9.

A The plaintiff, a lighterman, while going to the wharf from a ship, the loading of which he was superintending, slipped on the gangway of the ship and injured his shoulder. In an action by him against the owners of the ship, for breach of statutory duty under reg. 9 of the Docks Regulations, 1934, which provides: "If a ship is lying at a wharf . . . for the purpose of loading . . . there shall be safe means of access for the use of persons employed at such times as they have to pass from the ship to the shore or from the shore to the ship as follows:—(a) Where reasonably practicable the ship's accommodation ladder or a gangway or a similar construction not less than twenty-two inches wide, properly secured, and fenced throughout on each side to a clear height of two feet nine inches by means of upper and lower rails, taut ropes or chains or by other equally safe means . . . (b) In other cases a ladder of sound material and adequate length which shall be properly secured to prevent slipping."

B
C
D HELD: the defendants did not escape the charge of breach of statutory duty merely by proof that they had provided a gangway which satisfied reg. 9 (a), for the obligation imposed by reg. 9 was that there should be "safe means of access" and the words of paras. (a) and (b) were not words of limitation, but prescribed what must be done in addition to the provision of a safe means of access; in fact, the gangway provided a safe means of access within the meaning of reg. 9; and, therefore, there was no breach of statutory duty by the defendants.

FOR THE DOCKS REGULATIONS, 1934, reg. 9, see HALSBURY'S STATUTORY INSTRUMENTS, Vol. 8, p. 165.

E ACTION for damages for breach of statutory duty or breach of common law duty.

F The plaintiff, a licensed lighterman employed in the Port of London, was engaged in the loading of a ship at a wharf. It was his duty on board the ship to marshal the barges into the right position under the holds of the ship so that bags of sugar could be loaded in her, and generally to superintend the loading. On Feb. 22, 1951, during working hours, as he was leaving the ship to visit his employers' office on the wharf, he slipped on the gangway leading from the ship to the wharf and injured his right shoulder.

W. G. Wingate for the plaintiff.

Berryman, Q.C., and H. P. B. Dow for the defendants.

G McNAIR, J.: The plaintiff, who was a licensed lighterman in the Port of London and a freeman of the river, employed by Messrs. Silvertown Services, Ltd., brings this action against the defendants as owners of the s.s. Henzee, claiming that on Feb. 22, 1951, he suffered an accident when he slipped on a gangway leading from the ship's rail to the deck of Symonds Wharf, by reason whereof he tore a tendon of his right shoulder, with the result that he was unable to do any work at all from Feb. 23 until Oct. 1, 1951, and was rendered incapable

H ever thereafter of performing his work as a lighterman. The basis of his claim against the defendants is twofold. First, he relies on a breach of statutory duty, the duty being contained in reg. 9 of the Docks Regulations, 1934, made under s. 79 of the Factory and Workshop Act, 1901. Alternatively, he alleges a breach of the common law duty owed by the defendants as occupiers of the Henzee towards him as an invitee. But, whichever way the claim is put, the real issue in the case, as it seems to me and as has been agreed by counsel, is as to the state of the cross treads of the gangway which at the

material time ran from the deck of Symonds Wharf to the ship's rail at an angle of about forty-five degrees.

On Feb. 22, 1951, the plaintiff went on board the Henzee which was then loading outwards at Symonds Wharf. His duty on board was to marshal the barges which were bringing bagged sugar up to Symonds Wharf, and he was responsible for seeing that the barges were put in the right position under the holds which were being worked, attending to the ropes from time to time, and generally superintending the loading of the sugar from the barges into the ship—superintending in the sense that it was his responsibility to see whether the bags that came out from the barges were leaking and damaged before they reached the ship, in which case he would return them to the barge, and that it was his function to receive the receipts for the cargo from the ship's clerk. The actual physical operation of loading was performed by stevedores and shore cranes.

The first question which was raised was whether a lighterman so engaged was a "person employed" within the meaning of the definition in the Docks Regulations. It was submitted by counsel for the plaintiff that the plaintiff was such a person, and it is conceded (and I think clearly rightly conceded) by counsel for the defendants that the plaintiff did fall within that definition.

The accident occurred in this way. The plaintiff, who had been on the wharf at the beginning of the day's work, had gone on board by a gangway on one or two occasions during the early part of the morning, and he remained at the other side of the ship where the loading was going on until somewhere about 11.30 in the morning. He then had occasion to go ashore on his employers' business—in order to speak to the office, I think—and, when he came to the gangway, he found that it was, by reason of the fact that the tide was by that time about two and a half hours flood, down to the wharf at an angle of forty-five degrees. When he stepped on the gangway, he slipped. He held on with his right hand to a rope which ran down the right hand side of the gangway looking down and threw extra strain on the muscles and tendons of his right shoulder, and, although at the time he did not think that the injury was in any way serious (indeed, he was able to continue his work during that day), it turned out that he had damaged his shoulder severely and was off work in the way I have recounted. He went down to the bottom of the gangway, and in due course the accident was reported.

The first question is whether there has been a breach of reg. 9 of the Docks Regulations, which provides:

"If a ship is lying at a wharf . . . for the purpose of loading . . . there shall be safe means of access for the use of persons employed at such times as they have to pass from the ship to the shore or from the shore to the ship as follows:—(a) Where reasonably practicable the ship's accommodation ladder or a gangway or a similar construction not less than twenty-two inches wide, properly secured, and fenced throughout on each side to a clear height of two feet nine inches by means of upper and lower rails, taut ropes or chains or by other equally safe means . . . (b) In other cases a ladder of sound material and adequate length which shall be properly secured to prevent slipping."

The gangway in question, by reason of its dimensions, satisfied para. (a). It was twenty-four feet long and two feet, six inches, wide, and there were across the floor of the gangway cross treads, twelve inches apart, composed of battens which were said to be battens of hardwood one and a quarter inches square. Along either side of this gangway there were iron stanchions some three feet apart, and through a ring at the top of those iron stanchions there ran a rope, while through rings half way down there ran a second rope. The first question which was debated was whether, by satisfying para. (a), the defendants had wholly satisfied the obligation imposed on them by reg. 9. In my judgment, the submission made to that effect is not well founded. The obligation imposed by reg. 9 is that "there shall be safe means of access". True that it is

followed by the words "as follows", and then there are set out paras. (a) and (b), but I think, applying a reasonable construction, that those words are not words of limitation, but are words which prescribe what has to be done in addition to the provision of a safe means of access. In other words, where reasonably practicable, a ship's accommodation ladder or a gangway of the dimensions set out must be provided, and, where that is not reasonably practicable—that is, "in other cases"—a ladder of sound material and adequate length must be provided. But, whichever of those paragraphs is applicable, the means of access must, in order to satisfy the regulation, be safe within the meaning of the regulation. I think that that construction follows from the ordinary reading of the words, and it conforms with the whole scheme of these regulations and similar regulations made under the Act. Of course, when considering whether a means of access is safe, one has to have regard to the persons for whose protection the provision is made. Accordingly, in my judgment, the defendants do not escape the charge of breach of statutory duty merely by proof that they had provided a gangway which satisfied para. (a) of reg. 9.

[His LORDSHIP reviewed the evidence, found as a fact that the gangway was in a satisfactory condition, and continued:] I have come to a clear conclusion that this gangway did provide a safe means of access within the meaning of reg. 9 of the Docks Regulations. I am not saying that the treads were as new, but the gangway with the treads in the condition spoken to by Mr. Bolding (formerly chief officer of the *Henzee*) constituted a safe means of access for the persons for whom the regulations were made, namely, for persons employed in the processes of loading and unloading. That conclusion also disposes of the claim based on common law, because the obligation under the regulations, as I see it, is a higher obligation than that imposed at common law.

Judgment for the defendants.

Solicitors: *Pattinson & Brewer* (for the plaintiff); *Botterell & Roche* (for the defendants).

[*Reported by G. A. KIDNER, Esq., Barrister-at-Law.*]

Re BASIOLI (deceased). Re DEPAOLI (deceased). McGAHEY v. DEPAOLI AND OTHERS.

[CHANCERY DIVISION (Upjohn, J.), January 14, 15, 1953.]

F *Will—Lapse—Statutory exception from lapse—Death of beneficiary intestate—Distribution of interests saved from lapse—Time of ascertainment of persons entitled to interests on beneficiary's intestacy—Wills Act, 1837 (c. 26), s. 33.*

G By her will, dated May 17, 1923, the testatrix gave a share of certain freehold properties and a share of her residuary estate to her daughter, A.D. In 1929 the daughter died, intestate, leaving her surviving her husband and a son. In 1939 the husband died, in 1940 the testatrix died, and in 1949 the daughter's son died before attaining the age of twenty-one. The interests given to the daughter by the will of the testatrix having been saved from lapse by the Wills Act, 1837, s. 33, the question arose whether the persons entitled to these interests on the daughter's intestacy were to be ascertained as at the date of her death in 1929 or on the footing that she survived the testatrix and died immediately after her.

H HELD: the sole object of the Wills Act, 1837, s. 33, was to give effect to the gift in a parent's will and prevent lapse and the section was not intended to alter the devolution of the beneficiary's estate by imputing to the beneficiary a fictitious date for his or her death, and, therefore, the persons entitled on the daughter's intestacy to the interests given to her by the will of the testatrix were to be ascertained as at the time of the daughter's death in 1929.

Re Hurd, Re Curry ([1941] 1 All E.R. 238), applied.

In the Goods of Councell, (1871), (L.R. 2 P. & D. 314) and *Re Allen's Trusts* ([1909] W.N. 181), not followed.

AS TO STATUTORY EXCEPTIONS FROM LAPSE, see HALSBURY, Hailsham Edn., Vol. 34, pp. 138-140, paras. 178-181; and FOR CASES, see DIGEST, Vol. 44, pp. 502-506, Nos. 3218-3248.

Cases referred to:

- (1) *Pearce v. Graham*, (1863), 32 L.J.Ch. 359; 8 L.T. 378; 40 Digest 511, 566.
- (2) *Re Hone's Trusts*, (1883), 22 Ch.D. 663; 52 L.J.Ch. 295; 48 L.T. 266; 44 Digest 505, 3242.
- (3) *Re Hensler*, (1881), 19 Ch.D. 612; 51 L.J.Ch. 303; 45 L.T. 672; 44 Digest 505, 3240.
- (4) *Re Hurd, Re Curry*, [1941] 1 All E.R. 238; [1941] Ch. 196; 110 L.J.Ch. 67; 164 L.T. 296; 2nd Digest Supp.
- (5) *Re Scott*, [1901] 1 K.B. 228; 70 L.J.Q.B. 66; 83 L.T. 613; 65 J.P. 84; 44 Digest 503, 3224.
- (6) *Pickersgill v. Rodger*, (1876), 5 Ch.D. 163; 20 Digest 411, 1457.
- (7) *In the Goods of Councell*, (1871), L.R. 2 P. & D. 314; 41 L.J.P. & M. 16; 25 L.T. 763; 36 J.P. 89; 44 Digest 503, 3219.
- (8) *Re Allen's Trusts*, [1909] W.N. 181; 44 Digest 503, 3220.

ADJOURNED SUMMONS to determine whether, on the true construction of the will of the testatrix, Maria Dominica Depaoli, and of the Wills Act, 1837, s. 33, the bequests and devises given by the will to her daughter, Adelina Emilia Basioli, who died in the lifetime of the testatrix leaving a son who survived the testatrix, but died before attaining the age of twenty-one years, devolved on the daughter's intestacy in the same way as her original estate, viz., on the persons entitled under the Administration of Estates Act, 1925, ascertained at her actual death, or whether the persons entitled to such bequests and devises on the daughter's intestacy were to be ascertained on the footing that she survived the testatrix and died immediately after her.

Wilfrid Hunt for the plaintiff, the administrator of the estates of the daughter and of her husband, Stephen Basioli.

T. A. C. Burgess for the defendants, a son and two daughters of the testatrix.

UPJOHN, J.: This summons raises an interesting point of construction on s. 33 of the Wills Acts, 1837, which, in certain events, prevents the lapse of a devise or bequest to a child or other issue of a testator who dies in the lifetime of the testator.

By her will, dated May 17, 1923, Maria Dominica Depaoli, whom I will call "the testatrix", made a number of devises and bequests to her four children, three of whom survived her and are the defendants to this summons. The fourth, Adelina Emilia Depaoli, who married a Mr. Basioli and whom I will refer to as Mrs. Basioli, predeceased the testatrix. By her will, the testatrix devised and bequeathed to Mrs. Basioli a one-third share of a house and furniture in Exeter, a quarter share of another house, which was near Exeter, and a quarter share of the residue. The aggregate value of these various shares is about £4,800. The testatrix died on Feb. 11, 1940, domiciled in England. Her will was proved in 1941 in the Probate Registry, and the first two defendants are her surviving executors. The testatrix's husband, the father of her children, predeceased her, having died on Nov. 26, 1937. Mrs. Basioli died on July 24, 1929, intestate, and was survived by her husband, Mr. Basioli, who died on Nov. 2, 1939, also intestate. The plaintiff is the administrator of Mr. Basioli and of Mrs. Basioli. Mrs. Basioli was survived by a son of her marriage who also survived the testatrix, but died on Sept. 12, 1949, shortly before attaining the age of twenty-one years. In these circumstances, although Mrs. Basioli predeceased the testatrix, s. 33 of the Wills

Act, 1837, operates to preserve the various shares devised and bequeathed to her by the will of the testatrix.

A The sole question which I have to determine is whether the persons entitled to these shares on Mrs. Basioli's intestacy are to be ascertained as at the date of her death in 1929 or whether they should be ascertained as though she had survived the testatrix and died immediately after her, in 1940. As Mrs. Basioli's son failed to attain the age of twenty-one years, if the former be the true view, the estate of her husband, Mr. Basioli, and the estates of her parents (the testatrix and her husband) are entitled to these interests on Mrs. Basioli's intestacy. The plaintiff, as the personal representative of Mr. Basioli, will take the lion's share, representing the surviving spouse's £1,000 and interest thereon (so far as he did not receive such sum out of Mrs. Basioli's original estate, which was very small), and the estates of Mrs. Basioli's parents will take the balance in equal shares. B If Mrs. Basioli is treated as having died in 1940, the defendants, her brother and her two sisters, are entitled on her intestacy. Section 33 of the Wills Act, 1837, is in these terms:

C " . . . Where any person being a child or other issue of the testator to whom any real or personal estate shall be devised or bequeathed for any estate or interest not determinable at or before the death of such person shall die in the lifetime of the testator leaving issue, and any such issue of such person shall be living at the time of the death of the testator, such devise or bequest shall not lapse, but shall take effect as if the death of such person had happened immediately after the death of the testator, unless a contrary intention shall appear by the will."

D Two views on the construction of that section have been expressed. One view, which has been called the narrow view, is that the sole object of the section is to give effect to the gift in the testator's will and to prevent lapse, and that the section was not intended to affect or alter the administration of the estate of the person receiving the gift by imputing to that person an artificial date of his or her death. The alternative view on the construction of the section has been referred E to as the wide view, and it is that the child who has predeceased the testator must be treated, for all purposes in relation to the testator's gift, as surviving the testator.

Authorities are to be found in support of both of those views, and I must, therefore, review them. In support of the narrow view, the earliest authority is *Pearce v. Graham* (1), a decision of SIR RICHARD KINDERSLEY, V.-C., in 1863. F In that case a testator, by his will, dated after the Wills Act, 1837, gave a legacy to his daughter, a married woman, who predeceased him, leaving issue and her husband her surviving. The settlement made on her marriage contained a covenant that all property coming to her or to her husband in her right during the coverture should be settled. It was held that, notwithstanding the fictitious survivorship created by s. 33 of the Wills Act, 1837, for the purpose of preventing G a lapse, the legacy was not acquired during the coverture within the meaning of the covenant, and was, therefore, not bound by the settlement. SIR RICHARD KINDERSLEY, V.-C., said (32 L.J.Ch. 360):

H " The property left to Mrs. Pearce according to the words of the covenant, must ' come to or be vested in ' her during the coverture; and therefore it is clear that if it did not ' come to or become vested in ' her during the coverture, it is not subject to the trusts of the settlement. It must be admitted, at the outset, that the legacy would be subject to the debts or contracts of the legatee, and be assets for that purpose; but for the purposes of the covenant, my opinion is that it did not come to or become vested in her whilst the coverture lasted. The effect of s. 33 of the Wills Act was simply to prolong her life by a fiction for a particular purpose, namely, that the legacy might not lapse, but certainly not for any other purpose; whereas the covenant applies to the actual coverture; and even therefore if the act .

had prolonged the coverture, it would have been a fictitious one only, and not an actual one within the terms of the covenant. The plaintiff is therefore entitled to a decree."

Those remarks on the effect of s. 33 are, I think, obiter, and were so treated by PEARSON, J., in *Re Hone's Trusts* (2), but SIR RICHARD KINDERSLEY, V.-C., expressed a clear opinion on the ambit of the section which is in favour of the narrow view.

The next authority which, in my judgment, on a careful examination supports the narrow view, is *Re Hensler* (3). In that case, a father, by his will, devised a freehold house to a son and his residuary real estate to trustees in trust for other persons. The son died in his father's lifetime, leaving issue who were living at his father's death, and having by his will devised all his real estate to his father. It was held that, as, under the Wills Act, 1837, s. 33, the son must be deemed to have survived the father, the property passed to the son absolutely under his father's will, and became subject to testamentary disposition by the son, but that, as by the will of the son the property was devised to his father, the devise by the son failed, and his heir-at-law was entitled to the property. SIR CHARLES HALL, V.-C., said (19 Ch.D. 614):

"By virtue of s. 33 of the Wills Act, the property passed under the devise in the father's will as if the devisee had died immediately after the death of his father. The effect of that is that I must consider the son to have survived his father and to have taken as devisee. I must also consider that the property became subject to the son's will, and included in the general gift therein contained. The son must be deemed to have had the property; and then the question arises whether he must by a legal fiction be taken to have survived his father for all purposes, or to have survived him only for the purpose of giving effect to the gift of the father. It seems to me that the object and the purpose of s. 33 was to effectuate the will of the father, and that that object and purpose are satisfied by holding that the son took the estate. Effect would have been given to the will of the son in case he had left his property to some one other than his father and who in fact survived him, yet as he left it to his father the gift by the son fails, for I cannot hold that the section ought to be extended to any case beyond the one expressly provided for. It must therefore be declared that John Hensler the son took the property but died intestate as to it, and that the petitioner is entitled as his heir-at-law."

I confess that I have some difficulty in following the grounds of the actual decision in that case, and I am not alone in that difficulty: see an article by Mr. R. E. Megarry in the *LAW JOURNAL*, vol. 91, p. 252. The author of that article, however, treats *Re Hensler* (3) as supporting, on the whole, the wide view. In that, in my opinion, he was wrong. I think it is clear from the judgment that the Vice-Chancellor would have held that a gift by the son in appropriate terms to a person other than the testator would have carried the testator's gift, even though that other person, though surviving the son, predeceased the testator, and that is consistent only with the narrow view of s. 33. Possibly, the actual decision in *Re Hensler* (3) may be supported on the ground that if, for the purpose of supporting the gift, the son was treated as surviving the testator, it was impossible to treat the father, at the same time, as surviving the son for the purpose of benefiting under his will, and, therefore, the father had to be treated as being under a special disability, unlike any other object of the son's bounty.

The last case which directly supports the narrow view is *Re Hurd, Re Curry* (4). It is plain from the arguments of counsel, as reported in the *LAW REPORTS* ([1941] Ch. 197), that no authority was cited to FARWELL, J., and he dealt with it as a matter of first principle. He said:

"The section [s. 33 of the Act of 1837] provides that the gift is not to lapse, but is to take effect as if the death of such person had happened

immediately after the death of the testator. If one treats those words quite literally, one must assume that [the daughter of the testatrix] . . . died immediately after the death of the testatrix in 1939, and the effect must be that the estate must be administered according to the law in force at that date—namely, at the date when she is deemed to have died. In my judgment, however, that is not . . . the true effect of this section. The effect of the section is to prevent lapsing in this particular case, the result being that, instead of the gift lapsing, it becomes part of the estate of the deceased person, and it is provided that the gift is to go on the footing that the [daughter] was alive at the death of the testatrix and was, therefore, a person to whom the gift could be given. However, although she is deemed, for the purpose of making this gift effective, to have been living in 1939, none the less the gift itself does become a part of the estate of the beneficiary—and, that estate being administered in accordance with the law as it was at the true date of the death, that is the law under which the share which she takes by virtue of this provision must also be administered. It is not difficult to appreciate what position might arise if that were not the true effect of the section. For instance, if a person dies intestate in the lifetime of the testator and it becomes necessary to inquire who is the next of kin at the date of the death, and an inquiry is ordered, and the whole matter is gone into and the master's certificate finding who were the next of kin of the deceased person is made. If subsequently that estate becomes increased by a gift which is in favour of a person deemed to have died after 1925, then, if I am to read s. 33 as meaning that the estate is to be administered in accordance with the law as it was after 1925, a further inquiry will be necessary as to the next of kin of that person, on the footing that she died at a time when, in fact, she had been long dead. The result might be that . . . one might have different persons . . . entitled to participate in any share to which the estate became entitled and which is saved from lapsing by virtue of s. 33. On the whole, I have come to the conclusion that this section does not apply beyond providing for the prevention of the lapse. That is to say, it is not intended to do anything more than prevent the gift having no effect at all, with the result that the gift which would otherwise have lapsed passes to the person who is the legal personal representative of the deceased, who takes it as part of the estate of the deceased person . . . The Act does not, in my judgment, apply so as to alter the way in which the existing estate should be disposed of. It only operates so as to increase that estate, and does not change the persons who were entitled to the estate under the law which was in force at the time of the intestate's death."

In my judgment, support for the narrow view is also to be found in certain cases which, although not dealing directly with the point before me, illustrate the general scope and ambit of the section. In *Re Scott* (5) STIRLING, L.J., said ([1901] 1 K.B. 239):

"In s. 33 the effect is to be 'as if the death of' the devisee or legatee 'had happened immediately after the death of the testator'. To ascertain the meaning of this, let me suppose that the testator by his will has (as in the present case) devised real estate in fee to a child who predeceases him. If the child had survived the testator, the will would have passed the real estate to that child in fee; and the legislature prescribes that, notwithstanding the death of the child, the legal effect of the will shall be the same—that is to say, that the will shall pass the real estate to the child in fee. Such seems to me the natural meaning of the language of the Act; nor can I see any difficulty in understanding it. The legislature has simply provided that in certain cases there shall be a posthumous addition to the property of a deceased person, the object of such provision being to place that

additional property at the disposal of the deceased while still living. At this point, in my judgment, the operation of the Wills Act ceases; and this additional property is left to go and devolve as part of the property of the deceased child. If the child, while living, entered for valuable consideration into any contract with reference to such property (as, for example, by way of sale or mortgage, or by way of covenant in a marriage settlement), by such contract the property will be bound. If the child made a will by which such property is, by appropriate language, disposed of, either specifically or otherwise, the property will pass under such disposition. If the child died intestate, the property will go to the persons entitled by law as upon an intestacy. If the child died an undischarged bankrupt, it will vest in the trustee in bankruptcy, and so on."

Later in his judgment STIRLING, L.J., said (*ibid.*, 241):

"In *Pickersgill v. Rodger* (6) SIR GEORGE JESSEL, M.R., speaking of s. 33 of the Wills Act, says (5 Ch.D. 172): 'The result, therefore, is this, that the child dying in the testatrix's lifetime has his estate augmented by the devise or bequest made to him by the testatrix; in other words, the subject of the devise or bequest falls into the estate of the child, and of course can be disposed of by the will of that child, if that will contains apt words to dispose of it'."

Those passages in the judgments of STIRLING, L.J., and SIR GEORGE JESSEL, M.R., appear to me inconsistent with the wide view. To take an example, if A., who predeceases his father, gives all his residue to X., who survives A., but predeceases A.'s father, X. will receive the residue of A.'s estate on A.'s death. But, when the father dies leaving a legacy to A which is saved from lapse by the Wills Act, 1837, s. 33, and, under the provisions of A.'s will, falls into his residue, then, if the wide view of the effect of s. 33 be correct, X. will not take the legacy and it will be undisposed of. Again, if the wide view be right, then, as FARWELL, J., pointed out in *Re Hurd* (4), there may be two sets of next of kin in the event of the child dying intestate, or there may be two classes of beneficiary under the child's will; e.g., if the child leaves a residue to a class, there may be one class at the date of his real death and quite a different class at the date of his notional or fictitious death. If that view be right, it seems to me quite inconsistent with the words of STIRLING, L.J. ([1901] 1 K.B. 239), in *Re Scott* (5), that

"... additional property is left to go and devolve as part of the property of the deceased child"

or with the words of SIR GEORGE JESSEL, M.R. (5 Ch.D. 172), in *Pickersgill v. Rodger* (6), that

"... the subject of the devise or bequest falls into the estate of the child, and of course can be disposed of by the will of that child, if that will contains apt words to dispose of it."

I must now turn to the authorities which are in support of the wide view. The first is *In the Goods of Councell* (7). In that case, the deceased, a legatee under the will of her father, died in his lifetime, leaving issue living at his death. She also left a husband surviving her, who, however, died before the father, having made a will, in which he appointed executors who took probate of the same. The court granted administration to the son of the deceased limited to the personal estate bequeathed to her by the will of her father, and dispensed with the renunciation or citation of the surviving executor of the will of the husband of the deceased. On an unopposed motion for administration to be granted to the son, counsel on his behalf said:

"[Section 33 of the Wills Act, 1837] enacts, that where a legatee being a child of the testator shall die in his lifetime, leaving issue, the bequest shall

take effect as if the death of such legatee had happened immediately after the death of the testator. If that had been so in this case, Mrs. Councill [the deceased] would have died a widow, and her son would have been entitled to administration."

From the report it does not appear that there was any formal or reasoned judgment by LORD PENZANCE. After setting out the form of the letters of administration which LORD PENZANCE granted to the son of the deceased, the report states (L.R. 2 P. & D. 315):

"He [LORD PENZANCE] further dispensed with the renunciation or citation of the surviving executor of the will of the [husband of the deceased]."

As the husband's executor was the only person entitled or interested to urge that the narrow view was the true construction of s. 33 of the Act of 1837, it seems curious that LORD PENZANCE should have dispensed with the citation of him. It is clear that the matter was never argued before LORD PENZANCE, and it is also noteworthy that, although *Pearce v. Graham* (1) had been decided eight years earlier, that case was not cited to the learned judge.

In the *Goods of Councill* (7) was followed in *Re Allen's Trusts* (8). In that case the real issue was between the children of Harriet Iffinger, the testator's deceased child, who died intestate, and the estate of her husband who survived her, but predeceased the testator. If the narrow view be right, the husband's estate would have been entitled to the property, i.e., the fund representing the legacy given to the deceased by the will of the testator. Counsel for the children of the deceased cited *In the Goods of Councill* (7), and counsel for the surviving trustee of the testator's will and the residuary legatee under the will cited *Re Hensler* (3), but his clients were not interested in the property so the children's application was really unopposed. The husband's executor was not represented, and, therefore, as in *In the Goods of Councill* (7), the point was not argued before the learned judge. The judgment of NEVILLE, J., is reported in these words ([1909] W.N. 181):

"NEVILLE, J., held that the decision in *In the Goods of Councill* (7), covered the point. Having regard to the language of s. 33 of the Wills Act, 1837, Harriet Iffinger must be deemed to have died immediately after the death of the testator for the purposes of the bequest, and her next of kin must be ascertained at that date. Her two children were her next of kin at that date, and were the proper persons to take out representation to her estate."

As I understand it, the learned judge merely followed the decision in *In the Goods of Councill* (7), the contrary view never having been urged before him.

In *Re Hone's Trusts* (2), *Pearce v. Graham* (1) was cited and discussed during the argument, and PEARSON, J., did not disapprove of it, but I do not think that *Re Hone* (2) assists me on the point which I have to consider. I respectfully agree with the views expressed by FARWELL, J., in *Re Hurd* (4). In my judgment, s. 33 of the Act of 1837 is aimed solely at preserving the gift in the parent's will and is not in any way concerned to alter the administration of the estate of the child who has predeceased the testator. The words in the section

"... but shall take effect as if the death of such person had happened immediately after the death of the testator..."

are, in my judgment, put into the section solely to explain and amplify the immediately preceding phrase, "such devise or bequest shall not lapse", and are quite inappropriate to alter the devolution of the estate of a child who has predeceased the testator by imputing to him a fictitious date for his death. For the reasons I have given, *In the Goods of Councill* (7) and *Re Allen* (8) cannot be regarded as satisfactory decisions, and, therefore, in my judgment, they do not preclude me from following the decision of FARWELL, J., in *Re Hurd* (4).

I am fortified in the conclusion which I have reached that *Re Hurd* (4) is to be preferred to *In the Goods of Councell* (7) and *Re Allen* (8) by the views expressed in JARMAN ON WILLS, 8th ed., vol. 1, p. 468, and THEOBALD ON WILLS, 10th ed., p. 560. Therefore, in my opinion, the persons interested, on the intestacy of Mrs. Basioli, in the shares devised and bequeathed to her by the will of the testatrix are to be ascertained as at the date of Mrs. Basioli's death in 1929.

Declaration accordingly.

Solicitors: *Arnold Carter & Co.*, agents for *Dunn & Baker*, Exeter (for all parties).

[Reported by R. D. H. OSBORNE, ESQ., *Barrister-at-Law.*]

Re ALLEN (deceased). FAITH v. ALLEN AND OTHERS.

[CHANCERY DIVISION (Vaisey, J.), January 12, 13, 1953.]

Will—Condition—Certainty—Devise to person “who shall be a member of the Church of England and an adherent to the doctrine of that church”.

By his will, dated Nov. 4, 1906, a testator, who died on Nov. 25, 1908, devised real property to the eldest of the sons of F. “who shall be a member of the Church of England and an adherent to the doctrine of that church”, and, in case there should be no son of the said F. “who shall be a member of the Church of England or an adherent to the doctrines of that church”, then the testator devised the property to W.

HELD: the terms “member of the Church of England” and “adherent to the doctrine of that church” were incapable of exact definition, and, therefore, the condition was void for uncertainty.

Re Tegg ([1936] 2 All E.R. 878), *Re Lockie* ([1945] N.Z.L.R. 230), and *Re Biggs* ([1945] N.Z.L.R. 303), applied.

AS TO UNCERTAINTY IN A WILL, see HALSBURY, Hailsham Edn., Vol. 34, pp. 109, 219-222, paras. 143, 274-277; and FOR CASES, see DIGEST, Vol. 44, pp. 440-444, 609-611, 612, 613, Nos. 2667-2687, 4366-4385, 4393-4400.

Cases referred to:

(1) *Re Perry Almshouses*, [1898] 1 Ch. 391; 67 L.J.Ch. 206; 78 L.T. 103; 63 J.P. 52; *on appeal, sub nom. Re Perry Almshouses, Re Ross' Charity*, [1899] 1 Ch. 21; 68 L.J.Ch. 66; 79 L.T. 366; 63 J.P. 52; 8 Digest 371, 1781.

(2) *Clayton v. Ramsden*, [1943] 1 All E.R. 16; [1943] A.C. 320; 112 L.J.Ch. 22; 168 L.T. 113; 2nd Digest Supp.

(3) *Re Tegg*, [1936] 2 All E.R. 878; Digest Supp.

(4) *Re Lockie*, [1945] N.Z.L.R. 230.

(5) *Public Trustee v. Gower*, [1924] N.Z.L.R. 1233, 44 Digest 462, k.

(6) *Re Biggs*, [1945] N.Z.L.R. 303.

ADJOURNED SUMMONS to determine, inter alia, whether the devise by Henry George Allen of his dwelling-house “Paskeston” and of other hereditaments referred to in the third codicil to his will to the eldest of the sons of Francis Seymour Allen (excepting his son Hugh) who should be a member of the Church of England and an adherent to the doctrine of that church was valid, or void for uncertainty, or otherwise.

By his will, dated Nov. 4, 1906, the testator gave and devised his dwelling-house called Paskeston to his sister, Isabella Georgina Lort Phillips, during her life if she should prefer to live there, and, subject to her said option (which was never exercised), to his nephew, Frederick Seymour Allen, and his heirs, and, subject as aforesaid, he gave and devised all his lands and real estate to the said Frederick Seymour Allen. The testator made seven codicils to his will of which the third, dated Nov. 10, 1907, is relevant. By this codicil he declared that, if the said Frederick Seymour Allen should die leaving a son

him surviving, he confirmed the gift contained in his said will to the said Frederick Seymour Allen and his heirs of Paskeston, but, if the said Frederick Seymour Allen should die leaving no son him surviving, then the testator gave and devised the property to his (Frederick's) wife, Betty or Elizabeth (the defendant Elizabeth Constance Allen), during her life or until any marriage by her to any second husband, and on her death or second marriage the testator gave and devised Paskeston to Francis Seymour Allen during his life and from
 A after his death to the eldest of the sons of the said Francis Seymour Allen (excepting his son Hugh)

"who shall be a member of the Church of England and an adherent to the doctrine of that church"

(subject to certain provisions not material to be here mentioned), and, in case
 B there should be no son of the said Francis Seymour Allen (other than the said Hugh) "who shall be a member of the Church of England or an adherent to the doctrines of that church", then, on the death of the said Francis Seymour Allen, the testator devised Paskeston to Wilfred Allen. The testator gave and devised all other his land and real estate to the same devisees to whom he had by the said codicil given and devised Paskeston subject to the said conditions
 C so far as applicable. The testator died on Nov. 25, 1908, and his will with seven codicils was proved on Jan. 5, 1909. On Aug. 31, 1941, Frederick Seymour Allen died, never having had a son. On June 18, 1932, Francis Seymour Allen died having had issue four sons: (i) Reginald Seymour Allen, who died on May 14, 1935; (ii) Hugh Evelyn Allen; (iii) Guy Francis Seymour Allen, who died on Apr. 15, 1923; and (iv) Evelyn Prestwood Seymour Allen, who was
 D still living. Reginald Seymour Allen was a Roman Catholic at the date of the testator's death, but there were grounds for believing that he might later have become a member of the Church of England. Guy Francis Seymour Allen was a Roman Catholic at all material times. It appeared likely that Evelyn Prestwood Seymour Allen was a Roman Catholic at the date of the testator's death. The defendant Elizabeth Constance Allen had not re-married, and she
 E died on Sept. 8, 1952, since the date of the issue of the summons.

R. O. Wilberforce for the plaintiff, one of the trustees of the will.

Elles for the second, sixth and seventh defendants, one of the trustees of an indenture dated Apr. 24, 1909, who were for the time being entitled to the legal estate in the relevant hereditaments, and the legal personal representatives of Wilfred Allen.

F *Hunter-Brown* for the third defendant, the legal personal representative of Reginald Seymour Allen.

D. A. Ziegler for the fourth defendant, the legal personal representative of Guy Francis Seymour Allen.

H. A. Rose for the fifth defendant, Evelyn Prestwood Seymour Allen.

G *Richmount* for the eighth defendant, the surviving legal personal representative of the testator's heir-at-law.

The first defendant, Elizabeth Constance Allen, had not appeared before her death.

VAISEY, J. (having stated the facts): The question arises whether the description, qualification or condition—whatever one calls it—that someone
 H is to be a member of the Church of England and an adherent to its doctrine, is a description, qualification or condition which is sufficiently certain to be operative in law? There is a good deal of authority which seems to border on this point, although I am bound to say that I do not think that any of it is really satisfactory. Looking at it, first, in the absence of authority, it is, I think, notorious that what is meant by being a member of the Church of England is by no means settled or ascertained. For some purposes every parishioner who does not definitely dissent from the teaching and discipline

of the church is a member of the Church of England. Membership of the Church of England in some contexts is attributed to anybody who does not actively dissociate himself from the church of the land, which can be described, if one so chooses to describe it, as part of the Catholic Church of God or an association which derives in some way its concomitant powers or duties from the legislation at the time of the Reformation. In some respects nonconforming christians are (and, indeed, they are very apt so to describe themselves) members of the Church of England who do not conform, and that is why a person who has been baptised, but attends a Wesleyan chapel, a Congregational place of worship, or other dissenting place of worship, will always say: I am a member of the Church of England, although I do not conform to it. A

I think that the question whether a person is or is not a member of the Church of England may be answered in many different ways, according to the subject-matter under discussion. Every baptised christian is entitled to be buried in the local parish churchyard, and, subject to certain safeguards, which, again, are rather controversial, to come and be married in the parish church. Indeed, until very recent times it was the only place in which one could get married—the modern legislation under which marriage in the registry office is permitted is, of course, comparatively recent—and every person was treated as a member of the Church of England who was entitled to be married in the building which was the church of the parish in which he or she resided. That is one view of what “a member of the Church of England” means. Another, and much narrower, meaning is that a member of the Church of England is a person who, having been baptised and confirmed, regularly attends the parish church, conforms, so far as he can, to the discipline which is laid down by the formularies and has his name on the electoral roll of the parish, and would describe himself as a member of the Church of England, or, at any rate, would say negatively: “I am not a dissenter or a nonconformist. I am a churchman”. Between those two views, however, there is a fairly wide gulf, and, indeed, apart from the church people, on the one hand, and the nonconforming christians, on the other, there is a vast number of people who, when asked to put down what their religion is, would probably say “Church of England” as giving the least trouble. C D E

I am not at all sure that the words “a member of the Church of England”, are capable of any definite, certain significance, but then, added to those words, in this will are these curious words, “and an adherent to the doctrine of that church”. Be it observed that it is not “doctrines”, but “doctrine”. How does one adhere to the doctrine of a church? Of course, “adherence” is used metaphorically, but the metaphorical use of the word is well established and one may adhere to a political doctrine or one may adhere to a religious doctrine by a vast number of methods and to many varying degrees. If a man is asked, for instance, if he is a conservative or a socialist and is further asked: Do you adhere to the doctrine of conservatism? or: Do you adhere to the doctrine of Socialism?, he would probably be rather puzzled, but he would be prepared to say generally: If I am a conservative, I have to adhere to the doctrine which is laid down by the party leaders. If I am a socialist, I have to adhere to the doctrine of the party. All that is very vague, and almost equally vague is the consideration of adherence to the doctrine of a church. Just as in the Jewish communities there are various forms of Judaism—there is strictly orthodox Judaism, there is liberal Judaism, and there are other forms of intermediate belief and practice—in the same way there are, within the comprehensive walls of the Church of England, varying ideas of teaching (which, of course, is the same thing as doctrine) and there is a large number of members of the Church of England (in whatever sense you use those words) who adhere to the doctrine in some respects whole-heartedly, in some respects half-heartedly, and in other respects will say that they do not much care about it for it does not seem to them to have any bearing on practical life. F G H

But how far adherence must be reduced before it ceases to be adherence is, to my mind, a problem which is entirely beyond the wit of man and certainly past any function which this court can exercise. If one asks a man if he adheres to the doctrine of the Church of England, he would certainly want a little more explanation, I should have thought, before he allowed himself to be pinned down. "What do you mean?" would be his proper retort. "Do you mean that I have to take the words of the three creeds of the church and believe them without any sort of qualification?" One may say to him: "There are diverse views about this, and, no doubt, you will have some liberty of choice." To say that you adhere to the doctrine is obviously a statement of so wide and unqualified a character that no one would like to commit himself, any more than anyone would like to answer the question: "Are you a man of good life? Are you a man of good faith?" Who, with his knowledge of his own shortcomings, would answer that question without hesitation? I should have thought that in this case adherence to the doctrine of a church is something so uncertain as to its quality, so uncertain as to the degree of adherence, that it is impossible to say that it was sufficiently certain to make it plain, as I think it has to be made plain, that a person is not only a member of the Church of England, having first decided what one means by that, but is also an adherent to the doctrine of that Church. How is one to say that one adheres to the doctrine of the Church of England? What is the doctrine of the church? It is a body of beliefs of a very wide character, covering the whole of human experience and divine revelation, but not capable of being reduced to the certainty of a code.

I have been referred to *Re Perry Almshouses* (1). The headnote relating to the decision in the court of first instance is ([1898] 1 Ch. 391):

"The founder of an eleemosynary charity prescribed by the instrument of foundation that the objects should be selected from among persons who should have (1) regularly attended divine service at the parish church for a fixed period, (2) been partakers of the Holy Communion, (3) lived a godly, righteous and sober life to the glory of God's Holy Name, and that the trustees should be members of the Church of England:—*Held*, that this was a charity the endowment whereof was held for the benefit of members of the Church of England as such . . ."

I think that the difference between the kind of test which would have to be applied in admitting people to almshouses and the test applicable to decide whether a person qualifies for a benefit under a will is exemplified in this case.

Of course, the trustees of these almshouses would be compelled, if they were to do their duty, to decide whether the applicants for admission to the almshouses were people who had lived a godly, righteous and sober life to the glory of God's Holy Name. If they asked these people whether they had done that, I should have thought that a hardly more embarrassing question could be put to a human being; but the trustees would form their conclusion on the question whether these people qualified for admission. STIRLING, J., says in *Re Perry Almshouses* (1) (*ibid.*, 400):

"Whatever difficulty there may be in giving a strict legal definition of what constitutes membership of the Church of England, I think that a person who has been baptized, has been confirmed, or is ready and desirous to be confirmed, and is an actual communicant, does hold the status of a member of that church, and would be ordinarily regarded and spoken of as such."

The case went to the Court of Appeal and the court, consisting of SIR NATHANIEL LINDLEY, M.R., CHITTY and VAUGHAN WILLIAMS, L.JJ., upheld the judgment of the court below. I do not find in those judgments anything particularly helpful.

There is also not very much to help me in *Clayton v. Ramsden* (2), for one reason because that was a case of condition subsequent, where I think that the

position is different. In *Re Tegg* (3) the words were: "I desire that my daughter and any children she may bear should at all times conform to and be members of the Established Church of England." FARWELL, J., held that that condition was void for uncertainty, since it was open to grave doubt whether any particular act of omission in the future would bring about a forfeiture. That, again, was a case of a condition subsequent, but I think that the reasoning of that case is equally applicable to the present case, which is one of a condition precedent or a qualification. FARWELL, J., said ([1936] 2 All E.R. 881):

A

"In the present case the first condition which is imposed on this lady is that she herself and her children are at all times to conform to and be members of the Established Church of England. It may be—I am not deciding this—that if the testator had been content to say 'should be members of the Established Church of England,' that might be a matter of some certainty, but that is not enough, because the lady and her children must 'at all times conform to'. Now speaking for myself, I do not in the least know what that means. It seems to me it would be quite impossible to say, here and now, whether any particular act or omission would be enough to render this condition operative. Whether a person, merely because he has been baptised and confirmed in the Church of England, but thereafter has ceased to pay any attention to any religious services at all, can be said to conform to the Established Church of England, I have not the least idea."

B

C

Strangely enough there are in one volume of the NEW ZEALAND LAW REPORTS two cases which seem to me to be helpful, and, if I may say so, to be right. The first is *Re Lockie* (4). The headnote is:

D

"When a testator, who intends to declare that a gift shall be divested unless the legatee adheres to a prescribed form of religious faith, makes one statement of the events upon which the forfeiture shall take place and the gift over shall operate, and then, later in his will, purports to re-state that condition of forfeiture, but does so in inconsistent language, and the reconciliation is not clearly apparent, the court should hold that the event or events upon which the gift is to be forfeited have not been expressed with the precision which is required by the law, and, consequently, that the condition or conditions of forfeiture are void for uncertainty."

E

The conditions in question were that a particular person should be educated and brought up in the Protestant faith and should at all times remain a Protestant. Then further on the testator refers to adherence to the Protestant religion. The case was argued at considerable length. It was held that those conditions were invalid on the ground that they were not sufficiently certain. The learned judge, SMITH, J., doubted whether the phrase "Protestant faith" was of any certainty, and said ([1945] N.Z.L.R. 245):

F

"The next condition requires that [the person] shall adhere to the Protestant faith at the time of attaining twenty-five years of age. For the reasons already given concerning the term 'Protestant faith', this condition is also void on the ground of uncertainty, but there are other reasons for the same conclusion. What does the word 'adhere' precisely signify? In my view, there must be grave doubt as to what particular course of conduct will constitute adherence."

G

He referred to an earlier case in New Zealand—*Public Trustee v. Gower* (5)—in which the expression "voluntary adherence" was used, but, having dealt with that, the learned judge said:

H

"In my view, the word 'adhere' is too uncertain to be enforced. Would the condition be satisfied by a mere private adherence to the Protestant faith or would some public profession be required? Would outward adherence to the Protestant faith be sufficient whatever the private faith?"

Even if the court could determine these matters, what degree of adherence would be required? How much church attendance would be required? Would it be sufficient if [the person] answered, upon the taking of a census, that his religion was Protestant although he had no private faith . . . ”

The second case is *Re Biggs* (6), where the headnote is:

- A “A gift by will upon condition that the donee should be an ‘adherent of . . . the Church of England’ is void for uncertainty. The standard of certainty required is the same whether the condition is a condition precedent or a condition subsequent.”
- B *Clayton v. Ramsden* (2) and *Re Lockie* (4) were applied by the learned judge, who in this case was CALLAN, J. The words in that case were very similar to the words which we have in this case, and I do more than share the doubt expressed in those cases. I agree with the conclusions which they reached that those words are not sufficiently certain, either as conditions subsequent or conditions precedent or as qualifications, to justify me in saying that they can be considered as imposing a certain obligation and having a precise and ascertainable significance. I think that “member of the Church of England” is a very uncertain phrase, and, even if the matter had stopped there, I should have felt some doubt about it.
- C FARWELL, J., was very careful not to express any definite view about it. There are so many views as to what “member of the Church of England” means that I should have thought that those words, even alone, were incapable of having attached to them a definite meaning. I think that the difficulty is even greater when the will continues “and an adherent to the doctrine of that church.”
- D Whatever a man may say, whatever he may think, whatever his neighbours may think, or whatever his friend or closest companion may think, on the question whether a person is an adherent to the doctrine of the church, there is so much uncertainty, so much vagueness, so much room for doubt, so much room for difference of opinion, and so much room for differing interpretations, that, adopting the reasoning in the two New Zealand cases, *Re Lockie* (4) and *Re Biggs* (6), and considering the matter as best I can, from the circumstances of the case I come to the conclusion that the expressions “a member of the Church of England” and “an adherent to the doctrine of that church” are both singly and in conjunction void for uncertainty. I do not think that the testator has expressed himself with that clarity which is necessary both in a condition precedent of this kind and in a condition subsequent. Therefore, to the first question in this summons I declare that the devise of the testator’s dwelling-house “Paskeston” and other property to the eldest of the sons of Francis Seymour Allen (except his son, Hugh) who should be a member of the church of England and an adherent to the doctrine of that church is void for uncertainty.
- F

Order accordingly.

- G Solicitors: *Thicknesse & Hull, Capel Cure & Ball* (for the plaintiffs and third defendant); *Hore, Pattisson, Bathurst, Summerhays & Co.* (for the second, sixth and seventh defendants); *Andrew, Purves, Sutton & Creery* (for the fourth defendant); *Robbins, Olivey & Lake*, agents for *Sampson, Horner & Co.*, Bradford (for the fifth defendant); *Helder, Roberts & Co.* (for the eighth defendant).

[Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.]

RUSHTON v. NATIONAL COAL BOARD.

[COURT OF APPEAL (Singleton, Birkett and Romer, L.JJ.), January 12, 13, 1953.]

Negligence—Damages—Personal injury—Measure of damages—Regard to be had to awards in comparable cases.

While, in an action for personal injuries, it is impossible, in view of the difference in the facts of individual cases, to standardise the amounts of damages which should be awarded, damages should be assessed so as, while bearing in mind the special facts of the case under consideration, to accord with the general run of assessments made by the courts over a substantial time in comparable cases.

Dicta of BIRKETT, L.J., in *Bird v. Cocking & Sons, Ltd.* ([1951] 2 T.L.R. 1263), applied.

AS TO DAMAGES FOR PERSONAL INJURY, see HALSBURY, Hailsham Edn., Vol. 10, p. 111, para. 139.

Cases referred to:

- (1) *Bird v. Cocking & Sons, Ltd.*, [1951] 2 T.L.R. 1260; 2nd Digest Supp.
- (2) *Davies v. Powell Duffryn Associated Collieries, Ltd.*, [1942] 1 All E.R. 657; [1942] A.C. 601; 111 L.J.K. 418; 167 L.T. 74; 2nd Digest Supp.
- (3) *Nance v. British Columbia Electric Ry. Co., Ltd.*, [1951] 2 All E.R. 448; [1951] A.C. 601; 2nd Digest Supp.
- (4) *Greenfield v. London & North Eastern Ry. Co.*, [1944] 2 All E.R. 438; [1945] K.B. 89; 114 L.J.K.B. 252; 171 L.T. 337; 2nd Digest Supp.

APPEAL by the defendants, the National Coal Board, against an order made by BYRNE, J., at Liverpool Assizes on June 27, 1952, in an action for damages for negligence and breach of statutory duty in which he gave judgment for the plaintiff, holding that the defendants were in breach of a statutory duty, and assessed the damages at £10,000.

The plaintiff was a loader employed by the defendants at Cronton Colliery, near St. Helens, Lancashire. On Apr. 18, 1950, while working in the colliery, he tripped and fell, his right arm coming into contact with a moving conveyor belt and being torn away. On appeal, the defendants did not dispute their liability, but they contended that the award of £10,000 damages was too high in all the circumstances of the case and ought to be reduced.

Gardiner, Q.C., and *Rigg* for the defendants.

Wooll, Q.C., and *Pappworth* for the plaintiff.

SINGLETON, L.J.: The plaintiff was employed by the defendants at one of their collieries in the neighbourhood of St. Helens when he met with an accident of a very serious character. As a result the plaintiff became a one-armed man, and his injury was such that it was impossible to fix on him anything in the nature of an artificial arm. His injuries are set out in a report by a doctor at the County Hospital, Whiston, near Prescot, of Dec. 7, 1950, as follows:

"James Rushton was admitted to this hospital on Apr. 18, 1950. His right arm had been avulsed and he was suffering from shock. After appropriate treatment of the latter, an operation was carried out the same day under a general anaesthetic and a blood transfusion was given. The whole arm, including the scapula and its muscles, had been torn off, leaving the clavicle intact. Haemorrhage was controlled and the raw area adequately covered with the skin available. This wound healed very well. The following day his chest was troublesome, and, subsequently, it was found that he also had fractures of the second, third and fourth ribs on the right side. This injury had caused a pneumothorax, i.e., the entry of air into the chest cavity from laceration of the lung, and this, in conjunction with the severe damage to the chest wall, so limited

movements of his chest that he developed a collapse of the base of the right lung with infection amounting to a 'pneumonia' which was, undoubtedly, a direct result of the accident. He was discharged on May 11, 1950. It was found later that the projecting lateral end of his clavicle was tending to cause ulceration of the skin and on June 28, 1950, one inch of this bone was removed under a general anaesthetic. He was discharged again on July 1, 1950. He was seen again in September, 1950, when he complained of pain in his 'phantom' limb, i.e., as if the limb were still actually present, a well recognised symptom of such injuries. I have not seen him since and do not know how far he suffers from this complaint now."

That agreed report was used before the learned judge, and it was amplified, but not seriously differed from, by a doctor and a surgeon who gave evidence for the plaintiff, and a doctor called for the defendants. There was some question as to the condition of the chest, of which there had been X-ray examinations, but nothing was shown in the way of disease. After the damage done by a broken rib or ribs pneumonia had developed and the plaintiff was left with a cough, and, according to one doctor, there was chronic bronchitis.

After the accident the plaintiff remained in hospital for about three weeks. That he was out of hospital so soon after an injury of this kind, though then approaching thirty-six years of age, shows that he must have been a fit and strong man. After eleven weeks the defendants offered him work as a clerk at the colliery, which he accepted. He had been earning £6 2s. 6d. a week as a labourer in the mine and his earnings as a clerk were almost the same. At the date of the trial he would have been earning £7 5s. had he still been a labourer in the pit as there had been an increase of wages. After fourteen months he voluntarily gave up his employment as a clerk with the defendants and commenced to work on his own account in duplicating, at which he made some £2 or £3 a week profit. He had thought at one time of making commercial art his main occupation in life. He had been some six years in the forces, part of which time was spent in the Middle East, but on his return some domestic trouble caused him to think he had better earn money, and he decided to work as a labourer in a coal mine. Dreadful though his injuries were, his loss of earnings is probably lower than in almost any case of this kind coming before the court where the injured person has been earning money. As counsel for the plaintiff says, a man who is injured is not bound to take every offer of work made to him, but the plaintiff accepted work as a clerk and earned, and could have continued to earn, wages almost as high as he was earning at the date of the accident. The loss of earnings is, therefore, only a small part of the loss. The out-of-pocket loss at the date of the trial was only some £83, which was included in the general award of £10,000 damages.

We have been reminded that when damages have to be assessed in a case of this kind there are many elements for consideration—the pain and suffering which have been undergone and which may occur in the future, the loss of some of the amenities of life, the fact that a man with an injury of this kind will always require some measure of help, even though he may be able to earn considerable money. Those are some of the matters which have to be taken into consideration, besides reduced earnings. Counsel for the defendants directed our attention to a number of cases which have been decided in the courts recently, and he submitted that, however this case might be looked at, the award of £10,000 damages was too high and completely out of line with the decisions of this court and of judges of the Queen's Bench Division recently. Counsel for the plaintiff rightly pointed out that the circumstances of two different cases are not alike, and little help is to be gained from looking at what some judge or this court awarded in the case of an injury of a totally different kind. He submitted that it was impossible to standardise damages.

Everyone appreciates the difficulty of a judge assessing damages by himself in a case of this kind. On appeal every member of this court is anxious to do all he can to ensure that the damages are adequate for the injury suffered, so far as they can be compensation for an injury, and to help the parties and others to arrive at a fair and just figure in all the circumstances. Nevertheless, there is foundation for counsel's remark that it is impossible to standardise damages.

The matter is, perhaps, best put by BIRKETT, L.J., in *Bird v. Cocking & Sons, Ltd.* (1). On an appeal to this court against the assessment of damages, we are constantly reminded that we ought to interfere if the damages are so low that it can be said that there is a wholly erroneous estimate of damage or if the damages are inordinately high. BIRKETT, L.J., said ([1951] 2 T.L.R. 1263):

"The assessment of damages in cases of personal injuries is, perhaps, one of the most difficult tasks which a judge has to perform, and certainly the task is no lighter when the appellate court is asked to re-consider the assessment made by a judge in the court below. The task is so difficult because the elements which must be considered in forming the assessment in any given case vary so infinitely from other cases that there can be no fixed and unalterable standard for assessing the amounts for those particular elements. Although there is no fixed and unalterable standard, the courts have been making these assessments over many years, and I think that they do form some guide to the kind of figure which is appropriate to the facts of any particular case, it being for the judge, or for the appellate court if they are reviewing the matter, to consider the special facts in each case; for I agree with Mr. Veale that one case cannot really be compared with another. The only thing that can be done is to show how other cases may be a guide, and when, therefore, a particular matter comes for review one of the questions is, how does this accord with the general run of assessments made over the years in comparable cases?"

That passage expresses everything that I would say on the two views put before us in this court as to the use of other cases. It is impossible to standardise damages, but it is the duty of this court to see that, so far as possible, the same general principles are followed and the same approach is ensured for all litigants who have suffered personal injuries and for all defendants in a case of this kind. More than that the court cannot do.

The plaintiff's injury was a dreadful one. It is the worst case of the loss of an arm that any one of us has ever encountered, involving as it did, great suffering, great present discomfort, pain in the future, no doubt, and, inevitably, considerable loss of the amenities of life. The plaintiff is not as other men are. The doctor said he had aged considerably and looked older than his years. There was some damage to the lung and the plaintiff is left with a chronic cough and, it may be, some bronchitis. There is also the less serious loss of earnings. Giving full effect to all those things and being anxious that the plaintiff should receive full compensation, so far as he can, for the injuries he has suffered, I have yet reached the conclusion that the sum of £10,000 is much too high, and that it is the duty of this court to reduce it. Applying such tests as have been put to this court and bearing in mind decisions in earlier cases and the special facts of this case, I cannot say that the damages ought to have been more than £7,000. Accordingly, I would order that they be reduced from the sum of £10,000 to that of £7,000, and I would allow the appeal to that extent.

BIRKETT, L.J.: I am of the same opinion. This case is another illustration of the difficulties which attend the assessment of damages where personal injuries are concerned. There is no question in the assessment of

A the damages by BYRNE, J., of the omission of any material matter or the introduction of matters which were not material, and there was no misdirection in law. The only question is: Should this award of £10,000 stand? LORD WRIGHT, in the House of Lords in *Davies v. Powell Duffryn Associated Collieries, Ltd.* (2) ([1942] 1 All E.R. 664) has used the phrase "a wholly erroneous estimate of the damage suffered" as one of the grounds on which an appellate court can interfere. A phrase used by VISCOUNT SIMON in *Nance v. British Columbia Electric Ry. Co., Ltd.* (3) ([1951] A.C. 613), was "... the amount awarded is either so inordinately low or so inordinately high ...", and MACKINNON, L.J., in another case, *Greenfield v. London & North Eastern Ry. Co.* (4) ([1944] 2 All E.R. 440) had spoken of damages being "so excessive ... as to be plainly unreasonable." How those tests are to be applied is a matter of some difficulty, because it can be said that no money can compensate for this dreadful accident and whatever sum a judge awards cannot be inordinately high. BYRNE, J., said in his judgment:

C "This is a case in which money cannot really compensate at all for the loss of enjoyment or the curtailment of his ability to do what he would like to do in the way of earning a living and clearly it must be a case in which the damages are substantial."

D From one point of view it is abundantly plain that money cannot compensate, since nothing is really worth while unless health goes with it, but if money is no compensation, then no sum, £5,000, £10,000, £15,000 or £20,000, has any meaning. The courts have been compelled by the logic of circumstances to decree that their only possible course in cases of personal injury is to award damages in money, and, that being so, it is useful to look at comparable cases to see what other minds have done and so gather the general consensus of opinion as to the amount which an injured person in the present state of society ought to be awarded.

E Here the financial element is the least of all and counsel for the plaintiff says that this award can be justified by the loss of amenities, in that the plaintiff in certain matters must always be dependent on others and cannot conduct his life as he would wish to do or do such things as playing cricket or football and taking part in many athletic exercises. There is also the pain and suffering endured and still to be endured. After anxious consideration, I have come to the same conclusion as my Lord. While this court must regard the decisions of the past, it must also consider the future, and the effect which its decisions may have. Taking all these matters into consideration and looking at the past cases, the general standard, and the particular facts in this case, I concur in the view that the sum awarded is too high and should be reduced to £7,000.

F ROMER, L.J.: I also agree. In the passage cited by my Lord, BYRNE, J., summarised his conclusion on the question of damages by intimating that it was obvious that money could not be regarded as compensation to the plaintiff. Accordingly, this is one of the many cases where the court in effect is being asked to measure the immeasurable, because, except with regard to financial loss, e.g., loss of earnings, damages cannot constitute actual compensation whether £50,000 or £100 is awarded, but the principle has been adopted (and it is the only possible principle) of trying to compensate a person in the plight of the plaintiff by awarding what might fairly be described as notional or theoretical compensation to take the place of that which is not possible, viz., actual compensation. The court should plainly apply that principle with some degree of uniformity so far as possible. I say "so far as possible" because nothing in the nature of any rigid classification can be achieved when one is dealing, not with fact, but with theory. The only way to achieve anything approaching a uniform standard is by considering cases that have come before courts in the past and seeing what amounts were awarded in circumstances,

so far as may be, comparable with the case the court has to decide. In the light of the guidance afforded by the authorities it seems to me that the £10,000 awarded in the present case is not only not in conformity with the standard which has in general been adopted in the past, but that it deviates from that standard to such a degree that it cannot be sustained. I agree that £7,000 is the sum which should be awarded in conformity with the trend of previous decisions.

Damages reduced.

Solicitors: *R. S. S. Allen*, agent for *C. R. Hodgson*, Manchester (for the defendants); *Mawby, Barrie & Letts*, agents for *Silverman & Livermore*, Liverpool (for the plaintiff).

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

Re BATES (deceased). BATES *v.* RODWAY AND OTHERS.

[CHANCERY DIVISION (Roxburgh, J.), January 21, 1953.]

Family Provision—Provision for widow—Estate not exceeding £2,000—Payment of capital—Maximum amount payable—Capitalised value of income—Inheritance (Family Provision) Act, 1938 (c. 45), s. 1 (3) (b), s. 1 (4).

Semle: Where the value of a testator's estate does not exceed £2,000 the court, in making provision for the maintenance of the testator's widow (she being the only dependant of the testator) by way of payment of capital under s. 1 (4) of the Inheritance (Family Provision) Act, 1938, has power to order the payment out of capital of the capitalised value of the provision by way of income which would otherwise be made to the widow under s. 1 (3) (b) of the Act, but not to order the payment of one-half of the capital.

Re Catmull ([1943] 2 All E.R. 115), considered.

Observation of BENNETT, J., in *Re Vrint* ([1940] 3 All E.R. 475), criticised.

FOR THE INHERITANCE (FAMILY PROVISION) ACT, 1938, s. 1 (3) and s. 1 (4), see HALSBURY'S STATUTES, Second Edn., Vol. 9, p. 796.

Cases referred to:

- (1) *Re Vrint*, [1940] 3 All E.R. 470; [1940] Ch. 920; 109 L.J.Ch. 431; 163 L.T. 306; 2nd Digest Supp.
- (2) *Re Catmull*, [1943] 2 All E.R. 115; [1943] Ch. 262; 112 L.J.Ch. 242; 169 L.T. 92; 2nd Digest Supp.

ADJOURNED SUMMONS by which application was made by the widow of the testator for provision to be made for her out of the testator's estate under the Inheritance (Family Provision) Act, 1938, s. 1 (1).

By his will, dated July 27, 1951, the testator, after making a specific bequest to his son by a former marriage and giving a legacy of £100 to his sister, gave his residuary estate equally to two charities. He died on Aug. 2, 1951. The net value of the estate was under £2,000. The widow was the only dependant, and her application was not opposed by the residuary legatees. Counsel for the widow contended that the court should make an order for the payment to her of (a) one-half of the capital, in a lump sum, without conditions, or (b) an annual income amounting to one-half of the net income of the estate plus supplementary payments out of capital, or (c) the capitalised value of her widowhood interest.

Arthur Bagnall for the widow.

Lindner for the executor.

L. H. L. Cohen for the residuary legatees.

ROXBURGH, J., stated the facts and continued: As the residuary legatees, who are charities, have left the matter to me, not wishing to submit

arguments against provision being made for the widow, I need not give reasons for my conclusion that, in the circumstances of this case, I ought to award her the maximum permissible amount (subject to what I am about to say), namely, one-half of the annual income of the net estate, which may be treated as £28 per annum, during her widowhood. Counsel for the widow, however, is not content with that. The estate is under £2,000, and, therefore, s. 1 (4) of the Act of 1938 is brought into operation. That sub-section reads:

A

"Where the value of a testator's net estate does not exceed £2,000, the court shall have power to make an order providing for maintenance, in whole or in part, by way of a payment of capital, so however that the court, in determining the amount of the provision, shall give effect to the principle of the last preceding sub-section."

B

By s. 1 (3):

C

"The amount of the annual income which may be made applicable for the maintenance of a testator's dependants by an order or orders to be in force at any one time shall in no case be such as to render them entitled under the testator's will as varied by the order or orders to more than the following fraction of the annual income of his net estate, that is to say . . . (b) if the testator . . . leaves a wife . . . and no other dependant, one-half."

Section 1 (4) has been twice considered in these courts. The first occasion was in *Re Vrint* (1), where BENNETT, J., said ([1940] 3 All E.R. 475):

D

"The amount available where the testator leaves a widow and no other dependant is half the income, or, as in this case, where the net estate does not exceed £2,000, half the capital."

That was a passing observation by BENNETT, J., and was of no particular moment in the view which he took of the case which he was deciding. The point was not argued, and I can hardly think that he was consciously construing this difficult sub-section by those random words, "half the capital".

E

I would, however, have given more weight to his words than I do if there had not been a contrary decision on the point. In *Re Catmull* (2), a decision of UTHWATT, J., the point which arises on s. 1 (4), namely, whether the court can give one-half of the capital or is limited to giving the capitalised value of the provision which could otherwise be made under s. 1 (3), was argued

F

by counsel on both sides and decided by the judge. Counsel for the widow in that case contended that the court had a discretion under s. 1 (4) to make a larger provision than it could under s. 1 (3), while counsel for the testator's daughters contended that, in making an order for a capital payment under s. 1 (4), the court could not award more than the capitalised value of the maximum amount of income which it would order under s. 1 (3). The issue being thus

G

joined, UTHWATT, J., dealt with the question at considerable length and came to the considered conclusion that the provision which could be made under s. 1 (4) was limited to the capitalised value of the provision which would otherwise be made under s. 1 (3). Counsel for the widow in the present case submitted that that decision was obiter and that I need not, and ought not, to follow it. I do not think that it was obiter, though, for reasons which will appear in a

H

moment, I have not troubled counsel to look into the authorities on what is, or is not, obiter. UTHWATT, J., having to exercise a discretion in the matter, first discussed and decided the area within which his discretion was to operate, and, having done that, in the exercise of his discretion he decided to make no order in favour of the widow. If it were necessary for me to come to a decision on the point, I should probably decide that I was bound to follow *Re Catmull* (2), but, in the view that I take of the circumstances of the present case, I need not pursue this question any further. Counsel for the widow asked me,

first, to order an immediate payment to her of one-half of the capital as a lump sum payment, without conditions. Assuming that I have jurisdiction to make such an order, in the exercise of my discretion I would not do so. He then asked me to make an order for her to receive one-half of the net income plus supplementary payments out of capital. I have no jurisdiction to do that, as it would be violating the principle of s. 1 (3) (b), because it would be giving her more than half the annual income. Lastly, he asked me to give her the capitalised value of her widowhood interest. I have jurisdiction to do that, it being in accordance with the decision of UTHWATT, J., on the construction of s. 1 (4), but I do not think that in this case it is expedient to do so. For these reasons it is not necessary to decide whether I am bound by *Re Catmull* (2), though, in my opinion, I probably am.

Order accordingly.

Solicitors: *Theodore Goddard & Co.*, agents for *Lawrence, Williams & Co.*, Bristol (for the widow); *Robins, Hay & Waters* (for the executor); *G. & G. Keith* (for the residuary legatees).

[*Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.*]

BOWERS AND ANOTHER v. SMITH. EVANS AND ANOTHER v. SMITH. FLACK AND ANOTHER v. SMITH.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Croom-Johnson and Pearson, JJ.), January 21, 1953.]

Children and Young Persons—Protection—Probation order—Order to parent to exercise proper care and guardianship—Indecent acts by young persons—Absence of knowledge by parents—Inference from young persons' conduct—Children and Young Persons Act, 1933 (c. 12), s. 62 (1) (c) (d).

From the fact alone that on a few occasions a child or young person has committed grossly indecent acts of which his parents had no knowledge, no inference can be drawn that his parent or guardian has failed to give him any, or adequate, instruction in matters relating to sex and morality so that he is in need of care and protection by reason of exposure to moral danger, and, therefore, no order can be made under s. 62 (1) (c) of the Children and Young Persons Act, 1933, against his parent or guardian requiring such parent or guardian to enter into a recognisance to exercise proper care and guardianship, or, under s. 62 (1) (d), placing the child or young person on probation.

EDITORIAL NOTE. Section 61 (1) (a) of the Children and Young Persons Act, 1933, is amended in part by s. 9 and schedule, art. 4, of the Children and Young Persons (Amendment) Act, 1952 (c. 50).

FOR THE CHILDREN AND YOUNG PERSONS ACT, 1933, s. 61 and s. 62, see HALSBURY'S STATUTES, Second Edn., Vol. 12, pp. 1015, 1016.

Cases referred to:

- (1) *R. v. Toynbee Hall Juvenile Court JJ. Ex p. Joseph*, [1939] 3 All E.R. 16; 108 L.J.K.B. 649; 161 L.T. 37; 103 J.P. 279; Digest Supp.
- (2) *R. v. Senior*, [1899] 1 Q.B. 283; 68 L.J.Q.B. 175; 79 L.T. 562; 63 J.P. 8; 15 Digest 794, 8588.

CASES STATED by Gloucester justices.

At a court of summary jurisdiction sitting at Cheltenham on July 18, 1952, the respondent, Sidney John Smith, preferred a complaint under the Children and Young Persons Act, 1933, s. 62 (2) against (i) the appellants, Kenneth John Bowers and Thomas Arthur Bowers, (ii) the appellants, Allan Charles Evans and Edwin Henry Price Evans, and (iii) the appellants, Terence John

Flack and Edith Gladys Gavin, charging in each case that the first-named appellant, being a young person under the age of seventeen years, was in need of care and protection by reason of exposure to moral danger through his parent, the second-named appellant, not exercising proper care and guardianship.

A It was proved or admitted that each first-named appellant, then under the age of seventeen years, committed indecent conduct by having sexual intercourse (in the case of Flack, by endeavouring to have sexual intercourse) with a girl named Jean Smith, then aged seventeen years, two months, in a latrine in a football field adjoining the Beeches Recreation Ground, Cheltenham, on June 11, 1952; that Bowers watched while Flack attempted sexual intercourse and that Flack watched while Bowers had sexual intercourse with the said Jean Smith; that a boy, Roy Edwards, watched while Evans had sexual intercourse, and that Evans watched while the boy Edwards had sexual intercourse with the said Jean Smith; that there were about thirty boys between the ages of eight and sixteen years in the field at the time and that the latrine was a make-shift corrugated iron structure affording little privacy; that Bowers and Evans had had sexual intercourse with the said Jean Smith on previous occasions in another field; that there was no evidence that any one of the second-named appellants knew of the existence of the said Jean Smith or had been warned in any way of the likelihood of her presence or the presence of any other undesirable female at or in the vicinity of the said football field; that there was no evidence that any second-named appellant was, or should have been, aware that the giving of permission to his or her son, one of the first-named appellants, to play football at the place in question, involved any likelihood that the respective first-named appellant would there come into contact with any undesirable member of the opposite sex; that there was no evidence that any first-named appellant had ever committed or attempted to commit any act of indecency with any female other than the said Jean Smith; that there was no evidence that any second-named appellant had ever attracted the attention of the police by conduct involving a breach of the law or a neglect of the duties of a good citizen; and that there was no evidence that any second-named appellant had or had not given any or adequate sexual instruction to the respective first-named appellant.

It was contended on behalf of the appellants that, as stated in CLARKE HALL AND MORRISON ON CHILDREN, 4th ed., p. 3:

F " . . . where a juvenile is brought before a juvenile court not charged with an offence, but as in need of care or protection or beyond control, the first business of the court is to try the issue whether or not the case is brought within the terms of the statute, and only if this be proved by proper evidence can the court proceed to decide upon treatment. If the case be not proved, then whatever be the ground upon which the juvenile has been brought before the court he must be released from custody. The liberty of the subject, however small that subject may be, must be safeguarded by the courts, and as the case of *R. v. Toynbee Hall Juvenile Court JJ. Ex p. Joseph* (1) showed, the High Court will intervene where that liberty has been invaded without proper legal justification ";

H that on the occasion in question there was no evidence that any second-named appellant was failing to exercise proper care and guardianship, or, if any first-named appellant was exposed to moral danger (which was denied), that this was through the respective second-named appellant "not exercising proper care and guardianship"; that these words should be construed as having the same meaning as "wilfully neglects" as defined by LORD RUSSELL OF KILL-OWEN, C.J., in *R. v. Senior* (2) ([1899] 1 Q.B. 291, 292); and that the first-named appellants were not exposed to moral danger within the meaning of

s. 61 of the Children and Young Persons Act, 1933, so that any order made under s. 62 would be in excess of the court's jurisdiction.

The justices were of the opinion that the second-named appellants could not have given any or any adequate instruction to the respective first-named appellants in standards of morality and behaviour and matters of sex, and, therefore, they held that the first-named appellants were in need of care and protection by reason of exposure to moral danger through the respective second-named appellants not exercising proper care and guardianship, and ordered (i) under s. 62 (1) (d) of the Act, that the first-named appellants be placed under the supervision of a probation officer for two years, and (ii) under s. 62 (1) (c), that the second-named appellants should enter into a recognisance in the sum of £5 to exercise proper care and guardianship. The appellants appealed against the orders.

S. H. Noakes for the appellants.

Smallwood for the respondent.

LORD GODDARD, C.J.: These three Cases are stated by justices for the county of Gloucester sitting at Cheltenham, before whom the appellants, three boys and their parents, were brought under s. 61 and s. 62 of the Children and Young Persons Act, 1933. Section 61 (1) of that Act provides:

"For the purposes of this Act a child or young person in need of care or protection means a person who is—(a) a child or young person who, having no parent or guardian or a parent or guardian unfit to exercise care and guardianship or not exercising proper care and guardianship, is either falling into bad associations, or exposed to moral danger, or beyond control . . ."

If the justices find that, they can, among other things, under s. 62 (1) (d) put the young person under the supervision of a probation officer. With regard to parents it is provided, by s. 62 (1):

"If a juvenile court is satisfied that any person brought before the court under this section by a local authority, constable, or authorised person, is a child or young person in need of care or protection, the court may . . . (c) order his parent or guardian to enter into a recognisance to exercise proper care and guardianship . . ."

In this case, not only was an order under s. 62 (1) (d) made in the case of each boy, but also each parent was ordered, under s. 62 (1) (c), to enter into a recognisance in the sum of £5 to exercise proper care and guardianship.

The case raises the question whether in the circumstances the justices had any power to make such an order. The boys were brought before the court because a very disgusting state of affairs had been brought to the attention of the police. The boys were allowed to go to a football field by their parents—in fact I have no doubt they were sent there by their parents—to play games, and there they were guilty of conduct of a most reprehensible character which was deserving of some condign punishment. But it is quite another thing to say that, because these boys committed a grossly dirty act of this sort, they did it because their parents had not exercised proper care and control over them. All that the parents had done in this case was to send the boys to play football. The justices tell us in each Case:

"That there was no evidence that the parent knew of the existence of [the girl], or had been warned in any way of the likelihood of her presence or the presence of any other undesirable female at or in the vicinity of the said football field. That there was no evidence that the parent was or should have been aware that the giving of permission to his son to play football at the place in question, involved any likelihood that their sons would there come into contact with any undesirable member of the opposite

sex. That there was no evidence that [the son] has ever committed or attempted to commit any act of indecency with any female other than [the girl]. That there was no evidence that the parent has ever attracted the attention of the police by conduct involving a breach of the law or a neglect of the duties of a good citizen. That there was no evidence either that the parent had, or that the parent had not, given any or adequate sexual instruction to the boy."

A With regard to the last finding, parents are entitled to hold different views on that subject. Some parents hold the view that it is not desirable to give sexual instruction to boys at this age. Certainly, the appellant, Edith Gladys Gavin, might not care to give it herself, the boy not having a father, but, can it be said that there was any evidence before the court that the parents had not exercised proper care and guardianship? Of course, if boys are found repeatedly committing criminal or disgraceful acts, the court may be justified in drawing the inference that parental discipline is wanting. In such cases it ought not to be difficult to give some evidence from which the court can infer the existence of such a state of things, but to say that, because three young adolescents who have just come to puberty have had intercourse with a disreputable girl when they were sexually excited and, perhaps, tempted by the girl, their parents have been guilty of not exercising proper care and attention seems to me to be going a great deal too far. The conclusion of the justices was:

" . . . that the parent of the son could not have given any or adequate instruction to the latter in standards of morality and behaviour and matters of sex as shown by his conduct ",

D and then they set out the acts in which these boys had indulged. It is a very serious thing to say, even if it happens on two or three occasions with the same girl, the parents knowing nothing about it, that because young adolescents commit some sexual misbehaviour—whether it amounts to a crime or not is for this purpose immaterial—it is due to neglect on the part of the parents. I do not think that the statute was ever meant to deal with a case like this.

E If a girl or a boy is found being kept in a house where the mother is permitting prostitutes to assemble or to be housed, or if the mother herself is a prostitute or is carrying on a loose life, it is very proper that the children should be removed, but I fail to see that there is anything here which justified the justices in coming to their conclusion that, because these boys have been guilty of the conduct which has been described—which has been brought to the attention of the parents for the first time—the parents are to be held to blame for not having exercised proper care or guardianship because the justices think they cannot have given the boys sexual instruction. One knows that young adolescents commit indecent acts, and, no doubt, lewd conversation takes place which parents correct if they know of it, but those things, as a rule, are done in secrecy.

F Although the acts against the girl in the present case were done in the presence of other boys on a football field, which makes the boys' behaviour all the more reprehensible, there is not the least suggestion that the parents had any idea of what was going on. No one would say that it was in the least wrong to let the boys go to the field to play football. I cannot agree that, merely because it is found that sexual intercourse has taken place with one girl, that justifies the justices in coming to the conclusion that the parents have not exercised proper care and attention. Accordingly, these three appeals must be allowed and the orders set aside.

CROOM-JOHNSON, J.: Sections 61 and 62 of the Children and Young Persons Act, 1933, contain most valuable provisions for the protection of young people and for bringing them up in the right way. It is because of that that I have approached this case with a good deal of anxiety, looking to see whether the express provisions of beneficent sections are likely to be spoiled by any

observations I may make. It must be remembered that, while these sections do not deal with a criminal offence, the fact that an order has been made with regard to the children of apparently quite respectable citizens makes it incumbent on the tribunal which has to deal with the matter to proceed with a high degree of caution. No one seems to have thought of the possibility in this case that adequate instruction may have been given by the parents, and, as not infrequently happens with regard to parental advice, the young people in question did not choose to take advantage of it. No doubt, there are cases in which justices who have to deal with such matters may, from a persistent course of conduct by a young person, properly come to the conclusion that there must have been something lacking in the state of affairs at home and in the discharge of their duties by the parents. That is something with which justices will deal most carefully, with due regard to the express provisions of the statute. It seems to me that there is no material here on which the justices were entitled to draw that inference, if (though I am not sure) they did so. When one is being invited to draw an inference against a person because of something his child has done which is not to be commended, I venture to suggest that the justices should proceed with very considerable caution. I agree with what my Lord has said, and I think that in the present case the justices have erred. I agree that these appeals should be allowed and the orders set aside.

PEARSON, J.: I agree.

Appeal allowed.

Solicitors: *Gibson & Weldon*, agents for *A. Mason Amery & Co.*, Cheltenham (for the appellants); *Field, Roscoe & Co.*, agents for *Guy H. Davis*, clerk of the county council, Gloucester (for the respondent).

[Reported by F. GUTTMAN, ESQ., Barrister-at-Law.]

CARD v. SALMON.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Croom-Johnson and Pearson, JJ.), January 21, 1953.]

Case Stated (by Justices)—Power of examining justices to state—Summary Jurisdiction Act, 1879 (c. 49), s. 33 (1).

The appellant was charged before a court of summary jurisdiction with an offence against the Road Traffic Act, 1930, s. 11 (1), and, the offence being punishable on summary conviction by imprisonment for a term exceeding three months, he had a right to claim, and he, in fact, did claim, under the Summary Jurisdiction Act, 1879, s. 17 (1), to be tried by a jury. Before any evidence was given he raised the preliminary point that s. 21 of the Act of 1930 had not been complied with by the prosecution. The justices determined that point in favour of the prosecution, and, on an application by the appellant, purported to state a Case for the determination by the court of the question whether their decision was right.

HELD: as soon as the appellant had elected to be tried by a jury, the justices were required by s. 17 (1) of the Act of 1879 to deal with the case in all respects as if he were charged with an indictable offence; they were then sitting, not as a court of summary jurisdiction, but as examining justices under the Indictable Offences Act, 1848; and, as examining justices, they had no power to state a Case.

AS TO CLAIM TO BE TRIED BY JURY, see HALSBURY, Hailsham Edn., Vol. 21, pp. 592, 593, paras. 1037, 1038; and FOR CASE, see DIGEST, Vol. 33, p. 318, No. 332.

CASE STATED by Devides justices.

On Aug. 12, 1952, at a court of summary jurisdiction sitting at Devizes, an

information was preferred by the respondent, a police officer, charging the appellant with an offence against the Road Traffic Act, 1930, s. 11 (1), in that, on May 22, 1952, he drove a motor vehicle in Devizes in a manner dangerous to the public. Before the charge was entered on, the justices granted an application by the prosecution, under the Criminal Justice Act, 1948, s. 28 (1), for the case to be tried summarily. The appellant, when invited to say whether he wished the charge to be dealt with summarily or by a jury, elected to be tried by a jury if a case should be made out. Before any evidence was heard, it was contended on behalf of the appellant that the requirement of the Road Traffic Act, 1930, s. 21, in regard to notice of intended prosecution, had not been complied with. The justices, acting as a court of summary jurisdiction, determined that the requirement of s. 21 had been sufficiently complied with, and, on an application by the appellant, they purported to state a Case in regard to their determination on the point.

Skelhorn for the appellant.

Brodrick for the respondent.

LORD GODDARD, C.J.: This purports to be a Case stated by justices for the borough of Devizes, before whom the appellant was summoned under the Road Traffic Act, 1930, s. 11 (1), for driving a motor vehicle in a manner dangerous to the public. Before the case was gone into, he was asked whether he wished to be tried summarily or by a jury, and he claimed his right to go before a jury. Thereupon, the clear duty of the justices, under s. 17 (1) of the Summary Jurisdiction Act, 1879, was to sit as examining justices, and take the depositions.

Section 17 (1) of the Act of 1879, as amended by the Criminal Justice Act, 1948, s. 79 and sched. IX, provides:

“A person when charged before a court of summary jurisdiction with an offence, in respect of the commission of which an offender is liable on summary conviction to be imprisoned for a term exceeding three months, and which is not an assault, may, if he appears in person to answer the charge and before he pleads to the charge, but not afterwards, claim to be tried by a jury, and thereupon the court of summary jurisdiction shall deal with the case in all respects as if the accused were charged with an indictable offence and not with an offence punishable on summary conviction, and the offence (if not indictable otherwise than by virtue of this section) shall as respects the person so charged be deemed to be an indictable offence, and if the person so charged is committed for trial, or bailed to appear for trial, shall be prosecuted accordingly . . .”

Under the Road Traffic Act, 1930, s. 11 (1), the offence of dangerous driving may be prosecuted summarily or on indictment, but, as, under s. 11 (1) (a), the defendant is liable on summary conviction to be sent to prison for four months, he can claim his right to be tried by a jury, as the appellant did in this case, and thereupon the jurisdiction of the justices to hear and determine the case ceases. They then have to act as examining justices under the Indictable Offences Act, 1848, and take depositions under s. 17 of that Act.

In the present case, after the appellant had elected to be tried by a jury and before any evidence had been given, his solicitor asked the justices to give a decision on a question relating to the validity of the notice of intended prosecution which had been served on the appellant under s. 21 of the Act of 1930. By proviso (ii) to s. 21, the requirement of the section

“shall . . . be deemed to have been complied with unless and until the contrary is proved”,

and, therefore, the onus would be on the appellant to prove that it was not complied with. The point should not have been taken before the justices, as

it is a point of defence which would have been open to the appellant at the trial for which he had elected. If, after hearing the evidence, the justices had come to the conclusion that, on the facts, no jury would convict the appellant of an offence against s. 11 (1) of the Road Traffic Act, 1930, they could have ordered him to be discharged, under s. 25 of the Act of 1848, on the ground that a prima facie case had not been made out against him, but the question whether s. 21 of the Act of 1930 had been complied with was one partly of law and partly of fact which had to be decided by the court of trial.

The difficulty which confronts counsel for the appellant is that examining justices have no power to state a Case. A Case can be stated only by justices who are empowered to try a cause, i.e., by justices sitting as a court of summary jurisdiction, or by quarter sessions when sitting as a court of appeal from an order of justices. Justices have power to state a Case when they are sitting as a court of summary jurisdiction because, subject to appeal, their decision is conclusive, and they are entitled to ask this court whether or not it is in accordance with law. On the other hand, when they are sitting as examining justices, they have only to determine, under s. 25 of the Act of 1848, whether or not there is a prima facie case against the defendant so that he shall be committed for trial. The stating of a Case, like any other form of appeal, is a matter arising entirely from statute. After a defendant has claimed to be tried by a jury, the justices must deal with the case as if he were charged with an indictable offence, and they are then sitting under the Indictable Offences Act, 1848, and not under the Summary Jurisdiction Acts.

I have had some difficulty in following the argument of counsel for the appellant which was based on s. 13 (11) of the Interpretation Act, 1889. That subsection does not turn a court of examining justices into a court of summary jurisdiction. In this case the justices were empowered to hear the case, not by the Summary Jurisdiction Acts, but by the Road Traffic Act, 1930, s. 11 (1), which provides that the offence of dangerous driving can be dealt with as an indictable offence or as an offence which can be tried summarily. The person charged being liable on summary conviction to imprisonment for a term exceeding three months, the Summary Jurisdiction Act, 1879, s. 17 (1), applies, and, if the person charged elects to be tried by a jury, the case becomes for all purposes an indictable offence, and the Indictable Offences Act, 1848, then applies, and not the Summary Jurisdiction Acts. Accordingly, there was no power to state the Case, and we dismiss the appeal.

CROOM-JOHNSON, J.: I agree.

PEARSON, J.: I also agree.

Appeal dismissed.

Solicitors: *Darley, Cumberland & Co.*, agents for *Wansbroughs, Robinson, Tayler & Taylor*, Devizes (for the appellant); *Taylor, Jelf & Co.*, agents for *Wilson & Sons*, Salisbury (for the respondent).

[Reported by F. GUTTMAN, ESQ., Barrister-at-Law.]

R. v. DISPUTES COMMITTEE OF THE NATIONAL JOINT COUNCIL FOR THE CRAFT OF DENTAL TECHNICIANS AND OTHERS. *Ex parte* NEATE AND ANOTHER. R. v. SAME.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Croom-Johnson and Pearson, JJ.), January 22, 1953.]

A *Certiorari—Prohibition—Power of court to issue orders addressed to private arbitrator.*

The court has no power to direct the issue of orders of certiorari or of prohibition addressed to an arbitrator directing that a decision by him should be quashed or that he be prohibited from proceeding in an arbitration, unless he be acting under powers conferred by statute.

B AS TO ISSUE OF WRITS OF PROHIBITION AND CERTIORARI TO NON-JUDICIAL TRIBUNALS, see HALSBURY, Hailsham Edn., Vol. 9, pp. 833, 855, paras. 1411, 1449; and FOR CASES, see DIGEST, Vol. 16, pp. 387-389, 412-417, Nos. 2282-2312, 2709-2762.

C MOTION for an order of certiorari to quash an order made on July 3, 1952, by the Disputes Committee of the National Joint Council for the Craft of Dental Technicians declaring that the employers of an infant apprentice were entitled to dismiss him from their employment, and for an order of prohibition to prohibit the committee from further proceeding in an arbitration between the employers and the infant apprentice.

R. I. S. Bax for the applicants, the apprentice and his mother.

D Vester for the respondents, the employers.

LORD GODDARD, C.J.: Counsel for the applicants obtained leave to move for orders of certiorari and prohibition directed to the Disputes Committee of the National Joint Council for the Craft of Dental Technicians. I think that, possibly, the court, when giving leave, thought that the National Joint Council, by reason of its name, was a statutory body, but it turns out that they are merely arbitrators appointed under an ordinary submission to arbitration contained in an indenture of apprenticeship. Unless this were a body set up by statute and having duties conferred on it by statute, so that parties are bound to resort to it, it would be a very novel proceeding if we were to issue these prerogative writs addressed to it.

F Disputes are said to have arisen under an indenture of apprenticeship concerning a young man named Robin Neate under which he was to be taught the craft of a dental mechanic. It is provided in the indenture:

G "This indenture shall be registered with the National Joint Council for the Craft of Dental Technicians and the parties to this indenture hereby jointly and severally agree that all questions or differences whatsoever which may at any time hereafter arise between the parties hereto or their respective representatives touching these presents or the subject-matter thereof or arising out of or in relation thereto respectively and whether as to construction or otherwise shall be referred to the National Joint Council for the Craft of Dental Technicians."

H That is simply a reference to an arbitrator, and I have never heard of certiorari or prohibition going to an arbitrator. Arbitration is a very old remedy in English law, but in all the centuries that have passed since the decisions of English courts first began there is no trace of an arbitrator being controlled by this court by writ of either prohibition or certiorari. The bodies to which in modern times the remedies of these prerogative writs have been applied are all statutory bodies on whom Parliament has conferred statutory powers and duties the exercise of which may lead to the detriment of subjects as, for instance, where a statute gives a certain body power for the compulsory

acquisition of land and an arbitrator is set up by Parliament to assess the compensation, and it is essential that the courts should be able to control the exercise of the statutory jurisdiction within the limits imposed by Parliament. There is no instance of which I know in the books where certiorari or prohibition has gone to any arbitrator except a statutory arbitrator, and a statutory arbitrator is a person to whom, by statute, the parties must resort. It would be an enormous departure from the law relating to prerogative writs if we were to apply these remedies to an ordinary arbitrator, whether he be a single arbitrator or a body of gentlemen called a committee or council, and I am of opinion that we must dismiss these applications on the ground that they are wholly misconceived.

CROOM-JOHNSON, J.: I agree that these applications are wholly misconceived. It is an attempt by the use of prerogative writs to take a short cut to stop an arbitration which has been set on foot pursuant to a submission to arbitration contained in an indenture of apprenticeship. This being a private arbitration between private individuals and directed by agreement to a body which has the name of the National Joint Council for the Craft of Dental Technicians, all the matters in dispute must be dealt with by persons who represent that body. That is all. They are in no sense a public body. Their authority does not depend on any statutory jurisdiction. People are not compelled to abide by their decision. This is a private tribunal set up as arbitrators by agreement between the parties. I agree that these applications must be dismissed.

PEARSON, J.: I agree.

Applications dismissed.

Solicitors: *Francis & Davies*, Wembley, Middlesex (for the applicants); *Tackley, Fall & Read* (for the respondents); *Beddington, Hughes & Hobart* (for the committee).

[Reported by G. A. KIDNER, Esq., Barrister-at-Law.]

MORGAN v. ASHMORE, BENSON, PEASE & CO., LTD. AND ANOTHER.

[LEEDS ASSIZES (Donovan, J.), December 2, 19, 1952.]

Tort—Joint tortfeasors—Contribution—Action against two defendants—Action against second defendant not commenced within statutory period—First defendant's right to contribution from second defendant—Law Reform (Married Women and Tortfeasors) Act, 1935 (c. 30), s. 6 (1) (c).

On July 3, 1948, during the course of his employment by the first defendants, a workman was killed in an accident in a factory owned and occupied by the second defendants. Within twelve months of his death his widow commenced an action against the first defendants under the Fatal Accidents Act, 1846. On July 4, 1949, she added the second defendants as defendants to the action, but they were discharged from the case as the action against them was not commenced within twelve months of the death of the deceased, as required by s. 3 of the Act of 1846. The first defendants claimed contribution from the second defendants under the Law Reform (Married Women and Tortfeasors) Act, 1935, s. 6 (1) (c), in respect of the damages and costs payable by them to the widow. While not denying that they were joint tortfeasors, the second defendants contended that the first defendants were not entitled to contribution under s. 6 (1) (c), as the widow had failed to bring an action against them within the time prescribed by s. 3 of the Act of 1846.

Held: under s. 6 (1) (c) of the Act of 1935 the right of the first defendants to recover contribution from the second defendants as joint tortfeasors depended, not on whether the second defendants had been sued or could now be sued, but on whether they would have been liable if sued in the past, that is to say, within the twelve months prescribed by s. 3 of the Act of 1846, and, as they would have been liable if sued within that time, they were liable for contribution under s. 6 (1) (c).

Merlihan v. Pope (A. C.), Ltd. (Pagnello, Third Party). ([1945] 2 All E.R. 449), discussed.

FOR THE LAW REFORM (MARRIED WOMEN AND TORTFEASORS) ACT, 1935, s. 6 (1) (c), see HALSBURY'S STATUTES, Second Edn., Vol. 25, p. 360.

Cases referred to:

- (1) *Merlihan v. Pope (A. C.), Ltd. (Pagnello, Third Party)*, [1945] 2 All E.R. 449; [1946] K.B. 166; 115 L.J.K.B. 90; 173 L.T. 257; 109 J.P. 231; 2nd Digest Supp.
- (2) *Hordern-Richmond, Ltd. v. Duncan*, [1947] 1 All E.R. 427; [1947] K.B. 545; [1947] L.J.R. 1024; 176 L.T. 332; 2nd Digest Supp.

ACTION for damages for negligence.

The plaintiff's husband met with a fatal accident while employed by the first defendants in a factory owned and occupied by the second defendants. The plaintiff now sought to recover damages against both defendants under the Fatal Accidents Act, 1846, but the second defendants were discharged from the action as they were not added as defendants within the period prescribed by s. 3 of the Act. The first defendants, who were held liable in respect of the damage suffered by the plaintiff, claimed contribution from the second defendants under the Law Reform (Married Women and Tortfeasors) Act, 1935, s. 6 (1) (c). The second defendants, while not disputing their liability for the accident, contended that they were not liable for contribution under s. 6 (1) (c) as the action against them was not commenced within the statutory period. The report deals only with the question of the second defendants' liability under s. 6 (1) (c) of the Act of 1935.

R. W. Payne for the plaintiff.

G. N. Black for the first defendants.

Leslie for the second defendants.

Cur. adv. vult.

Dec. 19. DONOVAN, J., read the following judgment. On July 3, 1948, the late James Frederick Morgan was killed as a result of an accident while he was employed by the first defendants, Ashmore, Benson, Pease & Co., Ltd., in a factory owned and occupied by the second defendants, Samuel Fox & Co., Ltd. In consequence, the widow brought this action against the first defendants claiming damages under the Fatal Accidents Acts. She began the action against the first defendants within twelve months of the death, and on July 4, 1949, she added Samuel Fox & Co., Ltd., as the second defendants. Later, they were discharged from the case on the ground that the action against them was commenced after the lapse of twelve months from the death, and, therefore, outside the period of limitation prescribed by the Fatal Accidents Act, 1846, s. 3. On Feb. 9, 1950, however, the first defendants, by the appropriate notice, claimed contribution from the second defendants in respect of any damages and costs which the first defendants might have to pay to the widow under the Fatal Accidents Acts, and they did so on the ground that the second defendants were in this respect joint tortfeasors. The second defendants do not dispute that they were joint tortfeasors, but they contend that, as the widow brought no action against them under the Fatal Accidents Acts within the time prescribed, the claim for contribution must necessarily fail. That is the issue which I have to try.

The Fatal Accidents Act, 1846, s. 3, provides as follows:

" Provided always . . . that not more than one action shall lie for and in respect of the same subject-matter of complaint; and that every such action shall be commenced within twelve calendar months after the death of such deceased person ".

The claim for contribution is made by the first defendants under the provisions of s. 6 of the Law Reform (Married Women and Tortfeasors) Act, 1935. Section 6 (1) reads: A

" Where damage is suffered by any person as a result of a tort . . . (c) any tortfeasor liable in respect of that damage may recover contribution from any other tortfeasor who is, or would if sued have been, liable in respect of the same damage, whether as a joint tortfeasor or otherwise . . ." B

The second defendants contend that they are not within s. 6 (1) (c) inasmuch as they are not persons who are, or would, if sued, have been, liable in respect of the same damage, since the plaintiff let twelve months go by without suing them under the Fatal Accidents Act.

The purpose of the words " who is, or would if sued have been, liable " in s. 6 (1) (c), is to identify the joint tortfeasor against whom contribution may be sought. He may be either (a) a person who is liable, for example, because he has been sued already, or (b) a person who is not so liable, but who, if sued, would have been liable. Why are the second defendants not liable as falling within the second category ? Because, they say, they cannot be sued now, or because when they were sued it was too late, the period of limitation having expired. Section 6 (1) (c), however, does not ask whether the other tortfeasor can be sued now or whether he was, in fact, sued in time in the past. What it does ask is this. (i) Is the other tortfeasor liable in respect of the same damage ? The second defendants in the present case can answer that question in the negative, not having been sued in time. (ii) Would the other tortfeasor *have been* liable, if sued ? This question obviously requires one to make the assumption that the other tortfeasor was sued in the past and to determine on that hypothesis whether he would have been liable. If, in obedience to this direction, I assume that the second defendants were sued in the past, the answer is that they would have been liable in respect of the damage in question. They would have been liable if sued in the past, namely, in the twelve months after Mr. Morgan's death. Accordingly, in my view, they are liable to make contribution under s. 6 (1) (c), and it is no answer to say: " Yes, but in fact we were not sued within that twelve months ". Section 6 (1) (c) is dealing in part with the case of joint tortfeasors not sued in fact. C
D
E
F

It can, of course, be urged, and it is urged, that it is anomalous that the second defendants, safe behind the shield of limitation afforded by the Fatal Accidents Act, 1846, s. 3, are, nevertheless, open to attack, almost from the rear, under the Law Reform (Married Women and Tortfeasors) Act, 1935, in respect of the same damage. On the merits that consideration is not very moving. The twelve months' limit in the Act of 1846 is an arbitrary one, and in the present case was exceeded by only one day. But the true answer is that the anomaly, if it be such, cannot alter the construction of s. 6 (1) (c) of the Act of 1935 if the words be plain, as, I think, they are. Reference was made, however, to *Merlihan v. A. C. Pope, Ltd. (Pagnello, Third Party)* (1). I am uncertain as to the exact ground of this decision. The third party proceedings brought against Pagnello were in the nature of a separate action, and they were brought outside the period of limitation of twelve months prescribed in favour of public authorities by the Limitation Act, 1939, s. 21 (1). Pagnello, being a Canadian soldier engaged as such at the time of the accident, was able to rely on s. 21 (1). That being so, it was enough for the disposal of the case, unless the cause of action arose, not at the date of the accident, but at the date when G
H

judgment was given against the defendants in that case. If that were so, the third party proceedings would have been in time. This was the central argument in the case, and BIRKETT, J., decided that the cause of action arose at the date of the accident, so that the third party proceedings were out of time. In a later case, *Hordern-Richmond, Ltd. v. Duncan* (2), CASSELS, J., speaking obiter, was inclined to take the view that the cause of action in such cases arises when judgment is given against the defendants. This does not concern me in the present case. In the *Pagnello* case (1) BIRKETT, J., gave his judgment in favour of the third party on the express ground that the third party was protected by the Limitation Act, 1939, because the cause of action in fact accrued on Mar. 15, 1943, the date of the accident in that case. But BIRKETT, J., then went on to say ([1945] 2 All E.R. 451):

“... this statute [the Act of 1935] (which certainly made a great change in the law—but apparently this particular point had not been foreseen), as it stands, and as it is worded, ought not to have added to it ‘who if sued in time would have been liable’.”

It is this last sentence which puzzles me. It seems to me to suggest that the third party proceedings were not themselves an action subject to s. 21 (1) of the Limitation Act, 1939, and what had to be considered was whether the third party could presently be sued by the plaintiff. In that case he could not. If that were the crucial question, then the parties seeking contribution could succeed only if, alternatively, the words in s. 6 (1) (c) of the Act of 1935 could be construed as if they meant: “Would the joint tortfeasor have been liable if sued *in time*?” BIRKETT, J., declined to read the words “in time” into s. 6 (1) (c).

I approach s. 6 (1) (c) rather differently, and I have already set out my view as to its construction. But supposing in the *Pagnello* case (1) the words “in time” had been written into s. 6 (1) (c), what difference would it have made? The third party proceedings themselves would still have been out of time in view of s. 21 (1) of the Limitation Act, 1939. The truth is, I think, that the *Pagnello* case (1) did not require s. 6 (1) (c) to be construed as the present case does, and that I am, therefore, free to express my own view. There will be no conflict between the actual decision of BIRKETT, J., in that case and my decision in this, as there is nothing in the present case barring the present claim for contribution as there was in the *Pagnello* case (1) barring the third party proceedings, namely, s. 21 (1) of the Act of 1939. If there is any limitation on the present claim for contribution, it may be the six years’ period prescribed by the Act of 1939, though I do not decide this, for it is not necessary to do so, and I gather that there is professional doubt on the matter. Clearly s. 3 of the Fatal Accidents Act, 1846, does not require the present claim for contribution to be brought within twelve months of the death, for it refers to “such action” and when read in conjunction with s. 1 of that Act means an action under that Act. For these reasons I decide that the first defendants are entitled to claim contribution from the second defendants.

Judgment for the first defendants against the second defendants.

Solicitors: W. H. Thompson (for the plaintiff); Harold Jackson & Co., Sheffield (for the first defendants); Raworth & Co., Harrogate (for the second defendants).

[Reported by G. M. SMAILES, Esq., Barrister-at-Law.]

OSBORNE v. SNOOK.

[COURT OF APPEAL (Somervell, Birkett and Romer, L.J.J.), January 19, 20, 1953.]

Landlord and Tenant—Shop—Renewal of tenancy—Omission of particulars in application—Leasehold Property (Temporary Provisions) Act, 1951 (c. 38), s. 10 (1)—County Court Rules, 1936, Ord. 40A, r. 7, Form 342A, para. 2 (h), para. 2 (k), added by County Court (Amendment) Rules, 1951.

An application by the tenant of shop premises for a new tenancy under s. 10 (1) of the Leasehold Property (Temporary Provisions) Act, 1951, did not contain all the particulars required by the Form of Originating Application prescribed by Ord. 40A of the County Court Rules, 1936, as amended by the County Court (Amendment) Rules, 1951, in particular, the extent of the living accommodation and whether it was occupied for the purposes of the trade or business carried on at the shop (as required by para. 2 (h) of the form) and the period, rent, and other terms of the tenancy sought (as required by para. 2 (k)), being omitted.

HELD: compliance with the provisions of the rules was not to be regarded as a condition precedent to the jurisdiction of the court to entertain the application, and, therefore, the application was, despite the omission of the particulars in question, a valid application for a new lease within the Act and leave to amend the application should be granted.

Marshall v. London Passenger Transport Board ([1936] 3 All E.R. 83), and *British & Colonial Furniture Co., Ltd. v. William McIlroy, Ltd.* ([1952] 1 All E.R. 12), distinguished.

Per SOMERVELL, L.J.: "...the form is by way of guidance and by way of stating the type of matters which should be dealt with rather than laying down the conditions precedent to a valid application".

FOR THE LEASEHOLD PROPERTY (TEMPORARY PROVISIONS) ACT, 1951, s. 10, s. 11, s. 12, see HALSBURY'S STATUTES, Second Edn., Vol. 30, pp. 206, 208, 210.

Cases referred to:—

- (1) *Marshall v. London Passenger Transport Board*, [1936] 3 All E.R. 83; Digest Supp.
- (2) *Collins v. Hertfordshire County Council*, [1947] 1 All E.R. 633; [1947] K.B. 598; [1947] L.J.R. 789; 176 L.T. 456; 111 J.P. 272; 2nd Digest Supp.
- (3) *British & Colonial Furniture Co., Ltd. v. William McIlroy, Ltd.*, [1952] 1 All E.R. 12; [1952] 1 K.B. 107.
- (4) *Upton v. Farmer*, (1930), 142 L.T. 526; Digest Supp.
- (5) *Ligon v. Count*, [1945] 1 All E.R. 710; [1945] K.B. 391; 114 L.J.K.B. 404; 173 L.T. 1; 2nd Digest Supp.
- (6) *Hanily v. Minister of Local Government & Planning*, [1951] 2 All E.R. 749; [1951] 2 K.B. 917; 115 J.P. 547; 2nd Digest Supp.
- (7) *Cropper v. Smith*, (1884), 26 Ch.D. 700; 53 L.J.Ch. 891; 51 L.T. 729; *reversd. on other grounds H.L.*, (1885), 10 App. Cas. 249; 55 L.J. Ch. 12; 53 L.T. 330; 21 Digest 272, 902.

APPEAL by the applicant from an order of His Honour JUDGE ARMSTRONG at Poole County Court, dated Nov. 5, 1952, whereby it was ordered that the application for a new tenancy be dismissed. The judge held that no application complying with the Act of 1951 had been filed and that he had no power to allow the application to be amended after the expiry of the period of one month referred to in s. 11 of the Act. He further held that the application, if amended in the manner originally sought, would not comply with Ord. 40A and Form 342A of the County Court Rules, 1936, as amended by the County Court (Amendment) Rules, 1951.

Fay and *P. Back* for the applicant.

Moloney for the respondent.

SOMERVELL, L.J. : This is an appeal from a decision of His Honour JUDGE ARMSTRONG in an application made under the Leasehold Property (Temporary Provisions) Act, 1951. The applicant was the tenant of premises which she had held under a twenty-one years' lease and which included a shop and a dwelling-house. The application was for a new lease on the expiry of the twenty-one years' lease. The application admittedly did not contain certain particulars, as required by the form of application under the rules, to which I shall refer in detail in a moment. The learned judge refused leave to amend so as to bring the application into conformity with that form. In the note which we have, made by the learned judge at the time, he sets out that there was an application to amend, and that the solicitor appearing for the landlord objected. Two cases are referred to, and then he adds,

B "Application for a new tenancy refused on the ground that no application for tenancy complying with the Act has been filed."

There are some extended notes taken at the time of his judgment which were submitted to him, about which I will say a word or two later.

The Leasehold Property (Temporary Provisions) Act, 1951, s. 10 (1), provides:

C "The provisions of this Part of this Act shall have effect for enabling the occupier of a shop under a tenancy to which this section applies . . . to apply to the court for, and subject to the provisions of this Act to obtain, the grant of a new tenancy where apart from the next following section the expiring tenancy would come to an end immediately before the date of the commencement of this Act or within the period of two years beginning with that date, and would so come to an end by effluxion of time or by the expiration of a notice to quit. . ."

D Sub-section (2) provides that the section applies to a tenancy which

" . . . (a) consists of a shop, or (b) consists of a shop and of living accommodation occupied wholly or mainly by the tenant or by a person who is employed by the tenant for the purposes of the retail trade or business carried on in the shop . . ."

E and then para. (c) deals with a case, which I need not refer to in detail, where the shop is separate from the rest of the premises or the shop and the living accommodation are separate from the whole subject-matter of the lease. I think that is all I need refer to in s. 10. Section 11 (1) provides:

F "An application under this Part of this Act for the grant of a new tenancy shall—(a) if apart from this section the expiring tenancy would expire by effluxion of time, not be made later than one month before the date on which that tenancy would so expire . . ."

That is the provision with which we are concerned. Section 12 (1) provides:

G "Subject to the provisions of this section, on an application under this Part of this Act duly made the court may, if in all the circumstances of the case it appears reasonable so to do, order . . ."

—and I am now summarising—that a new tenancy shall be granted. Under sub-s. (2), "The period for which . . . a tenancy may be ordered to be granted shall be a period, not exceeding one year . . ." Sub-section (3) provides for certain events in which the court shall not order the grant of a new tenancy if it is satisfied on certain matters. One which was referred to in argument is that the landlord has offered to the tenant, on terms which appear reasonable, alternative accommodation. Section 18 provides, and there is no point on this, that the county court shall be the court to which the application shall be made subject to the provisions of s. 111 of the County Courts Act, 1934.

H Rules were made under the general rule-making power contained in the County Courts Act, 1934, s. 99, to which it is unnecessary to refer because it is not

suggested that the rules made were ultra vires in any way or that they were not properly made under the rule-making power so conferred. The County Court Rules, 1936, Ord. 40A (as amended by the County Court (Amendment) Rules, 1951) provide that proceedings under the Act shall be commenced by originating application. Rule 3 provides that the respondent shall within eight days file an answer in which certain matters are to be set out. Rule 4 provides for the service of notice in a particular form on superior landlords, if any, and other parties who might be interested. Rule 7 provides:

"The forms in the appendix relating to proceedings under this Act shall be used in the cases to which they are applicable with such variations, if any, as may be required."

Then the form of an Originating Application for a New Tenancy is set out and it contains a number of particulars to be given, the address, the date of the existing lease, the names of the parties, and so on. Before the alleged application there had been negotiations, but they had not resulted in any agreement. The lease was due to expire on Sept. 29, 1952. An application was made on Aug. 28. The question is whether it was an application within the Act. As I have said, it admittedly did not set out all the particulars as set out in the form. It set out that the premises contained a shop and dwelling-house, but it did not set out, as required by para. 2 (h) of the form, the extent of that living accommodation and whether it was occupied by the tenant or a person employed by the tenant for the purposes of the retail trade or business carried on in the shop. There was no suggestion that the shop or the house was separate within the provisions to which I have referred, so I need not read the part of the form which deals with that. The application did not state what is required by para. 2 (k), namely: "State period, rent and other terms and conditions of the new tenancy for which you are applying". Those are the two important matters. There may have been other minor matters, or it may be that all the other matters were set out.

It was submitted, as is clear from the learned judge's note, that the application to amend should be rejected on the same ground as that on which an application to amend is rejected where the Limitation Act, 1939, or the Public Authorities Protection Act, 1893, applies. The learned judge was referred, as we were referred, to *Marshall v. London Passenger Transport Board* (1). We were also referred to another case where amendment was allowed, *Collins v. Hertfordshire County Council* (2). In the first of those cases it was sought to bring in by amendment a claim based on a breach of statutory duty whereas it appeared (though the actual words of the writ do not appear in the report) that the writ, which had been issued in time, was for negligence at common law only. The court held that the amendment introduced a new case which, if set up in an action commenced at the date of the amendment, would have been barred by lapse of time, and the amendment must be disallowed. In *Collins v. Hertfordshire County Council* (2) the amendment was allowed on the ground that it was no more than an amendment of the particulars of the cause of action indorsed on the writ. That indicates the dividing line between those two cases. We were also referred to a decision of DONOVAN, J., *British & Colonial Furniture Co., Ltd. v. William McIlroy, Ltd.* (3). There a somewhat similar point was raised under the Landlord and Tenant Act, 1927, s. 4 (1), which provides that

"The tenant of a holding to which this Part of this Act applies shall, if a claim for the purpose is made in the prescribed manner . . ."

be entitled to certain things. Under s. 25 (1), "The expression 'prescribed' means prescribed by County Court Rules", or the High Court Rules if there were High Court proceedings. The manner was prescribed by rules, but the application in an essential matter did not fulfil what was prescribed. DONOVAN, J., decided that no application had been made in the prescribed manner and that the tenants were, therefore, debarred from proceeding with their claim. If I

may say so with respect, I agree with that decision, because the effect of the words used in that section seems to me to be that one must read into the section of the Act of Parliament the actual form prescribed by the rules, and the Act of Parliament is imperative that the application must be made within a certain time in that form and manner. There are no such words in the Act now under consideration. I have come to the conclusion that the principle of *Marshall's* case (1) and the case to which I have just referred do not apply to this statute.

A It is submitted on behalf of the landlord, as it was submitted to the learned county court judge and accepted by him, as I read his notes, that compliance with all the various matters set out in the form is a condition precedent to an application under the Act. I do not think that that is the proper construction of the Act, read together with the rules made under it. The Act is the governing instrument though questions might arise as to the limits of the rule-making power if the rules had purported to establish conditions precedent other than those which could be gathered from a perusal of the Act alone. That question does not arise because I find nothing in the rules which could be construed in that way. Under s. 11 (1) (a) of the Act there must be not later than one month before the expiry of the existing tenancy an application to the court which, in ordinary language, is an application for a new tenancy under the Act. I think the document which we have before us here comes within that description. I do not think I need elaborate the matter, having indicated, as I have already, the matters which were omitted. So far as the omission with regard to the living accommodation is concerned, it may well be said that that is implied in the fact of making the application because the Act only applies where the premises contain both shop and living accommodation if the living accommodation is used in accordance with s. 10 (2) which I have already read.

D Cases were cited to us regarding the general county court jurisdiction, in one of which SLESSER, L.J., gave a dissentient opinion in the Divisional Court (*Upton v. Farmer* (4)), on the lines that an amendment ought not to be allowed where the original form was defective in that it did not state the amount of damages claimed, and the county court jurisdiction depended on the amount of damages claimed. In *Legon v. Count* (5), the other judgment in *Upton's* case (4), namely, the judgment of SCRUTTON, L.J., was approved, and it was laid down that where proceedings are brought in the county court for damages and the plaintiff fails to specify the amount of damages, the county court judge has power to allow the plaintiff to amend by restricting his claim for damages to an amount within the jurisdiction of the court. I am not saying that, in any event, the principle which appealed to SLESSER, L.J., in the *Upton* case (4) would have applied to an application under this Act. I refer to it as it was referred to in argument, because I think that *Legon v. Count* (5) disposes of that argument if it could ever have been maintained.

F I think the nearest analogy to the present case is to be found in *Hanily v. Minister of Local Government & Planning* (6). That dealt with provisions in the Acquisition of Land (Authorisation Procedure) Act, 1946. The relevant provisions provide that a person aggrieved by a compulsory purchase order who desires to question its validity can, within six weeks, make application to the court. An application was made to the court within the six weeks, but after that period had elapsed and before the notice of motion came on for hearing, the applicant applied for leave to amend her notice of motion by adding a further and separate reason as ground for that conclusion. COHEN, L.J., with whose judgment SINGLETON, L.J., agreed, said this ([1951] 2 All E.R. 752):

H “... it seems to me, therefore, that there is nothing inconsistent with the provisions of the Act in applying to the full the power which the court has under Ord. 28, r. 1, to allow an amendment, provided, of course, that the original notice of motion clearly raised the point that the authorisation was not empowered to be granted under the Act.”

Of course, the words there were different, and the subject-matter was different, but I have come to the conclusion that the original application here clearly raised the point that the applicant was applying for a new tenancy and was alleging that she was within the terms of the Act.

Therefore, with respect, I reject the view which I think was taken by the county court judge, that this application was a nullity. I think the view I have formed is reinforced by the general nature and terms of the form. It contains in brackets indications of the matters which should be dealt with rather than prescribing in a precise way the exact form that must be filed. Rule 7, which refers to the form, says:

“The forms in the appendix relating to proceedings under this Act shall be used in the cases to which they are applicable with such variations, if any, as may be required.”

Those words, I think, themselves indicate that the form is by way of guidance and by way of stating the type of matters which should be dealt with rather than laying down the conditions precedent to a valid application. That being so, therefore, the learned judge had, in my opinion, jurisdiction to consider and should have considered whether he should give leave to amend. It appears from the note which he made at the time that he regarded himself as not having jurisdiction to do so.

It would be more satisfactory and would probably save costs and time if we addressed our minds in this court to the question whether, in the circumstances, leave to amend ought to be given. On that matter I have come to the conclusion that leave to amend, subject to costs, ought to be given. The details do not matter, but it was common ground that there had been negotiations for some time before the actual application was filed. The tenant had indicated that she would like a new lease at an increased rent, and the landlord would have preferred to sell. There was an interview between the parties. The landlord would, as a result, be familiar with the general nature of the premises of which he was the landlord. It was said that the failure to state the amount of the rent was a serious matter in that the landlord might be prepared to grant a lease for such a rent without incurring the costs of legal proceedings. It may be that matter should be dealt with by an order as to costs, but, although I do not think the landlord was under a duty to make inquiries, he could, of course, have asked the applicant what rent she was prepared to pay, and the fact that he could so easily have done that makes it difficult for him to make much of that type of omission in considering whether leave to amend should be given. That the applicant should pay the costs was conceded, because she came to court with an application which was not in order and did not give the details as required by the rules and so had to seek leave to amend. I would grant leave to amend within whatever time may be appropriate and have the matter remitted so that it could be heard, subject to an order that the applicant should bear the costs of the proceedings, and we can hear arguments as to what should be the form and scope of the order. For these reasons, I would allow the appeal.

BIRKETT, L.J.: I am of the same opinion and I can state my reasons in a very few sentences. I am glad to think that the court could come to the conclusion which has been announced by my Lord because it seems to me on the facts of this case to accord with what is right and what is best. The point of the case arose on s. 11 (1) of the Act of 1951:

“An application under this Part of this Act for the grant of a new tenancy shall—(a) if apart from this section the expiring tenancy would expire by effluxion of time, not be made later than one month before the date on which that tenancy would so expire . . . ”

I call that the central part of the case because, as I read this judgment of the

learned judge, that was the dominant point in his mind at all times. The ground which he gave in his own note for the refusal of the application was:

“Application for new tenancy refused on ground that no application for tenancy complying with Act has been filed.”

A When he came to deal in some detail with the matter he referred to the authorities to which my Lord has referred which asserted the principle for which the solicitor on behalf of the landlord contended. The learned judge said of *Marshall's* case (1) and *Hamily's* case (6),

B “These two authorities do, I think, quite clearly establish the principle for which Mr. Miller contends. It is this: If you get a period limited by statute, or rules, duly made, limitations within which the defendant or respondent is entitled to be protected, then no amendment should be allowed in proceedings depriving him of that limitation.”

That refers to the one month under s. 11 (1) (a). Indeed, he says:

“In this case there is a limiting or protecting period of a month on which the landlord is entitled to rely.”

C The view that the learned judge took of the powers to amend were governed by the views he had taken of that principle because he said a little later:

D “Whether indeed there is power to amend does not seem to me to be material. It would be wrong to allow an amendment after practically one month has elapsed. Mr. Miller's suggestion is right and I refuse leave to amend and I am bound to hold the application is bad in form as it does not comply with the rules. The result is I have no power to grant a new tenancy and the application fails.”

E The original application in this case was made on Aug. 28, 1952. The lease expired on Sept. 29, so that was just within the month prescribed by s. 11. My Lord has already expressed the view that this was a proper application because it opens with these words,

F “Madeline Marie Osborne of the Post Office, Upton, Poole, in the county of Dorset, widow, hereby applies to the court for the grant of a new tenancy pursuant to the provisions of the Leasehold Property (Temporary Provisions) Act, 1951, s. 10, as the occupier of a shop under a tenancy to which that section applies. The following are the particulars.”

G Those particulars follow, in the main, Form 342A, which is prescribed under the rules, and the address of the premises, the date of the lease, the names of the parties, the terms, the rent, the mode of termination, are all set out. The concluding matters in the form about the extent of the living accommodation, and things of that kind, are omitted. The objection which was taken in the pleadings by the answer of the respondent was that:

“The originating application does not comply with the provision of the Leasehold Property (Temporary Provisions) Act, 1951, or the rules thereunder.”

H It is quite true that before the actual hearing before the county court judge an amendment had been made, but that does not appear to have been quite accurate or full. The learned judge took the view, after considering the matter with some care, that the question of amendment did not arise because there was no valid application before him. That must necessarily mean that he regarded the provisions of the rules which had not been followed as conditions precedent to the jurisdiction which he was to exercise. I share the view that my Lord has expressed that that was a wrong view to take.

On the question of amendment, I would like to add that, in Ord. 15 (1) of

the County Court Rules, 1936, the directions with regard to amendment are fully set out. The rule says:

"The court may, at any time—(a) amend any defects and errors in any proceedings whether the defect or error is that of the party applying to amend or not; and (b) add, strike out or substitute any person either as plaintiff or defendant; and all such amendments as may be necessary for the purpose of determining the real question in controversy between the parties shall be made, if duly applied for . . . "

In the note to that rule we had cited to us this passage:

"An amendment should always be allowed if it can be made without injustice to the other side, and there is no injustice if the other side can be compensated by costs . . . "

Then there is a quotation from BOWEN, L.J. (in *Cropper v. Smith* (7) 26 Ch.D. 710):

". . . I know of no kind of error or mistake which, if not fraudulent or intended to overreach, a court ought not to correct, if it can be done without injustice to the other party. Courts do not exist for the sake of discipline, but for the sake of deciding matters in controversy, and I do not regard such amendment as a matter of favour or of grace."

In the present case negotiations, which continued for some time, were opened by the landlord in June, 1952, when it was suggested that the property should be sold. The applicant and the landlord met and discussed the matter. The correspondence which continued right down to the end of August ends on the note that the landlord is saying: "I would like to sell", and the applicant is saying: "I would like a lease." In those circumstances, the question whether an amendment should be allowed assumes great importance, but I cannot for myself think that there is any element in this action of any kind which suggests that there would be an injustice or anything approaching an injustice by allowing the amendment which is sought to be made in this case. For these reasons, I agree with the decision which has been already announced by my Lord.

ROMER, L.J.: I also agree and I only add a word or two because we are taking a view of the position different from that which was taken by the learned judge. The main argument presented to us on behalf of the landlord was that there was no effective application before the judge at all because the application which was made failed to conform with the requirements of the County Court Rules, 1936, Ord. 40A. There is no doubt that the application did fail to conform with those rules in certain respects, but that failure cannot have the effect of invalidating the application to such a degree that it must be regarded as not being an application at all. If that were the true view of the matter then, even if the application had been made some months before the date on which the lease expired, the county court judge would have had no power to give leave to amend and would have had to dismiss it out of hand. That would be a most regrettable result, and I do not think that it emerges from a consideration of the Act and the rules. One only arrives at that result if the true view of the matter is that compliance with the various requirements of the form in Ord. 40A amounts to a condition precedent which, unless performed, invalidates the application. It is to be observed that in this form all sorts of things are provided for by way of particulars which should be given, many of them comparatively unimportant, many of them already known to the landlord. I cannot think that, if the Rules Committee had intended that compliance with the form was to be treated as a condition precedent to an application, they would have put into the form so many relatively unimportant matters of detail. It was admitted on behalf of the landlord that some of them are plainly unimportant,

and it was said that failure to comply with those would not invalidate the application. On the other hand, it was argued that failure to comply with those requirements which were of importance would invalidate the application. That is not a tenable way of approaching the matter because either they are all of such importance as to invalidate the application if they are disregarded, or none of them is. Although some of them are of importance, for reasons which my Lord has indicated, and such that the landlord should be acquainted with them as soon as possible, if they were intended to have the drastic effect which the argument for the landlord would result in, they would have been isolated from matters which were not important and they would probably have appeared in the rules themselves and not been relegated to the form. Be that as it may, I quite agree with what my brethren have said, that they cannot have the treatment accorded to them for which the landlord is contending.

The case on which the landlord primarily relied was *McIlroy's* case (3), but that seems to me to have been quite a different matter. That was an application under the Landlord and Tenant Act, 1927, and the application there, by the terms of the statute, could only be made if it was made in the prescribed manner. The application was not made in the prescribed manner, and, therefore, it was not an application of the kind which was required by the Act itself. DONOVAN, J., said that, for that reason, he could not entertain it and could not allow the amendment. It was sought to say that this case was similar to *McIlroy's* case (3) by pointing to the word "duly" in s. 12 (1) of the Act of 1951. It was said that an application cannot be regarded as "duly" made under the Act unless it conforms to the form in the order. I think the word "duly" falls very far short of the words "in the prescribed manner" in the Act of 1927. I think the word "duly" in s. 12 (1) is probably referable to the requirement in s. 11 (1) (a) that the application was "not [to] be made later than one month before the date on which that tenancy would so expire" and it may possibly incorporate or envisage other matters as well. But there is no reason to suppose that it was incorporating as a requirement the due observance in point of form of any rules which might be made in accordance with the Act. It seems to me, therefore, that *McIlroy's* case (3) does not assist the landlord, nor does it drive this court to what is clearly a somewhat unfortunate result—which was the result in *McIlroy's* case (3)—of defeating without hope of amendment an application which, although plainly directed to a certain jurisdiction and invoking that jurisdiction, did not comply in matters of form with the direction laid down or prescribed by the Act. I am glad that we are able to allow this matter to proceed because it is never satisfactory if an application is defeated, merely because of failure in point of form to comply with certain requirements. I agree with the conclusions which my Lord has indicated.

Appeal allowed.

Solicitors: *Church, Adams, Tatham & Co.*, agents for *Trevanion & Curtis*, Poole, Dorset (for the applicant); *Barnes & Butler*, agents for *J. W. Miller & Son*, Poole, Dorset (for the respondent).

[Reported by MISS PHILIPPA PRICE, Barrister-at-Law.]

R. v TALBOT.

[COURT OF CRIMINAL APPEAL (Lord Goddard, C.J., Croom-Johnson and Pearson, J.J.), January 26, 1953.]

Criminal Law—Sentence—Corrective training—Sentence of imprisonment to run concurrently with corrective training—Criminal Justice Act, 1948 (c. 58), s. 21 (1).

If a prisoner is sentenced to corrective training and there are outstanding charges against him for other offences, for which he is sentenced to a term of imprisonment, that sentence of imprisonment must be concurrent with the sentence of corrective training. It cannot take effect at the conclusion of the period of corrective training.

FOR THE CRIMINAL JUSTICE ACT, 1948, s. 21 (1), see HALSBURY'S STATUTES, Second Edn., Vol. 28, p. 371.

APPEAL against a sentence of six months' imprisonment passed at Sheffield Quarter Sessions on the conviction of the appellant, Derek Talbot, on charges of driving while disqualified for holding a driving licence and for using a driving licence with intent to deceive, contrary to the Road Traffic Act, 1930, to take effect at the conclusion of a sentence of three years' corrective training passed at Burnley Borough Quarter Sessions on the conviction of the appellant on a charge of shop breaking and larceny.

R. M. O. Havers for the appellant.

Drabble for the Crown.

LORD GODDARD, C.J., delivered the following judgment of the court. This is a matter referred to this court by the Secretary of State under the Criminal Appeal Act, 1907, s. 19 (a), which provides that the Secretary of State may

" . . . refer the whole case to the Court of Criminal Appeal, and the case shall then be heard and determined by the Court of Criminal Appeal as in the case of an appeal by a person convicted . . . "

The appellant, who has a bad character, was convicted at Burnley Borough Quarter Sessions on Mar. 31, 1952, of shop breaking and larceny, and he received what, in the opinion of the court, was a very proper sentence of three years' corrective training. At that time there were two other charges outstanding against him under the Road Traffic Act, 1930, s. 7 (4) and s. 112 (1) (b) (i), and, on Apr. 22, he was brought before Sheffield Quarter Sessions to answer those two further cases. One was the offence of driving while disqualified for holding a driving licence, and the other was for using a driving licence with intent to deceive (he was using his brother's licence and passed it off as his own). Driving when disqualified is regarded by the legislature as so serious an offence that a person convicted of it can be sent to prison for a term not exceeding six months unless the court can find some special reason for thinking that a fine will meet the case. The offence of using a driving licence with intent to deceive, which is almost equivalent to forgery, is punishable by a maximum sentence of two years. The recorder, hearing that the appellant was already serving a sentence of three years' corrective training, passed concurrent sentences for those two offences of six months to take effect at the conclusion of the period of corrective training.

By s. 21 (1) of the Criminal Justice Act, 1948, a sentence of corrective training can only be passed where a person

" who is not less than twenty-one years of age—(a) is convicted on indictment of an offence punishable with imprisonment for a term of two years or more; and (b) has been convicted on at least two previous occasions since he attained the age of seventeen of offences punishable on indictment with such a sentence . . . "

It follows that a person cannot be sentenced to corrective training for driving when disqualified because that is not a sentence punishable on indictment with imprisonment for two years, but he can be sentenced to corrective training for using a driving licence with intent to deceive. But he can only be sentenced to corrective training for that offence if the appropriate notices have been served under s. 23 (1) and it is shown that he is a person with the necessary previous convictions.

- A The recorder had to pass a sentence of imprisonment for driving when disqualified, and he thought, quite rightly, that the offence of using the driving licence with intent to deceive also deserved a sentence, but, as the notices under s. 23 (1) had not been served, he could not sentence the prisoner to corrective training. The court feels that the only course they can take is to say that the sentences passed by the learned recorder must be concurrent with the sentence of corrective training, and that, in the result, the whole sentence must be served in corrective training, that is to say, the concurrent sentences of imprisonment really have no effect. The appellant will continue to serve the sentence of corrective training. It is very unfortunate, but that seems to be the only result to which we can come on the wording of this Act. As under s. 19 (a) of the Criminal Appeal Act, 1907, we must treat this case as one in which the prisoner has appealed against the sentence—he has, in fact, petitioned the Home Secretary who has referred it to us—we will impose a disqualification for holding a licence to drive a motor vehicle, and we want to see that it takes effect when the prisoner comes out. We have to pass a sentence to take effect from the date of conviction (April, 1952). He has been in prison since March, 1952, so if he earns his remission he will come out of prison in March, 1954, and we think he ought to be debarred from holding a licence for five years from that period. Therefore, the sentence of disqualification will be a disqualification for seven years from Apr. 22, 1952.

Order accordingly.

Solicitors: *Registrar of Court of Criminal Appeal* (for the appellant); *John Heys*, town clerk, Sheffield (for the Crown).

[*Reported by G. A. KIDNER, ESQ., Barrister-at-Law.*]

E

R. v. DAVIES.

- F [COURT OF CRIMINAL APPEAL (Lord Goddard, C.J., Croom-Johnson and Pearson, JJ.), January 14, 26, 1953.]

Criminal Law—Larceny—Addition of charge to indictment for receiving—Evidence of previous conviction of fraud or dishonesty inadmissible—Larceny Act, 1916 (c. 50), s. 43 (1) (b).

- G If, where a prisoner has been charged with receiving stolen property, the prosecution feel that they cannot confine their case to that charge, but must add some other count, be it one for stealing or one for being accessory after the fact to larceny, then, if leave is given to amend the indictment to include a count for either of those offences, the prosecution must refrain from giving evidence under the Larceny Act, 1916, s. 43 (1) (b), of a previous conviction of the prisoner of an offence involving fraud or dishonesty, which evidence would be admissible on the trial of the charge of receiving alone.

H

FOR THE LARCENY ACT, 1916, s. 43 (1), see HALSBURY'S STATUTES, Second Edn., Vol. 5, p. 1038.

Cases referred to:

- (1) *R. v. Jones*, [1948] 2 All E.R. 964; [1949] 1 K.B. 194; 113 J.P. 18; 2nd Digest Supp.
- (2) *R. v. Ballard*, (1916), 12 Cr. App. Rep. 1; 15 Digest 970, 10,843.

APPEAL against a sentence of eight years' preventive detention passed at Bedfordshire Quarter Sessions on the conviction of the appellant on a charge of being an accessory after the fact to larceny.

J. C. G. Burge for the appellant.

N. MacDermot for the Crown.

Cur. adv. vult.

Jan. 26. **LORD GODDARD, C.J.**, read the following judgment of the court. The appellant was convicted at Bedfordshire Quarter Sessions of being an accessory after the fact to larceny.

In view of the course which the appeal took it is only necessary to state the facts very shortly. A man named Cobb stole a headlamp and a six-volt battery and took them to a café of which the appellant was the manager. Subsequently, the appellant was found in possession of the goods and endeavouring to sell them. He was charged with receiving them knowing them to have been stolen. On that charge he was brought before examining magistrates and the prosecution tendered evidence under the Larceny Act, 1916, s. 43 (1) (b), of a previous conviction of an offence involving dishonesty. This was proved by a police officer and was included in the depositions. The appellant was committed for trial only on a charge of receiving and the indictment contained only a count for that offence. Before the arraignment, however, counsel for the prosecution applied for leave to amend the indictment by including a count charging the appellant with being an accessory after the fact to larceny. His object in so doing was because he felt that there might be a difficulty in proving that at the time the appellant received the goods he knew they were stolen, and, as it turned out, his doubt was well founded, for the evidence showed that the appellant was not at the café when the goods were left there and there was nothing to show that he knew that they were stolen when he first took possession of them. He did not become aware that they had been stolen until a later date. Eventually, the count for receiving was abandoned by the prosecution, and on it a verdict of Not Guilty was returned. Before the court gave leave to amend, the learned deputy chairman asked the defending counsel if he had any objection to the amendment, and he said that he had not, although in our opinion, leave, if given at all, ought to have been given only on condition that evidence of the previous conviction was not given.

The attention of the deputy chairman was called to *R. v. Jones* (1) where the appellant was charged both with receiving and with being an accessory after the fact to larceny, and a previous conviction against him of factory breaking with intent was given. The jury acquitted on the charge of receiving and convicted on the accessory counts. This court quashed the conviction, but not on the ground of the reception of that evidence. In giving judgment HUMPHREYS, J., pointed out that advantage had been taken by the prosecution of s. 43 and had proved the previous conviction, and he said ([1948] 2 All E.R. 967):

"This evidence was receivable for the purpose of proving guilty knowledge on the charges of receiving. There was no specific direction to the jury that they must disregard it when considering the charge of being an accessory. It would certainly have been better that the jury should be so directed, but as they acquitted the appellant on the receiving counts to which it specifically related, we think it unlikely that it affected their minds on the other counts."

It was contended that this authority showed that where there was a charge of receiving and also a charge of being an accessory after the fact evidence of a previous conviction could be admitted, provided a warning was given to the jury that, when considering the accessory counts, they must disregard the evidence of previous conviction, and it is only right to say that in his summing-up the learned deputy chairman did give a strong direction to the jury to this effect. At the same time, the passage that I have quoted in the judgment was obiter

A and we may say, without any disrespect, that the court was not directly considering the admissibility of the evidence where there was a charge of being an accessory after the fact, because they quashed the conviction on quite different grounds. It is, perhaps, curious that there is not more authority on this point, and, indeed, the only other case which affords any assistance is *R. v. Ballard* (2). In that case there were counts for stealing and receiving, and objection was taken to evidence of a previous conviction on the ground that, though there was evidence on the stealing count, there was none on the receiving count, and, therefore, the evidence could not be admitted. In giving judgment LORD READING, C.J., said (12 Cr. App. Rep. 4):

B "The section has to be carefully administered, no doubt, and ought not to be used where there are counts for both stealing and receiving for the purpose of getting a verdict on the count for stealing, where the court cannot exclude the evidence as there is a count for receiving; it might induce the jury to convict of stealing on very slight evidence. So if the charge is substantially one of stealing, and not receiving, the evidence ought not to be given."

He goes on to say

C "... but the chairman held that he could not say that the substantial charge was one of stealing, so he felt bound in law to admit the evidence. The court thinks that he was right in that view. They jury found the prisoner guilty of receiving only."

D In our opinion, that case shows the true rule. If the case is substantially one of receiving and is presented to the jury on that footing, so that they are not being asked to find a verdict on some other count, evidence of a previous conviction may be admitted, but it cannot be admitted where there is another charge on which a verdict is sought, and we think that the only right rule to lay down is that, if the prosecution feel that they cannot confine their case to one of receiving, but must also rely on some other count, be it of stealing or of being an accessory after the fact to stealing, then, if they include in the indictment a count for either of those offences they must refrain from giving evidence of any previous conviction. Evidence of bad character or of previous convictions is evidence of a most prejudicial kind and is only allowed in receiving cases because the legislature, no doubt, recognised the difficulty which often arises of proving guilty knowledge in such cases. It must be restricted to those cases. One often has to tell a jury to disregard such matters as the statement which one prisoner makes involving another, but there a jury can often see a very good reason for one prisoner trying to throw the blame on another or to see the other does not escape if he himself is being convicted. Here, it is not a mere casual or accidental piece of evidence bearing unfavourably on the appellant's character. It is a case in which a witness was called to prove, and did prove, a specific conviction.

G No warning could possibly remove that evidence from the minds of the jury, and, accordingly, the court feel they have no option but to allow the appeal and quash the conviction.

Appeal allowed.

Solicitors: *Canter, Hellyar & Co.* (for the appellant); *Burgess & Cheshier*, Bedford (for the Crown).

[Reported by G. A. KIDNER, ESQ., Barrister-at-Law.]

HAINES v. ROBERTS.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Croom-Johnson and Pearson, JJ.), January 26, 1953.]

Street Traffic—Charge of motor vehicle while under influence of drink—"In charge"—Vehicle left in public yard—Road Traffic Act, 1930 (c. 43), s. 15 (1).

Where a person leaves a motor vehicle in a road or public place away from home, he is in charge of that vehicle until he puts it into the charge of somebody else.

Quaere: whether a person remains in charge of a motor vehicle left in a car park where there is an attendant.

FOR THE ROAD TRAFFIC ACT, 1930, s. 15, see HALSBURY'S STATUTES, Second Edn., Vol. 24, p. 589.

Cases referred to:

- (1) *Crichton v. Burrell*, [1951] S.L.T. 365.
- (2) *Dean v. Wishart*, [1952] S.L.T. 86.
- (3) *Adair v. McKenna*, [1951] S.L.T. 40.
- (4) *Leach v. Evans*, [1952] 2 All E.R. 264 ; 116 J.P. 410.
- (5) *R. v. Wallhouse*, (1933), 97 J.P.Jo. 699.

CASE STATED by Monmouth justices.

At a court of summary jurisdiction sitting at Abergavenny on Sept. 10, 1952, the appellant, John Haines, a police superintendent, preferred an information against the respondent, Haydn George Roberts, charging that he, on July 18, 1952, at Abergavenny, was under the influence of drink to such an extent as to be incapable of having proper control of a motor cycle of which he was in charge, contrary to the Road Traffic Act, 1930, s. 15.

It was proved or admitted that on July 18, 1952, the respondent, who was aged seventeen years and eight months and was employed as an engine fireman, went on his motor cycle to Abergavenny where he left it in the yard at the rear of a motor garage. During the evening the respondent, who was with a friend, F., had a good deal to drink, and shortly after 10 p.m. he was seen leaning on a wall of an omnibus station opposite the said garage by two other friends, S. and H., who had themselves spent the evening in a local cinema, were sober, and had not been drinking with the respondent. S. and H. saw that the respondent was drunk. They took him to the back of the omnibus station and asked him how he was going to get home. He told them that he was waiting for some friends and that he wanted a drink. Knowing that there was a water tap in the rear yard of the garage, S. and H. took the respondent to this yard, and, after he had taken a drink of water, they doused his head under the tap, and the respondent went to sleep and did not wake up till about 11.30 p.m. While the respondent was sleeping, F. arrived on the scene and after discussion it was arranged that F. should go and find a fourth friend who was to ride the respondent's motor cycle back to the respondent's home at Llanellen, some four miles away, and get the respondent's father to fetch the respondent. The respondent took no part in, and was not aware of, these arrangements made by his friends. At about 11.55 p.m., before the arrangements were completed, two police constables found the respondent clinging to an upright steel standard in the rear yard of the garage. He was swaying backwards and forwards, his breath smelled strongly of alcohol, and the constables formed the opinion that he was drunk. They shone a torch and saw a pair of gauntlet gloves and goggles hanging out of the respondent's pocket, and within about five feet of the respondent was his motor cycle. The respondent was asked if it was his motor cycle and he replied: "That is my bike, and you leave it alone." The constables tried to find out who the respondent was and where he lived, but he refused to give any information and was truculent and aggressive. When asked if he intended to ride his motor cycle in his condition, the respondent replied: "If I want

to ride that bike, I will ride it, and no one in town will stop me." The respondent was taken to the police station and examined by the police surgeon who found he was under the influence of drink to such an extent as to be incapable of having control of a motor vehicle. The rear yard of the garage was a public place. From the time when S. and H. first saw the respondent they intended to look after him and to prevent him from riding his motor cycle home.

A It was contended on behalf of the appellant (i) that the respondent was in charge of the vehicle when interviewed by the police officers in that he had retained the element of control over the said motor cycle, (ii) that he was not insensible and had in no way authorised or acquiesced in the arrangements which his friends were alleged to have set out to make, (iii) that *Crichton v. Burrell* (1), *Dean v. Wishart* (2) and *Adair v. McKenna* (3) were distinguishable from the present case, B and that *Leach v. Evans* (4) and *R. v. Wallhouse* (5) applied. It was contended on behalf of the respondent that, although he was admittedly under the influence of drink to such an extent as not to have proper control of a motor vehicle, he was not "in charge" of his motor cycle at the time in question, that he had been brought by his friends near to his vehicle at the rear yard of the garage from a place further away, that he had neither the intention nor the ability to ride C the motor cycle, that he could not be said to be "in charge" of it merely because he was the owner, and that his friends would have prevented him from riding the motor cycle.

D The justices were of the opinion that there had been no movement or possibility of movement, nor was the respondent a free agent, because his presence near his motor cycle was involuntary in the sense that he had been brought to the rear yard of the garage by his friends, that they were looking after him, that they would have been able to prevent him from riding or attempting to ride his motor cycle, and that he did not intend to ride his motor cycle. They, accordingly, dismissed the information and the appellant now appealed.

Arthur G. Davies for the appellant.

E *James Campbell* for the respondent.

LORD GODDARD, C.J.: This is a Case stated by justices for the county of Monmouth before whom the respondent was charged with the offence of being under the influence of drink to such an extent as to be incapable of having proper control of a motor cycle of which he was in charge. [HIS LORDSHIP stated the facts and continued:] How can it be said that in those circumstances the F respondent was not in charge of the motor cycle? He had not put it into anybody else's charge. It may be that, if a man goes to a public house and leaves his car outside or in the car park and, getting drunk, asks a friend to go and look after the car for him or take the car home, he has put it in charge of somebody else, but if he has not put the vehicle in charge of somebody else he is in charge of it until he does so. His car is away from home, on the road or in the car park— G it matters not which—and he is in charge. Some day, I daresay, we shall have to decide the question whether, if the car is in a car park and there is an attendant at the car park, the attendant is in charge. That, no doubt, will be a question of fact.

H The justices gave a great deal of attention to this case and had three Scottish decisions cited to them. Those cases have also been cited to us, but they are not binding on us and, I think, they are clearly distinguishable. Here it is clear that the respondent was in charge of the motor cycle until he had given it into somebody else's charge. He was not charged with driving while under the influence of drink. In these circumstances the Case must go back to the justices with an intimation that the offence was proved, and with directions to them to convict and to disqualify.

CROOM-JOHNSON, J.: I am of the same opinion and for the same reasons.

PEARSON, J.: I agree.

Case remitted.

Solicitors: *Torr & Co.*, agents for *H. J. P. Candler*, Abergavenny (for the appellant); *Gibson & Weldon*, agents for *Everett & Tomlin*, Pontypool (for the respondent).

[Reported by F. GUTTMAN, ESQ., Barrister-at-Law.]

A

R. v. NORFOLK QUARTER SESSIONS. *Ex parte* BRUNSON.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Croom-Johnson and Pearson, JJ.), January 20, 1953.]

Criminal Law—Committal—Validity—Inadmissible evidence given before examining justices.

B

Per curiam: The fact that evidence which is not admissible or is given by an incompetent witness is given before examining justices does not vitiate the committal by them of the defendant for trial.

R. v. Grant ([1944] 2 All E. R. 311) and *R. v. Sharrock* ([1948] 1 All E. R. 145), disapproved.

C

AS TO EVIDENCE IN PRELIMINARY EXAMINATION BEFORE JUSTICES, see HALSBURY, Hailsham Edn., Vol. 9, pp. 106-111, paras. 138-142.

Cases referred to:

(1) *R. v. Grant*, [1944] 2 All E. R. 311; 2nd Digest Supp.

(2) *Winsor v. Reginam*, (1866), L.R. 1 Q.B. 390; 35 L.J.M.C. 161; 14 L.T. 567; 30 J.P. 374; 14 Digest 329, 3442.

D

(3) *R. v. Gee*, *R. v. Bibby*, *R. v. Dunscombe*, [1936] 2 All E. R. 89; [1936] 2 K.B. 442; 105 L.J.K.B. 739; 155 L.T. 31; 100 J.P. 227; Digest Supp.

(4) *R. v. Sharrock*, [1948] 1 All E. R. 145; 112 J.P. 162; 2nd Digest Supp.

MOTIONS for mandamus and to bring up and quash an order for costs.

E

On a date in May, 1952, an Austin A.40 motor car No. 18BC92 was stolen from some military barracks near Colchester, and on May 24 it was found at a garage near Thetford owned by the respondent, Harry Fletcher. The police made inquiries about the car and Fletcher's account was such that the police arrested him. At the same time they arrested his son, Michael Fletcher, who was suspected by them of having been concerned in the theft with his father. The two men were handed over to the Essex police who took them to Colchester Police Station where the superintendent exercised his powers under the Criminal Justice Administration Act, 1914, s. 22, and the Criminal Justice Act, 1925, s. 45, and bailed the two men on their entering into recognizances to appear at such times and at such places as they might be required. The Essex police later decided not to go on with the case and gave notice to Harry and Michael Fletcher that their recognizances were at an end. Subsequently, Harry Fletcher was arrested by the Norfolk police, an information was laid against him charging him with receiving the car in question, and he was brought before the examining justices at Thetford. No charge was made against Michael Fletcher, but before the justices he was called as a witness for the prosecution. Harry Fletcher was committed for trial at the Norfolk Quarter Sessions where the indictment against him was quashed on the ground that Michael Fletcher had been charged jointly with him with stealing the car, that the charge had not been determined by process of law, and that, consequently, Michael Fletcher was not a competent witness. Quarter sessions, in the exercise of their discretion, also made an order that the costs of Harry Fletcher should be paid out of local funds. The applicant, George Brunson, an inspector of the Norfolk Constabulary, now applied for the order as to costs to be quashed and that

F

G

H

an order of mandamus should issue to the quarter sessions to hear and determine the indictment against Harry Fletcher.

Howard, Q.C., and F. P. Keysell for the applicant.

Head for the respondent.

Lionel Thompson for the justices.

A LORD GODDARD, C.J., stated the facts and continued: It is not necessary for us to go into the question whether a charge had been preferred against Michael Fletcher or not, for I am clearly of opinion that no charge had been preferred which made it improper for him to be called as a witness in the case. There was, indeed, no charge. He had been taken into custody and released on bail, and in due course the police told him that he need not surrender, and he did not do so. But this case is one of great importance, because, B if, in different circumstances, we had to give effect to this submission and uphold the quarter sessions, it would, so far as I can see, mean that, if any inadmissible evidence be given before justices when they are acting as examining justices, that vitiates the committal of the defendant by them. It is true that a judgment in *R. v. Grant* (1) given on circuit by BIRKETT, J., when, no doubt, C he had not had the opportunity of as full an argument and of cases being cited as we have had, seems to have been to that effect, and his judgment was followed by LEWIS, J., in *R. v. Sharrock* (4), but consider what it means. If a committal is to be vitiated because an incompetent witness has given evidence, which means that the evidence is wrongly admitted, it would follow that a committal could always be objected to if it could be shown that there was something on the depositions which could not be legally admitted as evidence. That would D be very revolutionary. I think that *R. v. Grant* (1) is, perhaps, to be explained by the fact that BIRKETT, J., strongly disapproved of what had been done in that case and thought that the witnesses who had been called were called in a way that was unfair, or it might have been they were put in the position of having to incriminate themselves. It is interesting to notice that counsel E in which it was expressly decided by a court of the highest authority—the Exchequer Chamber upholding the decision of the Queen's Bench—that, if two people are indicted together, although it is an undesirable practice—and I have no doubt nowadays it would never be allowed—there was nothing in law to prevent the Crown calling one prisoner as a witness for the Crown though the proceedings against him had not been determined. It may be that the F Criminal Justice Acts, 1855-1948, have put difficulties in the way of that case being followed, but we need not consider that because I am willing to admit for the purposes of this argument that Michael Fletcher should not have been called before the justices and his depositions taken.

G On that assumption, it might well be that at the trial objection could have been taken to his evidence, but the words of the Indictable Offences Act, 1848, s. 17, are:

H “ . . . in all cases where any person shall appear or be brought before any justice or justices of the peace charged with any indictable offence . . . such justice or justices, before he or they shall commit such accused person . . . for trial, or before he or they shall admit him to bail, shall, in the presence of such accused person, who shall be at liberty to put questions to any witness produced against him take the statement on oath or affirmation of those who shall know the facts and circumstances of the case, and shall put the same into writing, and such depositions shall be read over to and signed respectively by the witnesses who shall have been so examined . . . ”

That section took the place of statutes which were passed as long ago as the reign of Philip and Mary to regulate the procedure before justices. There

were two statutes, one dealing with bailable and the other dealing with non-bailable offences. In those days the duty of a justice when a person appeared before him charged with an offence was, first, to examine the prisoner, which, of course, cannot be done now, and then he reduced what he could obtain from the prisoner into writing. Then, but not in the presence of the prisoner, he examined any witnesses, or, to use the language of the Act, "persons", who should know the facts and circumstances of the case. Having taken their statements, which were, no doubt, in those days referred to as depositions, but which were not the same as depositions at the present time, they sealed them and sent them with a writ of mittimus to be used at the assizes, and one of the principal pieces of evidence was what the justice had got from the prisoner. Those statutes remained in force until Jervis's Act, the Indictable Offences Act, 1848, which prescribed what was to be done by committing justices. They were to take the depositions in writing, and that had to be done in the presence of the prisoner, who was entitled to cross-examine. If the provisions of that section are not complied with, the committal is bad, and that is what the Court of Criminal Appeal decided in *R. v. Gee*, *R. v. Bibby*, *R. v. Dunscombe* (3) where, instead of taking depositions in the way prescribed by the Act, statements had been obtained from witnesses and they were read over in court. Speaking for myself, I should have thought it would be a very good thing if something like that could be permitted because it would save an enormous amount of time, but it is not permitted, and, as the depositions had not been taken as prescribed by the Act, the court held that the committal was bad. But no court has suggested that, because justices in taking depositions admit some evidence that is not admissible or hear a witness to whom, it turns out, objection could be taken on some point or another, that vitiates the committal. The committal takes the place of the form of presentment by a grand jury, who could hear what evidence they liked or no evidence at all, and now the matter is dealt with by the Administration of Justice (Miscellaneous Provisions) Act, 1933, s. 2 (1), which makes a committal by justices equivalent to a presentment by grand jury. Therefore, so long as it is once shown that justices have acted in accordance with the Indictable Offences Act, 1848, their committal is a good committal. Whether the evidence that has been given before the justices will be admitted at the trial is another matter.

If we gave effect to the argument which has been advanced and did not disapprove of *R. v. Grant* (1) and *R. v. Sharrock* (4), it must follow, it seems to me, that any inadmissible evidence given before justices, that is to say, any evidence which the court of trial comes to the conclusion is inadmissible, would vitiate the whole committal. I cannot see the difference between the admission of inadmissible evidence or the admission of the evidence of a witness who is incompetent. During the argument I instanced a case in the Court of Criminal Appeal in which a wife had been called to give evidence against her husband on a charge of larceny, and we quashed the conviction on the ground that the evidence of the woman was the evidence of an incompetent witness although no objection had been taken in the court below. She had also given evidence before the justices, but no one had suggested that the committal was bad. In the present case there was no ground on which quarter sessions could properly refuse to try the indictment. Their order quashing the indictment must be quashed as also the order giving costs, and mandamus must go to them to hear and determine the case.

CROOM-JOHNSON, J.: I am of the same opinion. If the argument which has been advanced is right and the committal was bad, that does not mean that the prisoner of necessity goes free, for the court in a proper case, where there has been some irregularity, can send the matter back to the justices so that they can hear evidence properly in accordance with the statute. I cannot see that there was anything in any evidence which Michael Fletcher

might have given, if called on to give evidence at quarter sessions, which could be said to be inadmissible evidence. What happened when these two people were released by the Essex police cannot in the least affect his competence to give evidence. Whether it was desirable that he should be called to give evidence is a wholly different matter. It is true that a prisoner on trial is not permitted to give evidence as against a fellow prisoner unless it is clearly established that the proceedings against him have come to an end either by his being acquitted or convicted or by his pleading Guilty and being dealt with by the trial tribunal. I am at a loss to understand how in the circumstances this man was in the least incompetent as a witness.

PEARSON, J.: I also agree with the judgment proposed, and with the reasons given by my Lord. I would only like to say that, to my mind, the short point here is that it is not shown that there was any infringement in the taking of the depositions of the provisions of the Indictable Offences Act, 1848, s. 17. The requirement there laid down is that the justices shall take the statements on oath or affirmation of those who "know the facts and circumstances of the case". That wording, especially having regard to the history of the section which has been described, seems to me very different from other wording which there might have been—that they should take the evidence of only such witnesses as would be admissible according to the rules of evidence at the trial. This contemplates, to my mind, a much less formal inquiry. The object of the section is that the depositions of those who know the facts and circumstances of the case should be taken, and it is not in the least established here that there was any infringement of that provision. The second observation I want to make is that I thought that the argument of counsel for the respondents might depend to some extent on definite meanings which might be given to the word "charged". In a sense a prisoner may be charged at the moment when a policeman arrests him without warrant on suspicion of felony and there is some obligation to inform the arrested person for what he is being arrested. There may be further action taken by the police at the police station, but it does not follow that what happens at those earlier stages makes the person arrested charged in the relevant and material sense, which I should have thought means that an information has been laid against him so that the proceedings against him have at that stage been started. I am not satisfied that he can be said to be charged in any sense material for the purposes of this case until an information has been laid. I agree that the orders should issue.

Orders of quarter sessions quashing indictment and granting costs, quashed.

Order of mandamus issued to quarter sessions to hear and determine the indictment.

Solicitors: *Ford, Michelmores, Rose & Binning*, agents for *T. E. Rudling & Co.*, Thetford (for the applicant); *Peacock & Goddard*, agents for *Reed, Wayman & Walton*, Downham Market (for the respondents); *Sharpe, Pritchard & Co.*, agents for *H. Oswald Brown*, clerk of the county council, Norwich (for the justices).

[Reported by MICHAEL MALONEY, ESQ., Barrister-at-Law.]

GRIMSHAW v. DUNBAR.

[COURT OF APPEAL (Jenkins and Morris, L.JJ., and Roxburgh, J.), January 15, 1953.]

County Court—Appeal—New trial—Discretion of county court judge to allow—No reason given for refusal—Power of Court of Appeal to review facts and reverse decision—County Court Rules, 1936, Ord. 37, r. 2—County Courts Act, 1934 (c. 53), s. 105.

On June 5, 1952, a landlord commenced an action for possession against the tenant of a dwelling-house within the Rent Restrictions Acts on the ground of non-payment of rent. On June 30, 1952, the tenant paid the arrears of rent into court, with costs, and was then told by an official of the county court that it was unnecessary for him to attend the hearing of the action. On July 3, 1952, the action was heard, and, in the absence of the tenant, an order for possession on Nov. 3, 1952, was made in favour of the landlord. On Sept. 23, 1952, the tenant served notice of his application to have the order set aside under the County Court Rules, 1936, Ord. 37, r. 2. After an adjournment, the application was heard on Oct. 28, 1952, when the proceedings lasted only a few minutes and the county court judge dismissed the application, but extended the time for giving possession until Jan. 1, 1953. No reasons for the dismissal were given.

HELD: although no reasons are given by a judge exercising, or refusing to exercise, a discretionary jurisdiction, it may, nevertheless, be possible, on looking at the facts, to say that, if he had taken all the relevant circumstances into consideration and had excluded from consideration all irrelevant circumstances, he could not possibly have arrived at the conclusion to which he came, because on those facts that conclusion involves a palpable miscarriage of justice; in the present case the matters which the judge ought to have considered were (a) the reason for the tenant's failure to appear when the case was heard, (b) whether there had been undue delay in making the application so as to prejudice the landlord, (c) whether the landlord would be prejudiced by an order for a new trial so as to render it inequitable to permit the case to be re-opened, and (d) whether the tenant's case was manifestly insupportable; had the judge paid due regard to those considerations he must have exercised his discretion under Ord. 37, r. 2, in favour of the tenant; and, therefore, the judge had proceeded on a wrong principle which amounted to an error in law and a new trial would be directed on terms as to costs.

Dick v. Piller ([1943] 1 All E.R. 627), applied.

Per JENKINS, L.J.: In certain circumstances, the word "may" in Ord. 37, r. 2, should in effect be construed as "must".

AS TO CASES IN WHICH APPEAL LIES FROM A COUNTY COURT, see HALSBURY, Hailsham Edn., Vol. 8, pp. 376-380, paras. 809-813; and FOR CASES, see DIGEST, Vol. 13, pp. 525-527, Nos. 751-787.

Cases referred to:

- (1) *Dick v. Piller*, [1943] 1 All E.R. 627; [1943] K.B. 497; 112 L.J.K.B. 410; 169 L.T. 26; 2nd Digest Supp.
- (2) *Evans v. Bartlam*, [1937] 2 All E.R. 646; [1937] A.C. 473; 106 L.J.K.B. 568; *sub nom. Bartlam v. Evans*, 157 L.T. 311; Digest Supp.
- (3) *Jones v. S.R. Anthracite Collieries, Ltd.*, (1920), 90 L.J.K.B. 1315; 124 L.T. 462; 13 B.W.C.C. 346; 34 Digest 390, 3169.
- (4) *Dellenty v. Pellow*, [1951] 2 All E.R. 716; [1951] 2 K.B. 858; 2nd Digest Supp.

APPEAL by the tenant from an order of His Honour JUDGE SIR GERALD HURST, Q.C., at Bromley County Court, dated Oct. 28, 1952, whereby he refused an application for a new trial.

Sofer for the tenant.

E. D. Smith for the landlord.

JENKINS, L.J.: The action of which the tenant desires a new trial was commenced on or about June 5, 1952, and was a claim for possession by the landlord of certain rent-restricted premises on the ground that the tenant was in arrear with his rent. The particulars of claim allege no other ground for possession beyond the fact of the arrears, and there is claimed in addition, as is usual, the rent in arrear down to the issue of process and thereafter mesne profits at the same rate to the date of hearing or judgment. On June 30, 1952 (i.e., three days before the hearing of the summons, which came on before the learned judge on July 3), the tenant paid into court the full amount claimed, and costs. He says, and it has not been disputed before us, that he was misled by information he obtained from an official at the offices of the county court. I understand that when he saw the official on June 30, in connection with paying the money into court he asked whether, if he paid the full amount claimed into court, it would be necessary for him to be present at the hearing or would the summons in that event automatically stand dismissed or not be the subject of any order. He says that the official informed him that in the circumstances it was unnecessary for him to attend. That advice was, of course, erroneous. At the hearing on July 3, 1952, the learned judge heard the landlord's side of the matter, but the tenant did not appear, and on that *ex parte* hearing the learned judge appears to have come to the conclusion that, notwithstanding the payment into court, it would be reasonable to make an order within the meaning of the relevant provisions of the Rent Restrictions Acts. He made an order accordingly for possession of the premises on Nov. 3, 1952. A few days later the tenant received a copy of it, but he appears to have taken no step for some weeks, for it was not until Sept. 23, 1952, that he served notice of his application to have the order of July 3, 1952, set aside. That I understand to be the proceeding which is accepted for the present purpose as sufficiently intimating a request for a new trial. The matter did not come effectively before the learned judge until Oct. 28, 1952, and the only record with which we have been supplied of what took place before him on that occasion is a memorandum in these terms:

"This application was made on Oct. 28, 1952, and was dismissed, but the time for giving possession was extended to Jan. 1, 1953. No further application can be entertained. This is a final order. Costs of 10s. have been allowed which sum must be paid into court on or before Nov. 11, 1952."

There appears to have been no evidence before the learned judge in support of the application, the matter being dealt with in a few minutes. We have before us an affidavit filed on the part of the tenant which sets out his story about the mistaken advice he received from the county court official and his receipt of the order awarding possession against him. He explains that he issued the application for a new trial on Sept. 23, 1952, and that the application was originally fixed to be heard on Oct. 14, but, as I have said, it did not in the end come effectively before the learned judge until Oct. 28, 1952. In the last part of the affidavit it is stated:

"At the plaintiff's solicitors' instance the hearing of the said application was adjourned to Oct. 28, 1952. I appeared on that day before the learned county court judge when he refused my said application."

It will be observed that nothing is said as to the learned judge's reasons for refusing the application.

Those are the facts, and the question is whether the tenant has made out such a case of error of law on the part of the learned judge as would entitle this court to vary the order refusing a new trial which he made in exercise

of the discretion reposed in him under the County Court Rules, 1936. The relevant rule is Ord. 37, r. 2:

"(1) Where a defendant to an action or a defendant to a counterclaim does not appear at the hearing and a judgment or order is given or made against him in his absence, the judgment or order and any execution thereon may on application be set aside and a new trial may be granted. (2) The application may, if the parties are present, be made on the day on which the judgment or order was given or made, and in any other case shall be made on notice. (3) The application shall be made to the judge if the judgment or order was given or made by the judge and in any other case to the registrar."

It will be observed that the form of the rule is that "the judgment or order and any execution thereon *may* on application be set aside and a new trial *may* be granted". In other words, the rule is couched in language appropriate to the vesting of a discretion in the judge.

I should next say a few words about the principles on which this court acts in considering whether a case is made for interference with the exercise of a judicial discretion in the county court. The most useful case for that purpose is, I think, *Dick v. Piller* (1), a decision of the majority of the Court of Appeal, consisting of SCOTT, L.J., and CROOM-JOHNSON, J., *DU PARCQ*, L.J., dissenting. The case concerned an exercise by a county court judge of his discretionary power by refusing an adjournment sought owing to the illness of a witness, and the effect of the decision is that when a witness in, or a fortiori a party to, an action in a county court is alleged to be prevented by illness from attending the court for a hearing of the case and the judge is satisfied of the fact of his illness and of the materiality and importance of his evidence and that the granting of an adjournment will not cause an injustice to the other party which cannot be reduced by costs, it is the duty of the judge to grant an adjournment, it may be on terms, and failure on his part to do so constitutes a miscarriage of justice which necessarily involves an error of law on which an appeal may be founded. SCOTT, L.J., put his view of the matter thus ([1943] 1 All E.R. 628):

"The only question in the appeal is whether the judge erred or misdirected himself in law in refusing the particular adjournment. *DU PARCQ*, L.J., thinks that, if the judge erred, his error was an error of fact. *CROOM-JOHNSON*, J., thinks there was an error of law. I have read both judgments with care, and agree with the conclusion arrived at by the latter, although I agree with the former that, if the refusal of the adjournment had been an exercise of discretion on a pure question of fact, no appeal would have lain under the County Courts Act, 1934, s. 105. Upon the facts relating to the application for adjournment, I think the judge caused a serious miscarriage of justice, and that, in doing so, he neglected a first principle of law, for he deprived the defendant of his elementary right to be heard before he was condemned."

DU PARCQ, L.J., in his dissenting judgment, found himself unable to discern a question of law in the matter, but in the course of his judgment (*ibid.*, 632) he referred to this well-known passage from the judgment of LORD ATKIN in *Evans v. Bartlam* (2) ([1937] 2 All E.R. 650):

"Appellate jurisdiction is always statutory; there is in the statute no restriction upon the jurisdiction of the Court of Appeal, and, while the appellate court, in the exercise of its appellate power, is no doubt entirely justified in saying that normally it will not interfere with the exercise of a judge's discretion except on grounds of law, yet, if it sees that, on other grounds, the decision will result in injustice being done, it has both the power and the duty to remedy it."

A It should be noted that the discretion to which *Evans v. Bartlam* (2) related was a discretion exercised by a judge of the High Court, and, therefore, their lordships were not embarrassed in that case with the effect of the County Courts Act, 1934, s. 105, but from the passage in the judgment of SCOTT, L.J., to which I have already referred it will be seen that, in the view of the learned lord justice, similar considerations apply on appeals against an allegedly improper exercise of discretion by a county court judge. CROOM-JOHNSON, J., dealt with the matter on what I may, perhaps, describe as rather more conventional lines. He summed up his view in these terms ([1943] 1 All E.R. 635):

B “It has, I think, always been maintained that an exercise of judicial discretion on a wrong principle is appealable. To exercise it on wrong considerations or on wrong grounds, or to ignore some of the right considerations, is, in my judgment, to decide on wrong principles. The effect of the judge’s order was to reject in advance the defendant’s evidence altogether. Why? Apparently, if we are to accept the addendum to his note, on the ground that there was no affidavit in support of the [medical] certificates or verifying them.”

C The judge went on to say that this was not a sufficient ground.

D Applying the observations I have just quoted from the judgment of CROOM-JOHNSON, J., to the present case, did the judge here exercise his discretion on wrong considerations or wrong grounds, or did he ignore some of the right considerations? If so, then he decided on wrong principles, his error was a matter of law, and this court can interfere. It was argued before us for the landlord that it has not been shown that the judge took anything into consideration which he ought not to have taken into consideration or failed to take into consideration anything which he should have taken into consideration. We are told nothing more than the bare fact that the application for a new trial was made and dismissed. There is this amount of force in that submission, that *prima facie* it is the duty of an appellant to provide the court with a sufficient record of what took place before the learned judge to enable this court to understand and deal with the matter, but I think the truth here is that the application for a new trial was actually disposed of in the matter of a very few minutes, and the judge does not appear to have given any reasons. If he had given any reasons, no doubt, the solicitors present would have made a note. In the result, we have the facts which I have stated, and we have the judge’s refusal recorded, so far as we are concerned, without reasons, and nothing more.

E Can it be said in those circumstances that the judge demonstrably proceeded on some wrong ground or excluded something from consideration which he ought to have considered? In my view, although no reasons are given by a judge exercising, or refusing to exercise, a discretionary jurisdiction, it may, nevertheless, be possible, on looking at the facts, to say that, if the judge had taken all the relevant circumstances into consideration and had excluded from consideration all irrelevant circumstances, he could not possibly have arrived at the conclusion to which he came, because on those facts that conclusion involves a palpable miscarriage of justice. Thus, one gets back, in effect, to the way in which the point was dealt with by SCOTT, L.J., in *Dick v. Piller* (1).

H What were the matters to be taken into consideration here? Far be it from me to attempt an exhaustive statement of the considerations which should influence a judge in exercising his discretion under Ord. 37, r. 2; but I can, at all events, state a few considerations which are of the first importance. It is to be observed that in certain circumstances “may” in r. 2 should, I apprehend, in effect be construed as “must”. Suppose a case where a defendant, plainly through no fault of his own, arrives five minutes after an order against him has been made and perfected in his unavoidable absence. If in

such a case the defendant forthwith applies for a new trial, acting as promptly as he possibly can, it seems to me difficult to see how a learned county court judge could be justified in refusing to exercise his discretion in favour of that defendant—at all events, on suitable terms as to costs, but, perhaps, in an extreme case such as I have mentioned, not even on any special terms as to costs. With that in mind I will mention some of the main considerations which I conceive should be regarded in the exercise of the learned judge's discretion. First, although there is no hard and fast rule about it, as LORD ATKIN pointed out in *Evans v. Bartlam* (2) ([1937] 2 All E.R. 650), it must be material for the learned judge to know why it was that the defendant failed to appear on the proper day when the case came into the list and was heard. How does this case stand as regards that matter? There is the undisputed statement of the tenant which he has put on oath before us to the effect that his absence was due to the wrong advice which he received from one of the officials of the court. One starts with that. The difficulty in which he finds himself is due to the fact that an official of the court unwittingly misled him. Secondly, has there been any undue delay by the absent party in launching his proceedings for a new trial? In answering that question I venture to think that delay in itself would not be important, but delay prejudicing the other party or delay which would enable rights of third parties to intervene would be most material. How does the matter stand here as regards delay? The tenant did not move in the matter until, I think, Sept. 23, 1952, i.e., some six weeks or so after he received the copy of the order, but in estimating the importance of that lapse of some six weeks it is right, I think, to bear in mind that the original order for possession did not direct possession to be given up until Nov. 3, 1952, so that at the date when the tenant launched his application there was plenty of time left for a new trial to be held without embarrassing the landlord (assuming him to be successful on the new trial) by having the tenant in his house for a longer period than he would otherwise have been and, therefore, perhaps impeding him in some future disposition or letting of the house. In this case, therefore, I should not say that there had been any undue delay, and that conclusion is reinforced by the circumstance that when this application did come before the learned judge and he refused it he granted the tenant an extension of time for giving up possession to Jan. 1, 1953. So the learned judge cannot have thought that there had, up to the time the matter came before him on Oct. 28, been any delay which would prejudice the landlord. The learned judge could on the same day have granted a new trial with every prospect that the new trial would be held before Jan. 1, 1953. Thirdly, will the landlord in this case be prejudiced by an order for a new trial? There may be cases where the order sought to be set aside has been acted on and circumstances have arisen (generally linked, I should say, with some undue delay or other dereliction on the part of the defendant) which would make it unfair or inequitable that the case should be re-opened. I see nothing in the facts of the present case which could be said to make an order for a new trial prejudicial to the landlord in any respect which could not be adequately compensated by a suitable award of costs.

There is a more debatable point, as I regard it, as to how far the learned judge should consider the prospects of success of the party applying for a new trial. No doubt, the learned judge is entitled to satisfy himself that the party applying has a bona fide intention of defending the action and that there is some possibility of his doing so with success. For example, I apprehend that, if an admitted and self-confessed trespasser allowed judgment for possession to go in default in his absence, the learned judge would be entitled, on an application for a new trial, to refuse on the ground that he was palpably a trespasser, and could not, whatever evidence he gave, possibly justify his presence in the house. Short of cases of that kind I think that a new trial should

seldom, if ever, be refused merely on the ground that the applicant's case appears a weak one, and it is, moreover, difficult to see how the tenant's case here could on the face of it be classed as obviously weak in view of the payment into court. Be that as it may, a party to an action is *prima facie* entitled to have it heard in his presence. He is entitled to dispute his opponent's case and cross-examine his opponent's witnesses, and he is entitled to call his own witnesses and give his own evidence before the court. If by some mischance or accident a party is shut out from that right and an order is made in his absence, then common justice demands, so far as it can be given effect to without injustice to other parties, that that litigant who is accidentally absent should be allowed to come to the court and present his case, no doubt on suitable terms as to costs, as was recognised in *Dick v. Piller* (1).

While I have felt considerable hesitation in finding that this is a proper case in which to interfere with the judge's discretion—in particular, a discretion exercised by so careful and experienced a judge as SIR GERALD HURST—I have come to the conclusion that on the facts the learned judge could not have done otherwise than order a new trial on suitable terms as to costs if he had paid due regard to the considerations properly relevant to the exercise of his discretion, and to those considerations only. For these reasons I would allow the appeal.

MORRIS, L.J.: I have reached the same conclusion, and I only add a few words because I have formed a view different from that reached by the county court judge. When the application for a new trial came before him on Oct. 28, 1952, it appears that it was accepted that the tenant had, in fact, been told before the date fixed for the action by some official in the court that it was not necessary for him to attend on the date appointed for the hearing of the action. That being so, it seems to me that the tenant showed a very compelling explanation for his non-attendance at the hearing, and he advanced very strong grounds in support of his application that there should be a re-hearing. He had never been heard; his case had never been before the learned judge. That was not the fault of the landlord, but the tenant had this rather unusual, but satisfactory, explanation, the accuracy of which was, apparently, not doubted. That being so, it seems to me that, in the absence of some very good reason, the application for a new trial should have been acceded to, and I think further that, in the absence of some such good reason, not to accede to the application involved proceeding on a wrong principle in such a way as to amount to an error in law. If there was such an error in law, then the matter becomes appealable to this court within the provisions of the County Courts Act, 1934, s. 105, which provides that if any party to any proceedings in a county court is dissatisfied with the determination or the direction of the judge in point of law or equity, or on other grounds which I need not mention, then he may appeal to this court.

In my judgment, *Dick v. Piller* (1), decided in this court, is authority supporting the view to which I have referred. I make one further citation from *Dick v. Piller* (1) in addition to those which my Lord has made. I refer to the concluding words in the judgment of SCOTT, L.J., who was one of the majority in the court. He said ([1943] 1 All E.R. 630):

“*Jones v. S.R. Anthracite Collieries, Ltd.* (3) in the Court of Appeal is authority that the question raised by this appeal is covered by the County Courts Act, 1934, s. 105, and, I think, affords some support to the view which I take that, where a miscarriage of justice, such as I think took place here, occurs, it necessarily involves an error of law.”

I, therefore, think that, unless there was some good reason pointing to a different result, there was a compelling case in favour of acceding to the application made, and that not to accede to it did, in the circumstances of this case,

involve proceeding on a wrong principle, which, in turn, amounted to an error in law. It has been said that on Oct. 28, 1952, the learned county court judge went into the matter, and that, in effect, he came to the conclusion that there was nothing to try, or that on a re-trial the result must have been reached which was reached originally in the absence of the tenant. I think that if, on an application for a re-trial within Ord. 37, r. 2, it is quite manifest to a judge that there is really nothing to be tried, or if there are some special circumstances which make it clear that on a re-hearing the same result as that already announced must again be reached, then it may well be that a learned judge could refuse an application. But I cannot regard the facts of the present case as being within any such principle. In *Dellenty v. Pellow* (4), in this court, JENKINS, L.J., in delivering his judgment, with which the other members of the court agreed, said ([1951] 2 All E.R. 716):

"I would agree that, prima facie, where possession is sought on the ground of non-payment of rent . . . and the tenant pays the rent into court or tenders the rent before judgment, it would not be reasonable to make an order for possession . . ."

That being so, on the facts of this case, as the rent was paid into court, prima facie it would not be reasonable to make an order for possession. The learned lord justice went on to say (*ibid.*):

"In the present case, however, the evidence showed that there had been a long history of default on the part of the tenant, and time after time it had been necessary to issue a summons against him before the rent could be extracted from him. This time again he allowed his rent to fall into arrear for more than a year and did not pay until the summons was issued and the case was about to be heard."

We have been told that on Oct. 28, 1952, the tenant did not give evidence on oath, that the hearing took a matter of minutes, and that the learned judge did not feel it necessary to make any notes of the points that were before him. It seems to me that it would require a careful examination of the history of the case before any conclusion could be reached in regard to the question whether it was reasonable to make an order for possession. The tenant had not gone to court on Oct. 28 prepared to argue his whole case, nor, so far as we can ascertain, did anything in the nature of a hearing of the case take place, nor was it the appropriate time for such a hearing. It could not possibly, in my judgment, be said that there was not a very substantial matter to be heard. The matter could not be disposed of in the course of a few minutes, and would require investigation of all the facts and would require also comparison of the facts, when ascertained and when explanations were received and considered, with the facts in *Dellenty v. Pellow* (4). Each case must obviously depend on its own facts. I cannot, therefore, accede to the view that what took place on Oct. 28 demonstrated either that there was nothing to be tried, or that in any event the landlord must on a re-hearing have received judgment. There was a case to be tried. I think that, in view of the explanation given, and not challenged, why the tenant had not been present at the hearing of the case, compelling reason was shown why he should be allowed to have a re-hearing.

ROXBURGH, J.: I agree. The explanation which the tenant offered for his non-attendance at the trial was compelling, and there is no reason to think that any doubt was thrown on its truth. Therefore, the learned judge, in refusing the application for a new trial, must have been actuated by some consideration of weight and importance. It cannot have been delay, for the reason which my Lord has already given. What, then, can it have been? It must, I think, have been that the judge thought that the tenant was unlikely to succeed if there was a re-trial. In my view, as a matter of law,

he was not entitled to adopt that attitude at that stage. As has already been pointed out, on the authority of *Dellenty v. Pellow* (4) (where, as in this case, the rent was paid into court before the hearing) prima facie there must have been a case to be tried because it would rest on the landlord to prove that in the circumstances of the case that prima facie rule should be departed from. By "evidence" in the passage quoted by MORRIS, L.J., from the judgment of JENKINS, L.J., in *Dellenty v. Pellow* (4), was meant, not a mere statement of some advocate dealing with an application for a new trial, but evidence taken in the ordinary way at a trial, cross-examined to if the other side desired to cross-examine to it, and accepted after hearing any counter-evidence. Therefore, in my judgment, this appeal should be allowed.

Appeal allowed.

Solicitors: *H. E. Thomas & Co.* (for the tenant); *Weller & Birrell* (for the landlord).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

Re JONES (deceased). MIDLAND BANK EXECUTOR AND TRUSTEE CO., LTD. v. JONES AND OTHERS.

[CHANCERY DIVISION (Danckwerts, J.), January 22, 1953.]

Will—Forfeiture clause—Forfeiture on annuitant, in opinion of trustee, having "social or other relationship" with named person.

By his will a testator directed his trustee to purchase an annuity in the name of the trustee in favour of the testator's daughter D. and to pay the income produced thereby to the said D. in such manner as the trustee should in its uncontrolled discretion appoint, "Provided always and I hereby direct that if at any time . . . [D.] shall in the uncontrolled opinion of the [trustee] have social or other relationship with [G.] . . . then in such case as from the occurrence of such event [D.] shall absolutely forfeit and lose one-half of the annuity payments . . ." and that half share should be paid to another person.

HELD: the term "social or other relationship" was incapable of exact definition; the uncertainty was not cured by the fact that the opinion of the trustee was the deciding factor, because the testator had not adequately defined the state of affairs on which the opinion was to be formed; and, therefore, the provision for forfeiture was void.

Dundee General Hospitals Board of Management v. Walker ([1952] 1 All E.R. 896), distinguished.

Dictum of JENKINS, J., in *Re Coxen* ([1948] 2 All E.R. 502), applied.

AS TO UNCERTAINTY IN CONDITION SUBSEQUENT, see HALSBURY, Hailsham Edn., Vol. 34, p. 109, para. 143; and FOR CASES, see DIGEST, Vol. 44, pp. 440-444, Nos. 2667-2687.

Cases referred to:

- (1) *Clavering v. Ellison*, (1859), 7 H.L. Cas. 707 ; 29 L.J.Ch. 761 ; 11 E.R. 282 ; 44 Digest 440, 2667.
- (2) *Dormer (Lord) v. Knight*, (1809), 1 Taunt. 417 ; 127 E.R. 895 ; 39 Digest 192, 818.
- (3) *Jeffreys v. Jeffreys*, (1901), 84 L.T. 417 ; 44 Digest 443, 2682.
- (4) *Dundee General Hospitals Board of Management v. Walker*, [1952] 1 All E.R. 896.
- (5) *Edgington v. Fitzmaurice*, (1885), 29 Ch. D. 459 ; 65 L.J.Ch. 650 ; 53 L.T. 369 ; 50 J.P. 52 ; 9 Digest 124, 635.
- (6) *Re Coxen*, [1948] 2 All E.R. 492 ; [1948] Ch. 747 ; [1948] L.J.R. 1590 ; 2nd Digest Supp.

ADJOURNED SUMMONS to determine, inter alia, (i) whether the direction in cl. 10 (b) of the will of John Hibbert Jones, deceased, that after the death of the testator's widow his trustee, the Midland Bank Executor and Trustee Co., Ltd., was to purchase an annuity for the defendant, Doris Mabel Jones, was (a) a direction to expend the whole of the testator's residuary estate in the purchase of such an annuity, or (b) a direction to purchase an annuity of such amount as the trustee in its discretion thought fit, or (c) a direction void for uncertainty; and (ii) whether the proviso in cl. 10 (b) of the will for forfeiture by Doris Mabel Jones of one-half of her annuity and payment of the other half if she should have social or other relationship as therein mentioned was a valid or a void provision.

By his will, dated Dec. 8, 1947, the testator, who died on July 22, 1950, devised and bequeathed the residue of his real and personal estate on the usual trusts for sale and conversion to his trustee (therein called "the company") and by cl. 10 directed the company to pay or provide for his debts, funeral and testamentary expenses, legacies, and certain duties, and to invest the residue, and to stand possessed of the investments and any part of his estate for the time being unconverted (therein called "his residuary trust fund") on the following trusts:

"(A) Upon trust to pay the income thereof to my . . . wife during her life and after her death (B) Upon trust to purchase an annuity in the name of the company in favour of my said daughter Doris Mabel Jones and to pay the income produced thereby to the said Doris Mabel Jones in such manner as the company shall in its uncontrolled discretion appoint . . . Provided always and I hereby direct that if at any time during the lifetime or after the death of my said wife my said daughter Doris Mabel Jones shall in the uncontrolled opinion of the company have social or other relationship with [G.] . . . then in such case as from the occurrence of such event my said daughter Doris Mabel Jones shall absolutely forfeit and lose one-half of the annuity payments hereinbefore directed to be paid to her and the other [sic] one-half share of the said annuity payments so forfeited shall from the date to be determined at the absolute discretion of the company be paid to my daughter Gladys Joyce during her life and after her death (c) Unto and equally between the British Empire Cancer Research Fund, and the Royal National Lifeboat Institution and Dr. Barnardo's Homes absolutely."

HIS LORDSHIP answered question (i) in the sense of alternative (a). This report relates to his decision on question (ii).

Brunyate for the plaintiff, the trustee.

Cross, Q.C., and *W. F. Waite* for the first defendant, Doris Mabel Jones, the annuitant.

Raymond Walton for the second and fourth defendants, beneficiaries under the will.

V. M. C. Pennington for the third defendant, the testator's widow.

M. J. Albery for the fifth defendant.

R. R. A. Walker for the sixth defendant.

Wilfrid Hunt for the seventh and eighth defendants.

The fifth, sixth, seventh and eighth defendants were various charities interested under the will.

DANCKWERTS, J.: I now have to consider whether provisions of cl. 10 (b) of this testator's will are effective or whether they are void for uncertainty. The testator evidently had an objection to a certain lady whom he mentions in the clause, and, in the event of his daughter, Doris Mabel Jones, "in the uncontrolled opinion of the company", that is, the bank, which is the trustee, having "social or other relationship with" the lady in question, she was to suffer a forfeiture in respect of an annuity which the testator provided for. There is no doubt that this condition imposed on the gift of the annuity is a condition subsequent and, as it is a condition subsequent which may involve forfeiture,

there is no doubt, again, as to the principle of law which is to be applied, namely, that

“ . . . that condition must be such that the court can see from the beginning, precisely and distinctly, upon the happening of what event it was that the preceding vested estate was to determine ”:

A per LORD CRANWORTH in *Clavering v. Ellison* (1) (7 H.L. Cas. 725), decided in 1859. That is the principle which I have to apply.

B It has been argued on behalf of those who would benefit in the event of forfeiture that the material words, “ have social or other relationship with ” the lady in question, are not too uncertain and have a meaning which can be clearly ascertained, and I have been referred to *Lord Dormer v. Knight* (2), decided in 1809. That was a decision of the Court of Common Pleas, sitting en banc, to consider a case which had been tried before LORD MANSFIELD, C.J., with a jury. The words in that case were “ associate, continue to keep company with, or cohabit or criminally correspond with ” a certain person. On the happening of any of those events, an annuity was to cease and a smaller annuity was to be substituted. The report says (1 Taunt. 418):

C “ The court were clear that this deed had received a perfectly right construction ; for it appeared by the evidence, that short of criminal intercourse, Mr. F. was a suspected person.”

What he had done, it appears, was simply to call in the ordinary way (*ibid.*, 417) and leave

D “ his card, like any other visitor: he had sometimes been admitted; but the witnesses had never seen any improper behaviour in him, nor any appearance of levity in the lady,”

whatever that may mean. The court said (*ibid.*, 418):

E “ The words of the deed were as general as could be, and went much further than the mere exclusion of criminal cohabitation: the intention was, to put a stop to all intercourse whatever between these two persons. The receiving a man’s visits whenever he chooses to call, is associating with him. The parties had chosen to express themselves in those terms, and the words must receive their common meaning and acceptance.”

F The point made in the course of counsel’s argument on behalf of the seventh and eighth defendants is that “ relationship ” has exactly the same meaning as “ association ”, that this case shows that the word “ associate ” is not too uncertain to be given a meaning by the court, and that, as the Court of Common Pleas had no difficulty there in construing that word, no difficulty arises in the present case. But it is to be observed, so far as *Dormer v. Knight* (2) is to be used as an authority, that the question of uncertainty operating to prevent a forfeiture being effective was never argued, the question of the uncertainty of conditions subsequent was never discussed before the court, and the word G “ associate ”, which possibly by itself may denote something more active than merely the existence of an association, appeared in conjunction with the words, “ continue to keep company with, or cohabit or criminally correspond with ”, all of which seem to me to denote something active on the part of the person who was not to associate with the other named person.

H In *Jeffreys v. Jeffreys* (3), FARWELL, J., thought that the word “ associate ” presented difficulties. There was a provision in regard to the life interest given to a certain person in that case by a codicil that, if the person should “ in any way associate, correspond, or visit with any of my present wife’s nephews or nieces ”, the life interest was to be forfeited and the gift over was to take effect. FARWELL, J., held that the condition, which was, of course, a condition subsequent, was void for uncertainty. He says (84 L.T. 418):

“ Taking, for instance, the word ‘ associate ’—does that mean simply for pleasure or business, or both ? ”

It is argued, on the other hand, in the present case that that difficulty at least does not arise, because the words are "social or other relationship" and, therefore, it is relationship of any kind, in any form, which is forbidden by the clause.

I find some difficulty in knowing exactly what the words "social or other relationship" mean. From the OXFORD DICTIONARY it appears that the word "relationship" may have a number of meanings. In the present case it obviously does not mean any connection by blood or marriage between the two persons in question. It seems to me that there may be a difference between the words "relationship" and "association", as referring merely to the existence of a state of affairs, and the word "associate" which connotes some active step. In the present case I think that "relationship" means simply the existence of a relative state of facts between the two persons named, or, at any rate, that that situation may be included in the word. It seems to me that it may include, for instance, such things as being members of the same congregation, members of the same omnibus queue, citizens of the same State, and all kinds of things which merely are a passive existence of facts. This is not, therefore, necessarily merely a prohibition against active steps on the part of Doris Mabel Jones. In ascertaining the precise meaning of these words I find difficulty similar to that felt by FARWELL, J., in *Jeffreys v. Jeffreys* (3), and, unless this doubt is cured by the reference to the opinion of the trustee, this clause cannot be regarded as sufficiently certain to be upheld as a forfeiture clause or a condition subsequent.

The relevant words relating to the trustee are "shall in the uncontrolled opinion of the company have social or other relationship". It is said by counsel for the fifth defendant that those words resolve the difficulty because the guiding fact is not the existence of "social or other relationship", but the existence of "the uncontrolled opinion" on the part of the company. He referred me to a case in the House of Lords which certainly is of great interest in regard to the matter—*Dundee General Hospitals Board of Management v. Walker* (4)—where, in order that a named body should qualify for a legacy, the trustees had to be satisfied as regards a certain hospital, the Dundee Royal Infirmary, that ([1952] 1 All E.R. 896):

"... the said infirmary has not been taken over wholly or partly by or otherwise placed under the control of the State or of a local authority or of a body directly or indirectly responsible to the State and/or a local authority."

As counsel correctly says, quoting a well-known observation of BOWEN, L.J. [in *Edgington v. Fitzmaurice* (5) (29 Ch.D. 483)] the state of a man's mind is as much a fact as the state of his digestion, and he says that it is the existence of an opinion or the non-existence of a particular opinion which is the test of forfeiture or otherwise in the present case. Reference to the *Dundee* case (4) shows that the will there contained a condition precedent, and, unless the trustees were satisfied that a certain state of things existed, the condition precedent was not fulfilled and the legacy could not be claimed. As counsel for the first defendant pointed out, the existence of a doubt in the minds of the trustees was sufficient to prevent the condition being fulfilled, so that the legacy was not payable. The legacy would never be payable unless the existence of a particular conviction on the part of the trustees was proved. In the present case, in substitution for the opinion of the court, the opinion of the trustee is to decide whether or not a certain obscure and difficult state of facts has occurred. The trustee might be unable to decide, and the court might have to decide the matter, or to attempt to do so, on a reference to it by the trustee. It appears to me that that alters the situation and brings the matter nearer to *Re Coxen* (6). In that case JENKINS, J., says ([1948] 2 All E.R. 502):

"I have so far treated the condition as if it was simply in the terms 'if she shall have ceased permanently to reside', whereas its actual terms are 'if in the opinion of my trustees she shall have ceased permanently to reside'. That I think makes a very material difference. The opinion of the

trustees that the double event has happened, and not simply the happening of the double event, is what brings about the cesser of Lady Coxen's interest. If the testator had insufficiently defined the state of affairs on which the trustees were to form their opinion, he would not, I think, have saved the condition from invalidity on the ground of uncertainty merely by making their opinion the criterion, although the declaration by the trustees of this or that opinion would be an event about which in itself there could be no uncertainty . . . "

He goes on to say that he thinks that the relevant double event is sufficiently defined to make it perfectly possible for the trustees to decide. It seems to me that that is directly on the point which I have to consider in the present case and that I should apply those observations of JENKINS, J., with the result that the mere fact that the decision of the point is referred to the trustee's opinion does not overcome the difficulty of uncertainty. Accordingly I come to the conclusion that the provisions of this clause for forfeiture are not enforceable and are void for uncertainty.

Order accordingly.

Solicitors: *Waterhouse & Co.* (for the plaintiff); *Sharpe, Pritchard & Co.* (for the first and third defendants); *Light & Fulton* (for the second and fourth defendants); *G. & G. Keith* (for the fifth defendant); *Wilde, Sapte & Co.* (for the sixth defendant); *Clayton, Leach, Sims & Co.* (for the seventh defendant); *Amery-Parkes & Co.* (for the eighth defendant).

[*Reported by R. D. H. OSBORNE, ESQ. Barrister-at-Law.*]

PASMORE v. WHITBREAD & CO., LTD.

[COURT OF APPEAL (Denning and Morris, L.JJ., and Roxburgh, J.), January 20, 1953.]

Landlord and Tenant—Compensation for goodwill—Carrying on business for five years—"Predecessors in title"—Title to premises, not to business—Landlord and Tenant Act, 1927 (c. 36), s. 4 (1), s. 25 (1).

The tenant of business premises surrendered his tenancy to the landlords who granted a quarterly tenancy of the premises to a new tenant, to whom the previous tenant sold the goodwill, fixtures and fittings. The landlords subsequently gave the new tenant notice to quit the premises expiring two and a half years after the commencement of his tenancy of the previous owner of the business. On an application by the tenant for compensation for loss of goodwill under s. 4 (1) of the Landlord and Tenant Act, 1927,

HELD: the "predecessors in title" of a tenant in s. 4 (1) and s. 25 (1) of the Landlord and Tenant Act, 1927, meant his predecessors in title to the premises and not to the business; as the previous owner of the business had not assigned his tenancy to the tenant, he was not his predecessor in title; and, therefore, the business had not been carried on by the tenant or his predecessors in title at the premises for not less than five years, and he was not entitled to compensation under s. 4 (1) of the Act.

FOR THE LANDLORD AND TENANT ACT, 1927, s. 4 (1) and s. 25 (1), see HALSBURY'S STATUTES, Second Edn., Vol. 13, pp. 889 and 910.

Case referred to:

(1) *Williams v. Portman (Viscount)*, [1951] 2 All E.R. 539; [1951] 2 K.B. 948; 2nd Digest Supp.

APPEAL from an order of His Honour JUDGE SIR GERALD HURST, Q.C., at Bromley County Court, dated Nov. 6, 1952.

On Nov. 24, 1951, the landlords gave the tenant notice to quit a garage occupied by him, and on Dec. 19, 1951, he served a notice on them claiming compensation for loss of goodwill or a new lease under s. 4 (1) and s. 5 (1) of the Landlord and Tenant Act, 1927. On Jan. 17, 1952, on the landlords' refusing either to pay compensation or to grant a new lease, he filed an originating application in the county court. The matter was referred to a referee under the Act, who reported that the tenant was not entitled to either compensation or a new lease. The court ordered that the report be confirmed and adopted and that the application be dismissed, and the tenant appealed. A

Percy Lamb, Q.C., and N. R. King for the tenant.

Winn and Warshaw for the landlords.

DENNING, L.J.: The tenant claims compensation from the landlords under the Landlord and Tenant Act, 1927, s. 4 (1), on the ground that he has had to leave certain business premises, to which he says, a goodwill has become attached by reason of a garage business which has been carried on there for many years. To become entitled to compensation for goodwill under the sub-section the tenant must prove B

"to the satisfaction of the tribunal that by reason of the carrying on by him or his predecessors in title at the premises of a trade or business for a period of not less than five years goodwill has become attached to . . ." C

them.

The whole question is whether he and his predecessors in title have carried on the business for the requisite period of five years. The facts as found by the referee are that a Mr. Fordham carried on the business of a garage in the premises from early in 1946 until the beginning of October, 1949, and the tenant from the beginning of October, 1949, until 1952. So a garage business has been carried on on the premises for over five years, but the question is whether Mr. Fordham was a predecessor in title of the tenant. The real issue is whether "predecessors in title" in the sub-section means predecessors in title to the goodwill of the business or predecessors in title to the tenancy. D
Mr. Fordham held a quarterly tenancy at a rent of £90 a year. In August, 1949, in the course of negotiations between Mr. Fordham and the tenant, the question arose whether the tenant should take an assignment of Mr. Fordham's tenancy or should take a new tenancy from the landlords. Mr. Fordham would, of course, have to surrender his tenancy, to enable a new one to be granted to the tenant. E
The landlords made it plain that they were unwilling to consent to an assignment by Mr. Fordham to the tenant of Mr. Fordham's tenancy, but they were prepared to grant a new tenancy to the tenant on Mr. Fordham surrendering his, and that is how the matter in fact went through. The tenant bought the business from Mr. Fordham. He paid £1,625 for the goodwill, fixtures and fittings, of which a large part was attributable to goodwill. At about the same time Mr. Fordham surrendered his tenancy and a new tenancy was granted by the landlords to the tenant on quarterly terms. F
The matter was thus completed in September and October, 1949. From 1949 onwards the tenant carried on the business until, on Nov. 24, 1951, the landlords gave him three months' notice to quit expiring on Feb. 26, 1952, in accordance with his tenancy agreement. Thereupon the tenant gave notice under the Act claiming compensation or a new lease. G

The tenant contends that he carried on the business at the premises himself from 1949 to 1952—two-and-a-half years—and that Mr. Fordham had carried it on for three years before him, making more than five years altogether. But was Mr. Fordham the predecessor in title of the tenant? Counsel for the tenant says that the words "predecessors in title" in s. 4, properly construed, mean predecessors in title to the business, and that Mr. Fordham was the H

tenant's predecessor in title to the business. Counsel for the landlords says that "predecessors in title" means predecessors in title to the tenancy, i.e., to the legal interest in the premises. By s. 25 (1) of the Act of 1927:

"The expression 'predecessor in title' in relation to a tenant or landlord means any person through whom the tenant or landlord has derived title, whether by assignment, by will, by intestacy, or by operation of law."

A It seems to me, as MORRIS, L.J., pointed out in the course of the argument, that the expression must mean the same in relation to a tenant as it does in relation to a landlord. In relation to a landlord it clearly means predecessor in title to the property, not to the business. So, also, in relation to the tenant it must mean, and its natural meaning is, predecessor in title to the property and to the legal interest which the tenant holds. That meaning was assumed to be correct in *Williams v. Viscount Portman* (1) in which SIR RAYMOND EVERSLED, M.R., said ([1951] 2 K.B. 952):

"It is obvious that emphasis might appropriately have been directed to the interest in the business rather than the title to the property; but, whatever might have been done, Parliament chose language which this court must construe to the best of its ability."

C It seems to me that there is no escape from the plain meaning of the phrase "predecessors in title", which is the predecessors in title to the interest of the tenant in the premises. If Mr. Fordham had assigned his tenancy to the tenant, he would have been a predecessor in title of the tenant, but, as he did not assign his tenancy, but surrendered it in order that the landlords should grant a new tenancy to the tenant, he was not the tenant's "predecessor in title". Counsel for the tenant said that that might lead to most unjust consequences, and I can see that it is very hard on the tenant in this case. Indeed, as counsel pointed out, the policy adopted by the landlords here means that landlords have an easy way out of the Landlord and Tenant Act, 1927. If a landlord grants leases, each for three years, to a series of successive tenants, then, although a business carried on on the premises will increase in value with each tenant, none of them gains any rights under the Act or can say that his predecessor is a "predecessor in title" to him. Each has his own tenancy. I ought to say, however, that the policy of these landlords is not devised in any way so as to evade the Act. Long before the Act, indeed ever since 1915, their policy has been to say: "We do not like one tenant assigning to another. We much prefer the previous tenant to surrender his tenancy and ourselves to grant a new one to the incoming man". That is what they have done. The effect is that the previous tenant is not the predecessor in title of the new tenant and the Act does not operate unless the new tenant is himself there for five years. It is very hard on a tenant who has paid a very substantial sum for goodwill, but I hope that in future tenants taking a new tenancy will realise that they have not any security of tenure until five years have passed, and that, therefore, the amount which they pay to their predecessor in the business ought to be scaled down accordingly. I would willingly have decided in favour of the tenant if I could have found any escape from the wording of the Act, but I cannot do so, and, in my opinion, the appeal should be dismissed.

H MORRIS, L.J.: I agree. The point that has been submitted to us was stated very succinctly in the report of the learned referee as follows:

"But the question is whether the words used in the Act—s. 4 and s. 25—are apt to cover a case where there was clearly no assignment, but a cancellation of an old, and grant of a new, tenancy. The words are 'predecessors in title' and I do not take the view that they are apt to cover merely a continuance of a business although maintaining the same goodwill. The words connote a title to the premises. It appears to me that

the legislature cannot properly be held to have covered a case like the present whether its intention and policy were to do so or not."

I am in agreement with the way in which the referee stated his recommendation in that passage.

As my Lord has pointed out, *Williams v. Portman* (1), in this court, proceeded on the basis that the phrase "predecessors in title" had reference to the title to the property. The Master of the Rolls referred in his judgment to the language of the Act, and said ([1951] 2 K.B. 952):

"It may well be (and, I think, this is not said for the first time) that the language selected in s. 4 was not entirely happy, seeing that the subject-matter with which Parliament was dealing was compensation for goodwill attached to premises as the result of the carrying on at the premises of a particular business for a particular period of time."

On the language that was used and is to be found in the statute it seems to me that we cannot uphold the submission of counsel for the tenant. I think there is force also in what was submitted by counsel for the landlords that the word "title" is not the word that would normally be used in reference to the ownership of a business. I am in full agreement with all that my Lord has said and I think that this appeal cannot succeed.

ROXBURGH, J.: I agree.

Appeal dismissed.

Solicitors: *Vivash Robinson & Co.* (for the tenant); *Martineau & Reid* (for the landlords).

[*Reported by F. A. AMIES, Esq., Barrister-at-Law.*]

SCHIFFFAHRT-TREUHAND, G.m.b.H., AND OTHERS v. H.M. PROCURATOR-GENERAL.

[PRIVY COUNCIL (Viscount Simon, Lord Porter, Lord Normand, Lord Cohen), November 5, 6, 10, 11, 12, 13, 17, 18, 19, 20, 24, 25, 26, 1952, January 12, 1953.]

Prize Law—Condemnation—Partly constructed ship not capable of floating—Ship under construction in building yard—Seizure at same time as capture of port—No intention by captors to seize as immediate prize—Seizure after surrender of belligerent.

The fact which gives jurisdiction to the Prize Court is that a ship has been physically captured and taken out of the possession of her former owners. The physical capture of a ship is the same thing as taking her in prize, and the fact that the captors wish first to use the ship for their own purposes and then to make her a prize at a later date is irrelevant. It is the intention to seize, not the intention to seize in prize, which is essential. The jurisdiction of the Prize Court arises from the mere fact of seizure.

Article 46 of the Hague Convention No. IV provides that enemy private property cannot be confiscated by a belligerent. This must be understood to refer to private property which does not consist of war material or means of transport serviceable for military operations (OPPENHEIM'S INTERNATIONAL LAW, vol. II, 7th ed., para. 143, p. 405). Accordingly, an unfinished ship in course of construction can be a proper subject of prize—at any rate when it is captured by or with the assistance of naval forces—even though it is not capable of floating, because its completion would make it available for war-time use. A ship lying in a port is "captured" when the

port is captured, and, therefore, five partly constructed ships lying in German ports when those ports were captured by or with the co-operation of the Royal Navy were captured at the same time as the ports themselves, i.e., on May 2 or 3, May 6, and May 10, 1945.

Although the German High Command surrendered unconditionally all forces under their control on land, at sea and in the air by the Act of Military Surrender of May 8, 1945, there was no surrender of the German government or Reich itself. It was the Declaration of Berlin on June 5, 1945, which terminated hostilities and ended the right of seizure in prize, because it was not till that date that the passive submission of Germany to the will of the allies became an accomplished fact. Though a victor may abrogate his rights *jure belli*—including the right of prize—not only by express renunciation but also by conduct, there is no necessity to imply a condition between those two dates that all rights *jure belli* were to be foregone by the allies. Further, when war is carried on by partners as allies, the unconditional surrender of one partner cannot protect it against the right of seizure in prize so long as active hostilities are continued by the other partner (as was the case with Germany and Japan), unless the victor consents to abrogate his right.

In consequence, all of the partly constructed ships concerned were validly seized in prize, although two of them were seized on May 10, 1945 (i.e., two days after the Act of Military Surrender).

AS TO VALIDITY OF CAPTURE, see HALSBURY, Hailsham Edn., Vol. 26, pp. 216, 217, paras. 489-492; and FOR CASES, see DIGEST, Vol. 37, pp. 590-592, Nos. 266-283.

Cases referred to:

- (1) *The Progress*, (1810), 1 Edw. 210; 165 E.R. 1085; 39 Digest 346, 330.
- (2) *The Edward & Mary*, (1801), 3 Ch. Rob. 305; 165 E.R. 474; 37 Digest 674, 1395.
- (3) *The Zamora*, [1916] 2 A.C. 77; 85 L.J.P. 89; 114 L.T. 626; 37 Digest 652, 1071.
- (4) *The Remonstrant*, (1917), 87 L.J.P.C. 26; 37 Digest 662, 1219.
- (5) *The Pellworm*, [1922] 1 A.C. 292; 91 L.J.P. 102; 126 L.T. 780; 37 Digest 590, 266.
- (6) *The Bellaman. The Agostino Bertani*, [1948] 2 All E.R. 679; 2nd Digest Supp.
- (7) *The Roumanian*, [1916] 1 A.C. 124; 85 L.J.P.C. 33; 114 L.T. 3; 37 Digest 593, 591.
- (8) *Lindo v. Rodney*, (1782), 2 Doug. K.B. 613, n; 99 E.R. 385; 37 Digest 647, 994.
- (9) *The Santa Flavia*, PRISES MARITIMES, JURISPRUDENCE FRANÇAISE DE LE GUERRE, 1939-45, p. 421.

APPEALS by the claimants from decrees made by LORD MERRIMAN, P., in the Prize Court dated May 10, 1951.

The objects affected by the decrees were (i) Hulls 507 and 508, which were under construction on the stocks at Flensburg in May, 1945, and which were not then ready for launching. The ribs of Hull 507 were up and half the plating was completed, while the double bottom of Hull 508 had been laid and

half the ribs were up. The President referred to these as "the Flensburg structures" and the first-named appellant claimed them as its property. (ii) Numbers 347 and 348, which, in May, 1945, were still on the stocks at Lübeck. Number 347 was almost ready for launching save that she had not been painted. About seventy per cent. of No. 348 was completed, but the outer sides and decks were only partly riveted. The President referred to these as "the Lübeck structures" and the second appellant company claimed them as its property. (iii) The motor vessel, *Hermes*, which had been launched,

but which, in May, 1945, was not completely constructed. At the outbreak of war in 1939 she was lying partly built in the Vulkan shipyards at Bremen-Vegesack, but as, owing to the outbreak of war, work could not be completed there, she was taken, in September, 1942, to Bolnes, near Rotterdam, where she lay, still incomplete, at the time of the allied landings in Normandy. In October, 1944, her owners, the third appellant, decided to have her towed to Emden for completion, and while she was lying in Emden harbour she suffered considerable bomb damage during an air raid. She did not sink in consequence of this damage, but was lightly grounded as a precautionary measure and holes in her below the water-line were provisionally stopped. In May, 1945, she was lying in Emden harbour, damaged, grounded and still incomplete. The third appellant admitted that she had acquired the character of a ship, but claimed her as its property. In the summer of 1947 proceedings were instituted in the Prize Court by the Procurator-General for the condemnation of these objects as good and lawful prize. By this date the construction of all of them had been completed by the claimants (who had obtained authority to do so from the Powers occupying Germany) and the Crown subsequently paid for the work done. The writs were dated as follows: Hull 507, July 22; Hull 508, Aug. 23; No. 347, Aug. 6; No. 348, Sept. 1; the *Hermes*, Aug. 13. The writ was served in each case by affixing it, or a copy of it, on a portion of the vessel.

By Ord. XV 2 (b) of the Prize Court Rules, 1939 (S.R. & O., 1939, No. 1466), a cause for the condemnation of a ship is to be heard on evidence provided by affidavits of the officers of the ship concerned in the capture. Accordingly, the Procurator-General presented, in support of his claim, affidavits by naval officers asserting that they were present at the capture of these objects in 1947 and 1948, and that no ship's papers were found on board at the time of the seizure. The affidavits followed a common form, which was presumably prepared beforehand, but they did not in some cases state the precise date of capture alleged. For example, in respect of the Flensburg structure 507, the lieutenant who swore the affidavit on June 30, 1947, merely said that he was present at the capture of structure 507 "lately taken by His Majesty's ship of war". In the case of Flensburg structure 508, he was more specific and swore, on Sept. 29, 1947, that he was present "at the capture of the said ship 508 and lately taken by His Majesty's ship of war Royal Harold at Flensburg on Aug. 21, 1947". In the case of the Lübeck structure 347, another lieutenant of the Royal Navy, on July 22, 1948, swore that he was "present at the capture of the said ship s.s. Flenderwerke No. 347 . . . lately taken by His Majesty's ship of war Royal Harold". In an affidavit dated Aug. 26, 1947, he swore that he was present at the capture of s.s. Flenderwerke No. 348 "lately taken by His Majesty's ship of war". The Crown, in putting forward these affidavits in support of their claim, presumably overlooked the proposition that an enemy ship could only be captured as prize in time of war, and when this was pointed out by the German lawyer acting for the second appellant in a letter to the Admiralty Registry dated Oct. 28, 1947, this letter was placed by the Crown before the President. The President, finding that the order for condemnation, which he had pronounced on Apr. 29, 1948, against all these structures, except No. 348, had not been drawn up, thereupon cancelled the order which he had made and directed a new hearing.

On the re-hearing the Crown admitted that the right to seize in prize in connection with the late war expired on June 5, 1945, the date of the Berlin Declaration, when the allies assumed for the time being powers of government over the whole of Germany. It thus became obvious that the claim made on behalf of the navy that these objects were seized as prize in the summer of 1947 failed, and the seizure hitherto relied on and sworn to was invalid to give the Crown any rights in the Prize Court. The Procurator-General, therefore,

revised his claim and contended that the occupation or seizure of the ports of Flensburg, Lübeck and Emden constituted ipso facto the seizure of the five structures found therein. The writs were amended on Feb. 6, 1951, to claim that the Flensburg structures were "seized and taken as prize by our naval or military or naval and military forces while lying at Flensburg at the time of the capture of Flensburg on May 10, 1945"; that the Lübeck structures were similarly seized and taken as prize while lying at Lübeck at the time of the capture of Lübeck on May 2 or 3, 1945; and, in the case of the *Hermes*, that she was similarly seized and taken as prize while lying at Emden at the time of the capture of Emden on May 6, 1945. New affidavits were sworn by Vice-Admiral Baillie-Grohman, on Jan. 22, 1951, to establish the capture of Flensburg and Lübeck on the dates named, and by Mr. Kent (assistant-solicitor in the Treasury Solicitor's department, who had the conduct of the proceedings) to establish that the port of Emden was occupied by His Majesty's Canadian army on May 6 and 7, 1945. This was confirmed by an affidavit sworn by a naval officer on Feb. 5, 1951, which stated that the port of Emden was surrendered to the allied forces on the morning of May 6, 1945, that the port was controlled by the navy with the assistance of military guards and the port area was cleared of Germans other than those in guarded camps and was later enclosed in a barbed wire fence, that no German could enter the port precincts without a pass, and that it was impossible for the Germans to do anything to their ships or go aboard them.

Diplock, Q.C., and Threlfall for the appellants.

Sir Hartley Shawcross, Q.C., Le Quesne, Q.C., and Rena for the respondent.

Jan. 12. **VISCOUNT SIMON:** These are consolidated appeals brought by the respective former German owners of five objects against decrees of May 10, 1951, made by LORD MERRIMAN, P., sitting in a Court of Prize, which dismissed the respective claims of the appellants and pronounced the respective objects to be liable to confiscation by the Crown and condemned the same as good and lawful prize. The issues in the appeal are complicated and have been admirably presented and argued before the Board by counsel on either side.

[HIS LORDSHIP stated the facts and continued:] LORD MERRIMAN, in his judgment, defined the questions for decision as follows:—

- (i) Were the ports in question respectively occupied in circumstances and at a time which permitted the exercise of any belligerent rights of prize therein?
 - (ii) If the ports were captured when they were respectively occupied, was their capture of such a nature as, ipso facto, to effect the capture of these objects respectively?
 - (iii) Were the Lübeck and Flensburg structures a proper subject of maritime prize, or were they merely private property on land, and, therefore, protected from confiscation by virtue of art. 46 of the Hague Convention IV?
 - (iv) In any event, assuming that for any of the above reasons any one or more of these objects is not liable to condemnation as good and lawful prize, and, therefore, must be released, ought they, nevertheless, to be released to the Crown and not to the claimants because, as was said in a letter of July 8, 1949, . . . they have, in consequence of the assumption of the government of Germany by the declaration of June 5, 1945, and of what is the equivalent of German legislation thereunder, become the property of the Crown?
- Counsel for the appellants discussed the questions involved in a different order and formulated them thus: (a) Is conscious volition or intention on the part of a captor necessary to constitute capture or seizure in prize? (b) Are structures not capable of floating, such as the Lübeck and Flensburg structures, capable in their nature of being maritime prize? He conceded that the *Hermes* was a "ship". (c) Did rights of seizure in prize continue after May 8, 1945, when the act of military surrender was signed at Berlin on behalf of the German High Command? The contention that no seizure in prize was possible after

this date affects only Hull 507 and Hull 508, since Flensburg was captured on May 10, 1945.

Their Lordships find it convenient to deal with the issues raised in the order formulated by counsel for the appellants. The form in which the first question is framed implies that the captor who has laid hands on an enemy ship has an option to decide whether to claim her as a prize as from the date of seizure or to use her for his own purposes in the first place, with a right to seize her as a prize at a later date. There can be no doubt that this was the assumption made by the combined chiefs of staff of the allies in reference to captured German ships before the surrender of Germany. There is in evidence an affidavit, made on Jan. 18, 1951, in these proceedings by Mr. H. D. Samuel, an assistant secretary in the Admiralty and the head of the naval law branch of the secretary's department, which paraphrases the signals sent in cypher on this subject as follows:—

"4. I have read the signals and can say that in December, 1944, the combined chiefs of staff agreed on the following policies concerning enemy ships captured before the surrender of Germany: (a) For operational purposes supreme commanders were to have first claim on enemy ships taken in ports within their commands just as they had on ex-allied ships. (b) When supreme commanders had no further need for military operations of enemy merchant ships captured or found in ports within their commands these were to be transferred to representatives of the Combined Shipping Adjustments Board. Arrangements for manning and operations would then be made within the combined shipping pool, but such ships were to remain subject to all claims, including salvage claims, and were to be accounted for in the final shipping settlement. 5. On May 14, 1945, instructions were sent by the combined chiefs of staff to General Eisenhower that unless otherwise directed the policies referred to in para. 4 hereof should be applied to all German shipping captured by forces under General Eisenhower's command in German ports before the surrender or declaration of defeat of Germany. 6. Further instructions were given on this date to General Eisenhower that captured ships were to be seized as prize except for fishing-craft, inland water craft and vessels needed for local service with German crews. Seizure was to be effected in Bremen and Bremerhaven by the United States Navy and in other ports by the Royal Navy. 7. Further instructions were to follow regarding the treatment of shipping falling into the hands of the Allied Expeditionary Force upon surrender or declaration of defeat. On June 8, 1945, instructions were sent by the Admiralty to the naval authorities in Germany referring to the seizure of German ships in prize. A paraphrase of this signal is annexed to this affidavit and is marked 'A'."

Exhibit A, which was addressed to flag officers-in-charge, Hamburg and Kiel, flag officers, Norway, Western Germany, and Denmark, C. in C. Rosyth, F.O.I.C. Humber, and N.O.I.C. Methil, stated:

"Subject: German ships seized in prize. Vessels are, if possible, to be seized in ports of Germany or in ports occupied recently. Vessels to be accompanied to U.K. with affidavits of seizure in hands of officer commanding armed guard. These affidavits to be delivered to N.O.I.C. at arrival port. At such port affidavit to be delivered by N.O.I.C. to customs officer. Vessels not to be seized until at point of departure for U.K. by reason uncertainty regarding arrangements for re-fitting."

(The flag officer-in-charge for the Kiel area, which included Flensburg and Lübeck, was Vice-Admiral Baillie-Grohman.) These "further instructions" are obviously given with a view to complying with the procedure called for by s. 16 of the Naval Prize Act, 1864. The explanation of the last sentence

of Exhibit A is that it was desirable to send a vessel seized as prize to the port of this country where she could be conveniently "re-fitted", i.e., overhauled.

- The view on which these directions were framed was, therefore, that when the allies took possession of German ports and thereby acquired control of enemy merchant shipping in them, a practical question would arise as to what was to be done with the shipping. On the one hand, the allies might be glad to use it "for operational purposes", for example, to move troops or to bring in supplies. The
- A fact that merchant ships and transports belonging to the allies had been extensively sunk by German submarines made it all the more necessary to avail themselves of means of sea transport which fell into their hands. On the other hand, the allied navies might be ambitious of taking the German shipping as prize and thereby contributing to the fund which would be available for prize-bounty. Having, as they conceived, these two alternatives before them, the joint chiefs of staff adopted the policy of recognising that the first claim on the shipping was for operational use and so informed General Eisenhower and others concerned. But they contemplated that German shipping seized in German ports should in the end be dealt with so as to contribute to the prize funds of the victorious navies. Thus, the plan was to use the seized ships in necessary operations as long as the war was going on without being handicapped by the formalities of a Prize Court,
- C but it was contemplated that when Germany surrendered there would still be time to bring the vessels before the Prize Court. Those who advised this plan and gave these instructions laboured under the misapprehension that proceedings based on capture in prize, which invoked the jurisdiction of the Prize Court, could be taken after the surrender of Germany. This, in their Lordships' opinion, was an error, and it is now conceded by the Crown that no seizure in prize could
- D validly take place after June 5, 1945. Counsel for the appellants, relying on the above assumption on which the first question is based and on the view set out above of the chiefs of staff, contended that the instructions given by the latter to seize in prize at a later date demonstrated that there had been no seizure in prize at the time of the capture of the ports, and that, therefore, there could have been no intention on the part of the captors to seize the objects in prize when the
- E ports were captured. This argument, however, is met, in their Lordships' opinion, by considering what is the nature of a prize-capture over which the Prize Court has jurisdiction.

- The British Prize Court, constituted at the beginning of any war in which this country is engaged involving naval action, is set up by a commission under the Great Seal addressed by the Crown to the Admiralty. The commission under
- F which the Prize Court sat in connection with the last war was issued under a Order in Council dated Sept. 5, 1939, which recited that a state of war existed between this country and the German Reich

- "so that His Majesty's fleets, ships, and aircraft may lawfully seize all ships, vessels, aircraft and goods belonging to the said German Reich or to the citizens and subjects thereof, or other persons inhabiting within any of the countries, territories, or dominions of the said German Reich, and bring the same to judgment in any such courts as shall be duly commissioned to take cognizance thereof",
- G

and the commission authorised

- "the commissioners for executing the office of Lord High Admiral to will and require His Majesty's High Court of Justice and the judges thereof for the time being to take cognizance of and judicially proceed upon all manner of captures, re-captures, seizures, prizes and reprisals of all ships, vessels, aircraft and goods that are or shall be taken, and to hear and determine the same, and according to the course of Admiralty and the law of nations and the statutes, rules, and regulations for the time being in force in that behalf, to adjudge and condemn all such ships, vessels, aircraft, and
- H

goods as shall belong to the said German Reich or to the citizens or subjects thereof, or to any other persons inhabiting within any of the countries, territories, or dominions of the said German Reich or be otherwise condemnable as prize".

The Admiralty then executed this commission by issuing a warrant to the High Court requiring the judges to act accordingly. It is plain, therefore, that the Prize Court has jurisdiction in every case of seizure or capture of a ship alleged to have belonged to the enemy and to decide "according to the course of Admiralty and to the law of nations" whether it should be condemned as true and lawful prize. "Prize", in this connection, means nothing more than "taking" or seizure. "Capture in prize" or "as prize" is not one species of capture. If a ship is captured, she thereby becomes a prize subject to the jurisdiction of the Prize Court. The French equivalent for our "Prize Court" is "Cours des Prises", and "prise" means "taking". Littré defines "prise" as "action de prendre un navire". The jurisdiction of United States courts in prize cases equally extends to all captures, as explained by JUDGE STORY in NOTES ON THE PRINCIPLES AND PRACTICE OF PRIZE COURTS. It was pointed out in the course of the argument that, according to MURRAY'S OXFORD DICTIONARY, the English word "prize" in this sense, though spelt and pronounced in the same way as the word for a reward, is a distinct word and means simply a capture. The first question in every prize case is: Was the vessel "captured" by the captors who demand its condemnation as prize? Similarly, in a claim for "prize salvage" it is normally essential to prove that the rescued ship had been "captured" by the enemy: *The Progress* (1); *The Edward & Mary* (2). This view of the matter, which is fundamental to the first and main issue in the case, is supported by the early history of prize jurisdiction. In ROSCOE'S HISTORY OF THE ENGLISH PRIZE COURT, the author points out how captures of ships when an English King was carrying on a naval war were likely to lead to complaints by neutrals or allies that their ships had been seized and how the Lord High Admiral was authorised in early days by the Crown to investigate such complaints "with a delegated authority in the nature of prize jurisdiction" (op. cit., p. 4). In course of time, a personage called the Admiral's deputy came into existence, who exercised a prize jurisdiction (SELECT PLEAS OF THE CROWN IN THE COURT OF ADMIRALTY, vol. 1, p. 42), and by the sixteenth century a rudimentary prize court undoubtedly existed (ROSCOE, p. 11). The jurisdiction was to decide about "prizes" i.e., capture of ships. In 1589, at the time of the Armada, for example, Dr. Julius Caesar, "doctor of laws, the duly appointed judge lieutenant of the High Court of Admiralty of England", was pronouncing sentence of condemnation of a Spanish ship as lawful prize (LAW AND CUSTOM OF THE SEA (Navy Records Society), vol. 1, p. 254).

Their Lordships, therefore, reach the conclusion that the physical capture of a ship is the same thing as taking her in prize and that a prize court has jurisdiction to decide "according to the course of Admiralty and the law of nations" the fate of every vessel so captured. The fact that captors wished or intended to make the vessel a prize at a later date is irrelevant; she became a prize subject to the jurisdiction of the Prize Court from the moment of capture. It is the intention to seize, not the intention to seize in prize, that gives jurisdiction. The view of their Lordships that the physical capture of a ship is the same thing as taking her in prize, and that the jurisdiction of the Prize Court arises from the mere fact of seizure, is supported by the language of the Naval Prize Act and by the Prize Rules made thereunder. The rules (Ord. I) define "captor" as meaning

"any person taking or seizing, or having taken or seized, any ship, aircraft or goods as prize . . ."

It is true that s. 16 of the Act requires, as a matter of procedure, that every ship taken as prize and brought into port within the jurisdiction of a Prize Court shall be delivered up to the custody of the marshal, or, failing him, to the principal

officer of customs of the port, and s. 17 requires the captors "with all practicable speed" after this to bring the ship's papers into the registry of the court. If the captor seizes a ship and does not promptly act in accordance with these sections, this does not oust the jurisdiction of the Prize Court: see *The Zamora* (3) per LORD PARKER ([1916] 2 A.C. 104), but complaint can be made to it that this has not been done, and the Prize Court will permit those interested in the captured ship to institute proceedings before it and, in an appropriate case, to claim damages from the captor: see *The Remonstrant* (4), and COLOMBOS ON THE LAW OF PRIZE, 3rd ed., p. 310. Similarly, once a ship is captured, the Prize Court has jurisdiction to control its requisition, and to make orders to preserve the res.

When, then, did the capture of these objects take place? Allied forces, with which the British Navy co-operated, captured Lübeck on May 2 or 3 and naval forces occupied Flensburg on May 10, 1945. Naval officers were appointed "to control the ports and the shipping in them": see Admiral Baillie-Grohman's affidavit, para. 5. As a result "nothing could be done by the Germans with their ships, whether they were completed ships or uncompleted ships building in shipyards": see same affidavit, para. 6. LORD SUMNER said in *The Pellworm* (5) ([1922] 1 A.C. 302)

"... capture consists in compelling the vessel captured to conform to the captor's will. When that is done *deditio* is complete . . ."

Admiral Baillie-Grohman hoisted his flag at Travemünde, at the mouth of the river on which Lübeck lies, and the entrances there and to Kiel harbour were controlled: paras. 3 and 8. The port of Emden, in which the *Hermes* was lying, was similarly captured and held with the co-operation of the British navy. The inevitable conclusion from these facts is that the ships and other objects in the ports were "captured" at the same time as the ports themselves, just as, in *The Bellaman. The Agostino Bertani* (6), ships aground in Tripoli harbour were regarded as seized when the port of Tripoli was taken. They became, in LORD PARKER's phrase in *The Roumanian* (7) ([1916] 1 A.C. 138),

"enemy goods seized on enemy territory by the naval forces of the Crown . . ."

This is in accordance with SIR WILLIAM SCOTT's view in *The Progress* (1) where he observes, in reference to the allegation that the French had captured shipping in the port of Oporto (1 Edw. 210):

"it is not necessary to show that they had taken formal possession of each individual ship, because they had possession of the port itself; and the taking of that which contained the vessels is in effect the same as taking bodily possession of the ships themselves."

It may be objected that, if the seizure of a port in such circumstances involves the seizure of enemy ships within it, a ship which is in the port but which belongs to a neutral owner or is otherwise not liable to seizure is none the less seized and made prize. The answer is that this is indeed so, but the captor can put himself right by promptly releasing any vessel against which no claim of condemnation can be validly made: see para. 433 of OPPENHEIM'S INTERNATIONAL LAW, vol. II, 7th ed., p. 868. If there is unreasonable delay in releasing such a vessel, the parties interested have the right to compensation, which is awarded by the Prize Court: see art. 64 of the Declaration of London, which, though it was not ratified, embodies this rule. To sum up, the fact which gives jurisdiction to the Prize Court is the fact that the ship was physically captured and taken out of the possession of her former owners. It is this fact which constitutes her a prize, and the intention of captors to postpone the date when the Prize Court has jurisdiction is irrelevant.

The second question is whether the Lübeck and Flensburg structures were, at the time of their capture in May, 1945, capable in their then condition and position of being regarded as a res which was subject to capture as prize. As international

law has developed, efforts have been made to set limits to the right of belligerents in war to capture property belonging to the enemy or to the enemy's subjects. Originally, no doubt, it was the practice of an army in invasion to seize such property on land and appropriate it, and equally for a belligerent navy to capture enemy ships and the like and their cargoes. But the rule soon developed (even though it was not always observed) that it was not legitimate to seize enemy private property on land (unless it was ammunition or arms which could be used against the enemy in fighting) while it remained the law of nations that captures at sea by naval forces were authorised. By 1781 a distinction between land warfare and maritime warfare in this respect was recognised: see LORD MANSFIELD's judgment in *Lindo v. Rodney* (8), in a note to *Le Caux v. Eden*. The explanation of this difference may well be found in the fact that merchant shipping is used in war for purposes of transport, and, so long as it belongs to the subjects of the enemy, it adds to his strength, while the capture of merchant shipping at once reduces the enemy's power and adds to the power of the belligerent and hence becomes a legitimate operation of war. Moreover, merchant shipping, unlike property on land, is usually found on the high seas, which belong to no particular nation. Cargoes belonging to or destined for the enemy (unless protected by the Declaration of Paris) are subject to capture by a belligerent for the same reason. The rule prohibiting the seizure by a belligerent of enemy property on land is now formulated in Hague Convention No. IV dealing with the Laws and Customs of War on Land, drawn up in 1899 and revised in 1907, art. 46 of which provides that "private property cannot be confiscated". This must be understood to refer to private property which does not consist of war material or means of transport serviceable for military operations: OPPENHEIM'S INTERNATIONAL LAW, vol. II, 7th ed., para. 143, p. 405; to capture and confiscate other private property in the course of land-warfare would be pillage, and this is formally prohibited by art. 47. Articles 52 and 53 deal with requisitions and the latter article, as revised in 1907, contains the paragraph:

"All appliances, whether on land, at sea, or in the air, adapted for . . . the transport of persons or goods apart from cases governed by maritime law, depots of arms, and, generally, all kinds of war material may be seized, even though belonging to private persons, but they must be restored and indemnities for them regulated at the peace."

The phrase "apart from cases governed by maritime law" marks the divergence between the rules of war on land, which prohibit capture of private enemy property, and the rules governing sea warfare which permit prize capture. On which side of the dividing line do the Flensburg and Lübeck structures fall?

There is no authority or decided case exactly in point and their Lordships agree with the learned President that the question whether the capture of any particular property is a justifiable means of coercion must be tested as a matter of principle. To use LORD MANSFIELD's phrase (2 Doug. K.B. 615), it is necessary to consider "the reason of the thing". DANA's note to WHEATON'S INTERNATIONAL LAW, 8th ed. (1866), p. 451, under the heading of "Distinction between Enemy's Property at Sea and on Land", contains the following passage:

"Where private property is taken, it is because it is of such a character or so situated as to make its capture a justifiable means of coercing the power with which we are at war. If the hostile power has an interest in the property which is available to him for the purposes of war, that fact makes it *prima facie* a subject of capture. The enemy has such an interest in all convertible and mercantile property within his control, or belonging to persons who are living under his control, whether it be on land or at sea . . . The humanity and policy of modern times have abstained from the taking of private property, not liable to direct use in war, when on land."

Applying this test, it would seem to follow that an unfinished ship in course of construction can be a proper subject of prize, at any rate when captured by or

with the assistance of naval forces, for its completion makes it available for war-time use. Their Lordships agree with the learned President that these structures, though not capable of floating at the time they were captured, are none the less to be regarded as "maritime property in a maritime town" and are rightly to be regarded as maritime prize.

- A The third and last question in the appeal affects only Hull 507 and Hull 508, which were under construction in the port of Flensburg when it was occupied by a detachment of the British army and by British naval forces on May 10, 1945. The appellants submitted that the seizure of these vessels was invalid because seizure in prize is an act of hostility and all hostilities had been brought to an end on May 8, 1945, by the Act of Military Surrender signed at Berlin on that date on behalf of the German High Command in the presence of officers representing the supreme commander of the Allied Expeditionary Force and the Supreme High Command of the Red Army. The Crown's submission is that the right to seize in prize persisted till June 5, 1945, when the governments of the United Kingdom, the United States of America and the Union of Soviet Socialist Republics, and the provisional government of the French Republic, by a declaration signed at Berlin by their representatives, declared that they assumed supreme authority with respect to Germany, including all the powers possessed by the German government, the High Command and any State, municipal and local government. That declaration admittedly brought to an end all hostilities between the allied Powers and the German State, and it terminated the right of seizure, because thenceforward all German ships and maritime property were at the disposal of the allied Powers as the supreme governing and legislative authority of the Reich. The decision of the learned President was that, though the victors might expressly and impliedly abrogate any rights that they may have jure belli including rights of prize, he saw no reason for holding that the Crown had lost those rights because of anything which occurred before the declaration of June 5, 1945.

- E The Act of Military Surrender of May 8, 1945, by which the High Command surrendered unconditionally all forces on land, at sea and in the air which were at this date under German control is unprecedented and there is no legal decision of the courts of the United Kingdom, nor, indeed, of any foreign court, which defines the consequences in relation to the victor's right of prize. The appellants, therefore, in default of more direct authority, sought to base an argument on precedents which define the effects of a general armistice. The argument was summarized by the learned President as follows:

- F "it is at the very least doubtful whether the exercise of belligerent rights in prize is permitted during an armistice, unless they are expressly reserved; and, seeing that an armistice is a mere suspension of hostilities, so much the less can the exercise of these rights be permissible after a total surrender, which involves an absolute cessation of hostilities."

- G This was in substance the argument presented to their Lordships. The argument is beset by the weakness which attends all arguments from analogy. A general armistice is the result of a negotiation in which detailed consideration is normally given to the conduct during the armistice of the armed forces of both parties, and it frequently includes as one of its terms a provision dealing with the right of seizure in prize. When that is done the agreed term regulates the right. But when there is no term in the armistice dealing with the right, then it is a question whether a provision should be implied that the right of prize is suspended, and that question will depend on the special circumstances of each case. When there are no special circumstances, the practice, or, it may be better to say, the tendency, of the courts varies in different countries. In France, for example, the tendency is to hold that the right of prize is suspended: see *The Santa Flavia* (9). The German and Italian courts, in obedience to their own municipal legislation, have taken a contrary view. There is, however, no doubt that during a general

armistice the right of visit and search and the right to seize contraband and neutral vessels attempting to run a blockade are not suspended. Their Lordships are of opinion that, if these rights can be exercised against neutrals, a fortiori the British courts would recognise the right of seizure of enemy ships. All these rights find their justification in the prevention during the armistice of the enemy's replenishment of his resources and of the increase of his warlike potentiality. If that be the sound view, the supposed analogy between a general armistice and an unconditional surrender turns against the appellants.

But the absolute surrender of all existing military forces is not truly analogous to a general armistice, and provisions regulating the conduct of the victor's forces find no place in it, and are, indeed, incompatible with it. It may not be correct to describe such a surrender as a unilateral act of the vanquished enemy, for, to take the present instance, the surrender was received by the victor as an acceptance of terms which he might impose. Article 4 of the act of surrender of May 8, 1945, expressly provided that it should be "without prejudice to and would be superseded by any general instrument of surrender imposed by or on behalf of the United Nations", and the Berlin Declaration of June 5, 1945, was, in fact, the general instrument of surrender contemplated by that article. In the interval between May 8 and June 5 it would, of course, have been contrary to international law and the dictates of humanity to attack submissive and unresisting officers and men of the German forces, and it would not be incorrect to say that abstention by the victor from acts of that kind was an inherent condition of the surrender. But there is no necessity to imply a condition that all rights *jure belli* were to be foregone by the victor. The allies were, for example, fully entitled to order their forces to advance further into German territory, and their Lordships have no doubt that they remained entitled to seize German vessels on the high seas in prize.

There are two specialities of the situation as it stood on May 8, 1945, which provide additional and independent grounds for this conclusion. The first is that there was on May 8 no surrender of the German government or of the Reich itself. The appellants' case is that the victor's rights as a belligerent were immediately replaced by rights of subjugation. Such an instantaneous transition is scarcely practicable even when it is the enemy government that surrenders, but there was a German government still in existence on May 8, and it was entitled to raise new forces, to dismiss the existing High Command, to appoint new military leaders with instructions to continue the struggle. A prolonged resistance after the defeat of the German armies had often been threatened by German leaders and on May 8 it could not have been said that the resistance of the Reich was finally at an end. It is significant that the Berlin Declaration of June 5, 1945, instead of proceeding merely on the narrative that the German armed forces had surrendered, narrates also that Germany was no longer capable of resisting the will of the victorious Powers, and that the unconditional surrender of Germany had thereby been effected. By June 5, the chief members of the German government had been arrested, and the passive submission of Germany to the will of the victors had become an accomplished fact. It was, therefore, the Declaration of Berlin that terminated all hostilities and ended the right of seizure. The other matter is that Germany had been waging war in alliance with the Japanese Empire and that the war with Japan continued after the surrender of the German armed forces. Their Lordships agree with the Crown's submission that when war is carried on by partners as allies the unconditional surrender of one cannot protect it against the right of seizure so long as active hostilities are continued by the partner, unless the victor consents to abrogate his right.

Their Lordships do not find it necessary to consider the opinions of writers on the effect of the unconditional surrender of Germany's armed forces on the right to seize in prize. No author was cited who had had before his mind the precise state of affairs between the surrender on May 8, 1945, and the Berlin Declaration

of June 5, 1945, or the distinction between a surrender by the High Command and the surrender of the Reich, or the effect of the continuance of the war by Germany's ally, Japan. Their Lordships find themselves in agreement with the opinion of the learned President that the victor may abrogate his rights *jure belli* including rights of prize, not only by an express renunciation, but also impliedly by his conduct, and they would add that there may be circumstances in which unreasonable delay after an unconditional surrender in regulating the situation by a new declaration or arrangement may have a prejudicial effect on the victor's retention of his rights. Their Lordships, therefore, hold that the condemnation as good and lawful prize pronounced by the Prize Court was correct and will humbly advise Her Majesty that this appeal should be dismissed. The conclusion at which their Lordships have arrived renders it unnecessary to decide the fourth question formulated by LORD MERRIMAN. Inasmuch as the ultimate case for the Crown varied so widely from that first presented, there will be no costs of the appeal.

Appeal dismissed.

Solicitors: *Freshfields* (for the appellants); *Treasury Solicitor* (for the Crown).
[Reported by G. A. KIDNER, ESQ., *Barrister-at-Law.*]

REES v. BERNARD HASTIE & CO., LTD.

[COURT OF APPEAL (Somervell, Birkett and Romer, L.JJ.), January 20, 21, 1953.]

Factory—Protection of eyes—Cutting sheet metal by cold process—Need for employers to provide goggles or screens—Factories Act, 1937 (c. 67), s. 49—Protection of Eyes Regulations, 1938 (S.R. & O., 1938, No. 654), schedule.

While a workman was engaged in cutting sheet metal with a machine operated by electrical power which did not involve the application of heat, a strip of metal which he was cutting off sprang up and injured his eye. His employers had failed to provide him with goggles or a screen. In an action for damages against the employers he alleged, *inter alia*, breach of s. 49 of the Factories Act, 1937, and the Protection of Eyes Regulations, 1938, made thereunder,

HELD: the "welding or cutting of metals by means of an electrical, oxy-acetylene or similar process" referred to in the schedule to the regulations applied only to high-temperature processes and did not extend to a cold cutting process, and, therefore, the employers were not under a duty to provide the workman with goggles or a screen, and were not in breach of the regulations.

FOR THE FACTORIES ACT, 1937, s. 49, see HALSBURY'S STATUTES, Second Edn., Vol. 9, p. 1039.

APPEAL by the plaintiff from an order of CROOM-JOHNSON, J., sitting without a jury, made at Swansea on July 18, 1952, in an action for damages for personal injuries.

The plaintiff was a cutter employed by the defendants who were sheet metal workers. The machine the plaintiff used cut the metal by means of knives or shears which were operated by electrical power, and had a flex attached to a plug from which the electrical power came, but did not involve the application of heat. Inside the machine, which was held in the hand, was a motor which operated the shears. The plaintiff first made from a piece of steel a rough cutting which was larger than the actual piece which was finally to emerge. He then cut off the superfluous margin so as to get the precise shape he required. In the course of cutting, this marginal strip, which had a sharp point, sprang up, injuring and causing the loss of one of his eyes. His employers had failed to provide him with goggles or a screen in accordance with the Protection of Eyes Regulations, 1938, and s. 49 of the Factories Act, 1937.

The plaintiff brought an action for damages against the defendants, his claim being based on (a) negligence at common law, and (b) on a breach of the Factories Act, s. 49, and the regulations made thereunder. CROOM-JOHNSON, J., held that the defendants were liable in damages for a breach of statutory duty, and the defendants appealed.

Beney, Q.C., and *G. P. Thomas* for the defendants.

Marven Everett, Q.C., and *T. Watkins* for the plaintiff.

SOMERVELL, L.J., stated the facts and continued: We are concerned with the allegation that there was a breach of statutory duty. The breach alleged is failure to provide the plaintiff with goggles or a screen, contrary to the Factories Act, 1937, s. 49 and the regulations made thereunder. The section reads as follows:

"In the case of any such process as may be specified by regulations of the Secretary of State, being a process which involves a special risk of injury to the eyes from particles or fragments thrown off in the course of the process, suitable goggles or effective screens shall, in accordance with any directions given by the regulations, be provided to protect the eyes of the persons employed in the process."

Regulations were made in pursuance of that section, and in the schedule various processes are set out in respect of which goggles or screens are to be provided. We are concerned with the construction of the words in the schedule "welding or cutting of metals by means of an electrical, oxy-acetylene or similar process."

The first issue raised is whether what the plaintiff was doing was a process within the words that I have read. Counsel for the defendants submits that it was not. Counsel for the plaintiff submits that it was, and his construction may be summarised as being that the regulations cover any form of cutting if the power which leads to the steel being cut is electrical. Counsel for the defendants submits, in effect, that the regulations cover cutting only where the electrical process involves a very high temperature. One can approach the matter by first considering the oxy-acetylene process. That clearly welds and cuts by raising the portion of the steel to which the blowpipe is applied to a very high temperature. In welding the two separate pieces of steel are welded together by the high temperature, and in cutting the high temperature is applied by another method and the two pieces come apart. Although that is not cutting in the sense in which the word is ordinarily used, such as cutting with a knife, or with scissors, or shears, that process is described in the trade as cutting, and it is clearly described as cutting in this schedule which covers cutting by means of an oxy-acetylene process. On the evidence, when so cut, particles and fragments are thrown off at a high temperature and constitute a special risk of injury to the eyes. Where cutting or welding is performed by an electrical process and a very high temperature is used, there is the same throwing off of particles as in the oxy-acetylene process.

It is submitted on behalf of the defendants that the electrical process dealt with by the regulations is a high-temperature process, the use of an arc. In my opinion, that is the natural construction of this schedule, and I can state my reasons briefly. The fact that the schedule covers welding or cutting indicates that the process dealt with, whether oxy-acetylene or electrical, is one which can be used for either purpose, and the word "similar" indicates a similarity in the danger to the eyes with which the schedule deals. As in the case of oxy-acetylene the provision in the schedule plainly deals with the well-known danger of fragments and particles being thrown off at a high temperature, I would expect it to be dealing with the same danger in that part of it which refers to an electrical process. If it is read as including all processes of cutting when electrical power is used, it is obvious that the dangers, if they existed, would be of a different character. The fact that we are dealing with a single sentence and the

use of the word "similar" point to the construction for which the defendants contend, namely, that the electrical processes referred to are high-temperature processes. Presumably, the words "similar process" were inserted to cover chemical means of obtaining a very high temperature other than by the combination of oxygen and acetylene, if they exist.

To my mind, that is the natural construction. Even if the other construction were possible, this is a schedule which creates offences, and the natural construction should clearly prevail for the benefit of the person against whom a breach is alleged. The learned judge seems to have assumed, or readily come to the conclusion, that the wider construction contended for by the plaintiff was right. I have given my reasons for coming to a different conclusion on that point. He went on to consider whether it was open to him to accept evidence, and act on a submission, that in this process particles and fragments were not in fact thrown off, or not thrown off so as to involve a special risk of injury to the eye, and, therefore, the regulations, in so far as they covered this process, should be regarded as *ultra vires*. He took the view that that was not a matter which it was open to him to consider and that the Secretary of State was the sole judge, and, as he had specified the process in regulations made under s. 49, it was not open to anyone to challenge it on the basis that it was not a process which involved a special risk of injury to the eyes within the meaning of s. 49. At first sight such a contention would be open to a party if a regulation were made covering a process which did not involve any special risk. I can see a possible argument to the contrary, but, as it does not arise in this appeal, I feel that it had better be left over to be decided when it arises. I am not satisfied, with respect, that the conclusion which the learned judge came to was necessarily the right one. For these reasons I would allow the appeal.

BIRKETT, L.J.: I am of the same opinion. There is no doubt that in the schedule to the regulations of 1938 the Secretary of State specified a process which involves a special risk of injury to the eyes in these words:

"Welding or cutting of metals by means of an electrical, oxy-acetylene or similar process."

The question is not the extent of the powers of the Secretary of State or whether he ought to have done this or the other. The simple question for this court is whether the instrument which does the work of cutting, as it has been described in the judgment of my Lord, comes within the material provision. My Lord has considered this provision. He said, and I agree, that there must be a process for the purposes of "welding or cutting of metals" similar to the oxy-acetylene process. I share the view that my Lord has expressed with regard to the construction of this schedule, and I think that this appeal ought to be allowed.

ROMER, L.J.: I agree. It seems to me that the relevant provision is confined to cutting processes which involve the application of heat. There is nothing I can usefully add to the very clear exposition on that subject which my Lord has given. The only point on which I add a word is the question whether a regulation is to be conclusively treated as valid because it is made by the Secretary of State, regardless of any other aspect of the matter. The learned judge said in his judgment:

"It looks to me as if once the regulations have been specified by the Secretary of State, that particular process is brought within the section, and, being brought within the section, it follows that suitable goggles or effective screens ought to be provided to protect the eyes of a person employed in the process... The process is the work which the man is being employed to do, and... it is for the Secretary of State to legislate. Parliament has put him into the position of deciding whether a particular process ought to be brought within the section or not. I do not think the

court has any duty or power to examine and see whether the Secretary of State is right or wrong in making the regulation."

I am not sure whether the learned judge was there laying down that the mere fact that the Minister makes a regulation under s. 49 establishes in itself the validity of the regulation. On the view that we have taken as to the meaning of the regulations, this particular point does not fall for decision, but I should hesitate to adopt that view as at present advised because, although I appreciate the suggestion that the words in s. 49 "being a process which involves a special risk of injury" are nothing more than a directive to the Minister, nevertheless, a formidable argument could be presented that the words "being a process which involves a special risk to the eyes" raise a question of fact which is open to review at the instance of anyone who is being proceeded against for an alleged breach of a regulation made under that section. It may be that as there are no such words as "being in the opinion of the Secretary of State a process", and so on, it would be open to an employer to prove, if he could, that the process which is the subject of the regulation was not one which involved a special risk of injury, but the point does not fall for decision in the present case and I agree with my Lord that it should be left as an open question. I agree that the appeal should be allowed.

Appeal allowed.

Solicitors: *Helder, Roberts & Co.*, agents for *Roger Williams & Son*, Swansea (for the defendants); *Chamberlain & Co.*, agents for *Beor, Wilson & Lloyd*, Swansea (for the plaintiff).

[Reported by MISS PHILIPPA PRICE, Barrister-at-Law.]

Re COHEN (*deceased*). NATIONAL PROVINCIAL BANK, LTD. v. KATZ AND OTHERS.

[CHANCERY DIVISION (Vaisey, J.), January 22, 23, 1953.]

Husband and wife—Ownership of property—Money found in matrimonial home after death of spouses—Wife owner of matrimonial home—Intention to form joint fund accruing to survivor.

A husband and wife lived in a flat which was the freehold property of the wife. The husband died in April, 1948, and his wife four months later, both leaving wills under which the plaintiffs were appointed executors and trustees. After the death of the wife a large number of banknotes and coins were found hidden in the flat. On the question whether the notes and coins belonged to the estate of the husband or to that of the wife or equally to both,

HELD: they belonged to the estate of the wife on the ground (i) that the freehold of the property on which they were found was vested in her: *South Staffordshire Water Co. v. Sharman* ([1896] 2 Q.B. 44), applied; or, alternatively, (ii) the fund was intended to be a joint fund in which both spouses were equally interested, and which, on the death of one of them, accrued to the survivor.

AS TO RIGHTS ANNEXED TO POSSESSION, see HALSBURY, Hailsham Edn., Vol. 25, p. 200, para. 336; and FOR CASES, see DIGEST, Vol. 37, pp. 158-161, H Nos. 31-50.

Cases referred to:

- (1) *Sinclair v. Brougham*, [1914] A.C. 398; 83 L.J.Ch. 465; 111 L.T. 1; 3 Digest 159, 231.
- (2) *South Staffordshire Water Co. v. Sharman*, [1896] 2 Q.B. 44; 65 L.J.Q.B. 460; 74 L.T. 761; 3 Digest 65, 80.

- (3) *Johnson v. Pickering*, [1907] 2 K.B. 437; 76 L.J.K.B. 904; *revsd.* C.A., [1908] 1 K.B. 1; 77 L.J.K.B. 13; 98 L.T. 68; 4 Digest 504, 4546.
- (4) *Mason v. Lickbarrow*, (1790), 1 Hy. Bl. 357; 126 E.R. 209; 1 Digest 307, 307.
- (5) *Ramsay v. Margrett*, [1894] 2 Q.B. 18; 63 L.J.Q.B. 513; 70 L.T. 788; 7 Digest 11, 44.
- (6) *Youngs v. Youngs*, [1940] 1 All E.R. 349; [1940] 1 K.B. 760; 109 L.J.K.B. 747; 2nd Digest Supp.
- (7) *Jones v. Maynard*, [1951] 1 All E.R. 802; [1951] Ch. 572; 2nd Digest Supp.
- (8) *Rimmer v. Rimmer*, [1952] 2 All E.R. 863.

ADJOURNED SUMMONS for the determination, inter alia, of the question whether a sum of £5,994 13s. 6d. in notes and coins found after the death of the testatrix, Rebecca Cohen, in the flat formerly occupied by the testator, Max Cohen, deceased, and the testatrix belonged to the estate of the testator, or to the estate of the testatrix, or partly to one estate and partly to the other, and, if so, in what shares and proportions.

B. S. Tatham for the plaintiffs, the executors.

H. A. Rose for the first, second, fourth and seventh defendants.

L. H. L. Cohen (*R. Cozens-Hardy Horne* with him) for the third and sixth defendants.

Rink for the fifth and eighth defendants.

VAISEY, J.: This question arises under an originating summons which was issued on Sept. 1, 1950, in the matter of the estates of Max Cohen, deceased, and Rebecca Cohen, deceased. Those two persons were husband and wife. The husband's will was dated June 21, 1944. He died on Apr. 3, 1948, and probate was granted on Dec. 3, 1948, to the National Provincial Bank, Ltd., who were appointed executors of his will, with his wife, the testatrix, Rebecca Cohen; she, however, died on Aug. 18, 1948, having left a will dated Aug. 3, 1948, by which she appointed the National Provincial Bank, Ltd., as her executors. The summons to which I have referred was taken out by the bank, as executors of both wills, joining as defendants a number of the beneficiaries under the wills.

The matter came before WYNN-PARRY, J., on Oct. 19, 1951, when he made an order disposing of all the questions raised by the summons. One of the questions was in these words:

"Whether the sum of £5,994 13s. 6d. in notes and coins found after the death of the testatrix in the flat, No. 19, Montpelier Villas, Brighton, formerly occupied by the testator and the testatrix, belongs to the estate of the testator or to the estate of the testatrix, or partly to one estate and partly to the other, and, if so, in what shares and proportions."

On that question WYNN-PARRY, J., ordered that there should be an inquiry whether that sum of money belonged to the estate of the testator or to the estate of the testatrix, or partly to one estate and partly to the other, and, if so, in what shares and proportions, and there was a further question added—whether, if any part of the money belonged to the testator's estate, it formed part of the assets of his business at the date of his death or not. That inquiry having been prosecuted in chambers, the master made his certificate on Oct. 10, 1952. The master finds himself unable to answer the question and leaves it for the consideration of the court.

Max Cohen, the husband, carried on business in the city of London. He and his wife were residing together till the date of his death, and the testatrix, as a widow, continued to reside, at the flat, No. 19, Montpelier Villas, Brighton. The interval between the husband's death and the wife's death was a little over four months. Very little was done in regard to the husband's affairs before

the death of the wife. After her death a large amount of notes and coins was found hidden in the flat. A bundle of notes was found behind the loudspeaker of the radiogram; more notes were found behind the water tank on the landing; a further sum was found in a locked tin box behind the wardrobe in the bedroom; and yet another sum was found underneath a kitchen cabinet. I venture to describe these two persons as having had some of the characteristics usually associated with magpies. In all, this sum of £5,994 13s. 6d. was found hidden in this flat.

So far as the evidence is concerned, there is nothing to throw any light on the mystery. In view of the conflicting claims of the beneficiaries under the respective wills I have to decide to which estate this money belongs. This money is not *res nullius*, an expression used in *Sinclair v. Brougham* (1), and it is obvious that no claimant other than the representatives of the two estates could be heard to assert any right to it. There is no indication to whom this money belonged. There is no suggestion that the husband and wife came to any agreement between themselves with regard to it. There is no evidence of the source of the money or of the purpose of its owner in depositing it in such a manner. Sometimes the solution to such a problem is to treat the claimants as entitled in equal shares.

I must, however, now mention another fact. The house, No. 19, Montpelier Villas, was the freehold property of the wife, that is to say, the legal estate was in her. Whether she held as nominee or trustee for her husband, or whether they had made any arrangement between themselves for any tenancy I do not know. But the fact is that she was the legal owner of the house in which they lived and in which this money was found, and it seems that there is a legal presumption that the owner of land is the owner of the chattels on the land, and for that proposition the authority is *South Staffordshire Water Co. v. Sharman* (2), of which the headnote states:

"The possessor of land is generally entitled, as against the finder, to chattels found on the land. The defendant, while cleaning out, under the plaintiffs' orders, a pool of water on their land, found two rings. He declined to deliver them to the plaintiffs, but failed to discover the real owner. In an action of detinue:—Held, that the plaintiffs were entitled to the rings."

In his judgment LORD RUSSELL OF KILLOWEN, C.J., uses these words ([1896] 2 Q.B. 47):

"... the general principle seems to me to be that where a person has possession of house or land, with a manifest intention to exercise control over it and the things which may be upon or in it, then, if something is found on that land, whether by an employee of the owner or by a stranger, the presumption is that the possession of that thing is in the owner of the locus in quo."

There is a further authority, *Johnson v. Pickering* (3), in which this passage occurs in the judgment of LAWRENCE, J. ([1907] 2 K.B. 444):

"The tendency of modern authorities is to make an intention to possess the test, in the absence of more direct evidence, of actual possession."

And *South Staffordshire Water Co. v. Sharman* (2) is cited with approval.

Questions regarding possession, namely, what amounts to possession, from what possession may be inferred, and when possession can be deemed to indicate ownership, are questions on which there is much authority and, perhaps, controversy. Certain principles are laid down in *Mason v. Lickbarrow* (4). I was referred to a short passage of the report, where it is said (1 Hy. Bl. 360):

"Possession of goods is *prima facie* evidence of title; but that possession may be precarious, as of a deposit; it may be criminal, as of a thing stolen; it may be qualified, as of things in the custody of a servant, carrier, or a

factor. Mere possession without a just title gives no property, and the person to whom such possession is transferred by delivery must take his hazard of the title of his author."

A The question of possession of property as between husband and wife has been adverted to and decided in many cases, especially since the passing of the Married Women's Property Act: see *Ramsay v. Margrett* (5) and *Youngs v. Youngs* (6). In the present case the possession was ambiguous in one sense, because the husband and the wife were both living in the house. It may be that this money came to be put where it was found between the death of the husband and the death of the wife, but, assuming that it was placed there while they were both living, then the possession of it as goods in the house is entirely ambiguous. Nobody can say as between the husband and the wife to which of them lawful possession must be attributed, but it was submitted that the authority of the *South Staffordshire Water Co.* case (2) must determine the issue in this matter as there is nothing better to rely on.

B I cannot find any solution which appears so probable or so convincing that it overrides what I find in *South Staffordshire Water Co. v. Sharman* (2) to be a principle of law to be appealed to if there is nothing else to guide one. I must follow that case and hold that this money belonged to the wife. As I have said, C I do not know whether this money was ever there in the husband's lifetime, but it was there when the wife died, and even if it was placed there in the husband's lifetime, it was so placed by one of two spouses on and in property which belonged to one of them, namely, the wife. I must, therefore, decide that these notes and coins were the property, not of the husband, but of the wife. Had I been able to decide the case on grounds a little more picturesque than D the whereabouts of the legal estate, I should have been very glad to do it.

E It was suggested that a useful guide is afforded by a recent decision of my own, *Jones v. Maynard* (7), approved in the Court of Appeal in *Rimmer v. Rimmer* (8). In the former case I came to the conclusion that where a husband and wife have what is called a "joint purse", and the purposes for which the joint F purse was formed come to an end, the proper way of dealing in a court of equity with the money that is left is not to investigate the precise sources out of which the fund was built up, but to assume that the intention was an equal division of what was left. The analogy of that case does not appeal to me in reference to the facts of the present case, because I consider that the more likely history of this deposit was that the husband and wife had put G the money aside with a view to providing for the survivor of them. I do not suggest that there was any intention to conceal assets from the revenue authorities, and it may well be that during the perilous times of the war it was thought advisable to have a large sum of cash at hand in case the husband should meet a tragic death, leaving the wife to maintain herself, or vice versa. In such a case the presumption would be, not for a division, but for an equality of ownership, in the sense that the nest egg was intended to remain intact for the benefit of the survivor after the death of one of the spouses. *Jones v. Maynard* (7) only applies to this extent, that, while the ownership of the fund might be presumed to be one of equality between the spouses, their interest in it was probably that of a severable joint tenancy, so that, if they wanted to divide the fund in their lifetimes, they could have done so, but if no such division were made, the fund would remain for the benefit of the survivor.

H If that view is taken,—and I only put it as an alternative to the main point on which I have decided the case, unsatisfactory though that point is—the result would be exactly the same, as, if the wife survived, she would be entitled to the fund as survivor. However, I base my decision primarily on the point which I mentioned first, but, in case I am held to be wrong in a higher court, I wish to add as an alternative reason for my decision in favour of the wife's estate that, if it were possible now to draw a deduction from one's knowledge

of human nature, I should hold that this was a fund intended to be a joint fund in which both were equally interested and which accrued to the survivor. On that view, also, the wife's estate would be entitled to my judgment. A further point with which the master was asked to deal was whether any part of these funds belonging to the estate of the testator formed part of the assets of his business. As I have held that no part of it formed part of the assets of the testator, that side of the inquiry has never arisen, and I need not deal with it.

Order accordingly.

Solicitors: *Haslewood, Hare, Shirley Woolmer & Co.*, agents for *Bosley & Co.*, Brighton (for the plaintiffs); *Teff & Teff* (for first, second, fourth and seventh defendants); *T. V. Edwards* (for third and sixth defendants); *Gilbert Samuel & Co.* (for fifth defendant); *Haslewood, Hare, Shirley Woolmer & Co.*, agents for *Daynes, Linsley-Thomas & Co.*, Hove (for eighth defendant).

[*Reported by MISS PHILIPPA PRICE, Barrister-at-Law.*]

HICKSON v. HICKSON.

[COURT OF APPEAL (Jenkins and Morris, L.J.J., and Roxburgh, J.), January 16, 1953.]

County Court—Adjournment—Action by wife for arrears of maintenance under separation deed—Application for determination of title to property under Married Women's Property Act, 1882, s. 17—Petition by husband for divorce on ground of wife's adultery—Proof of adultery relevant on issue of payment of maintenance—Applications by husband for adjournment of proceedings pending hearing of divorce petition—Husband's refusal to accept terms of adjournment.

A wife brought an action in the county court against her husband for arrears of maintenance under a separation agreement. The recital to the agreement contained a statement that the husband had undertaken to contribute to the maintenance of the wife and the child of the marriage so long as the wife should remain chaste. The wife also made an application, under the Married Women's Property Act, 1882, s. 17, for the determination of the title to certain property. On Nov. 3, 1952, the husband filed a petition for the dissolution of the marriage on the ground of the wife's adultery, and a copy of the petition was served on the wife on Nov. 4, the day fixed for the hearing of the county court proceedings. On applications by the husband for adjournment of the proceedings in the county court until the issue of adultery had been tried in the High Court, the county court judge was ready to adjourn both cases on certain terms. As the husband would not agree to the terms, the judge refused the applications for adjournment and heard and decided the cases. On appeal by the husband to the Court of Appeal on the ground that the county court judge should have adjourned the proceedings,

Held: (i) the practice followed in a court of summary jurisdiction, in accordance with the principle laid down in *Knott v. Knott* ([1935] P. 158) (viz., that, during the pendency of a matrimonial suit in the High Court on an issue of adultery, proceedings in a court of summary jurisdiction, in which the same issue was incidentally raised, should be stayed pending the decision in the High Court), did not give conclusive guidance in the case of a civil action for debt (e.g., the claim for arrears of maintenance under the separation agreement) brought in the county court; the county court judge had a discretion to stay the action, and, the issue of the wife's adultery being relevant both to the subject-matter of the case before him and to the matrimonial cause, it might have been convenient to grant the adjournment on terms; but, as the husband refused to agree to the terms on which

the judge was prepared to adjourn the case, the judge had committed no error of law in proceeding to hear it.

(ii) in regard to the wife's application under the Married Women's Property Act, 1882, s. 17, the question of the ownership of the property did not depend on her conduct during marriage, and, therefore, there was no reason why the county court judge should have adjourned the case.

A AS TO COUNTY COURT JUDGE'S POWER TO ADJOURN, see HALSBURY, Hailsham Edn., Vol. 8, p. 286, para. 586, and 1952 Supp.; and FOR CASES, see DIGEST, Vol. 13, p. 503, Nos. 536-538, and Digest Supps.

Cases referred to:

- B (1) *R. v. Middlesex JJ. Ex p. Bond*, [1933] 2 K.B. 1; 102 L.J.K.B. 432; 148 L.T. 544; 97 J.P. 130; *on appeal from* [1933] 1 K.B. 72; 102 L.J.K.B. 40; 148 L.T. 134; 96 J.P. 487; 27 Digest, Replacement, 558, 5093.
- (2) *Higgs v. Higgs*, [1935] P. 28; 104 L.J.P. 1; 152 L.T. 24; 98 J.P. 443; 27 Digest, Replacement, 695, 6642.
- (3) *Knott v. Knott*, [1935] P. 158; 104 L.J.P. 50; 153 L.T. 256; 99 J.P. 329; 27 Digest, Replacement, 695, 6643.

C APPEALS by the husband from orders made by His Honour JUDGE RICHARDSON, at Gateshead County Court, on Nov. 4, 1952, (i) in an action by the wife for arrears of maintenance under a separation agreement, and (ii) on an application by the wife under the Married Women's Property Act, 1882, s. 17, in regard to the title to certain property.

D The recital to the separation agreement contained a statement that the husband would pay maintenance so long as the wife remained chaste. The husband, having filed a petition for the dissolution of the marriage on the ground of the wife's adultery, applied to the county court judge to adjourn, pending the hearing of his petition, both the proceedings brought by the wife, but, as he would not agree to the terms on which the judge was ready to adjourn the proceedings, the judge refused the adjournments and heard the cases. The husband appealed to the Court of Appeal on the ground that the judge should have adjourned the proceedings in the county court until the issue of the wife's adultery had been decided by the High Court.

E *K. B. Campbell* for the husband.

F *Eastham* for the wife.

JENKINS, L.J.: I will ask MORRIS, L.J., to deliver the first judgment.

G MORRIS, L.J.: These are appeals from decisions of His Honour JUDGE RICHARDSON given in the Gateshead County Court on Nov. 4, 1952, in two proceedings between the same parties, a husband and his wife. The same point is raised in both appeals, and, shortly stated, it is that the judge ought to have acceded to applications by the husband for adjournment of the proceedings. One of the two proceedings was an action in which the wife claimed from the husband a sum by way of arrears under a separation agreement. The parties were married in December, 1941, and on July 11, 1952, they entered into a separation agreement. The recital was in these terms:

H "Whereas the husband has undertaken during the joint lives of himself and his wife so long as the wife shall remain chaste or as hereinafter appears to contribute to the maintenance of the wife and of the child of the marriage, Norma, born on May 31, 1947, of whom the wife shall have the custody, such sum as will after deduction of the appropriate rate of income tax for the time being amount to the sum of £3 per week and the parties hereto in pursuance thereof have agreed to enter into the covenants hereinafter contained."

The first covenant was:

“ The husband will pay to the wife during the joint lives of himself and wife so long as they shall be living apart the sum of 30s. per week and the sum of 30s. per week in respect of the said child Norma until she shall attain the age of sixteen years.”

By her particulars of claim the wife alleged that the husband had failed to make any payments under the agreement and claimed arrears due which, between July 12, 1952, and Oct. 11, 1952, amounted to £39. By his defence the husband denied the maintenance agreement and further denied any liability under it, including the alleged arrears of £39. The substance of the husband's case was that he alleged that his wife had not remained chaste and that, accordingly, he was not liable to pay.

The other proceedings before the county court judge were under the Married Women's Property Act, 1882, s. 17. The wife was the applicant and alleged, in the particulars of claim, that in May, 1949, certain property at Faraday Grove, Gateshead, was purchased by the husband for the sum of £625; that the sum of £100 by way of the deposit and legal expenses, including stamp duty on conveyance and mortgage, was supplied by her as part of the purchase price; that the balance of the purchase price was provided by a building society mortgage and that the repayment of the mortgage had been made by her and by her husband jointly; and that the rates and usual outgoings had been paid from joint moneys. She further alleged that the household furniture and effects set out in the schedule to her particulars of claim were bought by her out of moneys belonging to her or were gifts to her, and she claimed all the furniture. Therefore, she asked for a declaration under the Married Women's Property Act, 1882, s. 17, in regard to the house and for an order that the furniture and effects were her property and should be delivered to her.

Both proceedings were due to come on before the learned judge on Nov. 4, 1952. We were told by counsel for the husband that the husband considered that, since December, 1951, he had had reason to doubt his wife's conduct, that he had made applications to the Legal Aid Committee to be admitted as an assisted person, but that, as no step had been taken by the committee by Nov. 3, the day before the hearing of the county court proceedings, he withdrew his papers and his application from the committee, and, at his own expense, caused to be drafted and filed a petition for the dissolution of his marriage on the ground of the wife's adultery. The wife was served with that petition on Nov. 4. Before that date there were some discussions between the solicitors for the parties in regard to possible adjournments of the county court proceedings, but no agreement was reached. When the matters came before the county court judge on Nov. 4, applications were made on behalf of the husband that both proceedings should be adjourned pending the hearing of the divorce petition. The learned judge did not refuse an adjournment absolutely. There was a discussion as to certain terms, and the judge was willing to adjourn the proceedings, so far as the action for arrears of maintenance was concerned, if the money claimed by the wife on her own behalf was paid into court and the amount payable in respect of the child was paid by the husband. The husband would not agree to those terms. He would agree to pay the money for the wife into court, but, in respect of the child, he would agree to pay only 20s., and not 30s. After some consideration of the matter and after the failure of the parties to agree terms, the judge decided not to accede to the applications for an adjournment.

It seems to me that different considerations apply in regard to the two proceedings, as, in regard to those under the Married Women's Property Act, 1882, it is very difficult to see how a determination, as a matter of fact, in regard to the ownership of the property as between the husband and the wife could be affected by any question whether one of the spouses had or had not committed a matrimonial offence at a time after the property was acquired. It is plain, however,

- that the judge did not refuse out of hand to consider the application for adjournment. On the contrary, he went into the matter and considered possible terms, and it was only when there was a failure to agree that he decided not to grant an adjournment. So far as the action for maintenance was concerned, the course that was then adopted was that the learned advocate for the husband did not call evidence on the issue of the alleged adultery of the wife. I think that it was made clear to the judge that the adjournments were applied for on the ground
- A that there was a pending petition in the sense that a petition had been filed and served, though the matter was not ready for hearing, and that the issue of adultery should be determined in the High Court. The issue in the action was whether or not, under the terms of a contract, the husband owed a sum of money to his wife, and, incidentally, in the determination of that issue the husband proposed to raise a question that his wife had not remained chaste.
- B If counsel for the husband is to succeed in his application before us, he must show that there was some error of law. Therefore, he must show that the county court judge either had no discretion in this matter to refuse an adjournment or that he exercised his discretion on a wrong principle resulting in a miscarriage of justice, and, accordingly, that an error in law took place. No authority has been cited to us by counsel for the husband to show that any such question as that
- C which is now before us has ever arisen in regard to an action in the county court. Different considerations apply where an issue, which is to be determined in the Probate, Divorce and Admiralty Division, is raised in a court of summary jurisdiction. Counsel for the husband referred to three authorities, the first being *R. v. Middlesex JJ. Ex p. Bond* (1). I do not propose to refer fully to that case for the reason that, when it came to this court, it was determined on the
- D point that the matter had been res judicata before the justices. The facts of that case were that in 1930 the husband petitioned for the dissolution of his marriage. The wife entered an appearance, but did not defend the suit. In August, 1931, after the decree had been made absolute, she applied to a court of summary jurisdiction for an order under s. 5 of the Guardianship of Infants Act, 1886, as amended by the Guardianship of Infants Act, 1925, for the custody and main-
- E tenance of a child of the marriage. It was pointed out to the bench that the marriage of the parties had been dissolved and that the wife, having appeared to the petition, was entitled under the Matrimonial Causes Rules, 1924, r. 34, to be heard in the Divorce Division as to the custody of the children. The chairman said: "If that is the case we think the application should be made there." In April, 1932, the wife again applied to the justices and a differently constituted
- F court made an order giving her the custody of the child. On an application by the husband for a writ of certiorari, it was held by the King's Bench Divisional Court that the matter was res judicata by the decision in August, 1931, whether that were regarded as a refusal to make an order from which refusal there had been no appeal, or as a decision that the matter was one which would more conveniently be dealt with by the High Court. It was further held in the
- G Divisional Court that the jurisdiction of the Divorce Division, when it had become seised of a matrimonial cause, was an exclusive and overriding jurisdiction and ousted that of justices under the Guardianship of Infants Acts. When the matter came before this court the second point was left open, the decision of the Divisional Court being affirmed on the ground that the matter was res judicata.
- The two decisions on which counsel for the husband principally relied were
- H *Higgs v. Higgs* (2) and *Knott v. Knott* (3). In *Knott v. Knott* (3), which was heard by SIR BOYD MERRIMAN, P., and BUCKNILL, J., the President said that, though it might be sufficient to say that he thought they were bound by *Higgs v. Higgs* (2), he would go into the matter fully, for the reason (inter alia) that their decision in *Higgs v. Higgs* (2) was given without the court being made aware that the decision of the King's Bench Divisional Court in *R. v. Middlesex JJ. Ex p. Bond* (1), which they had followed, had been the subject of an appeal, and that the

Court of Appeal had not dealt with the matter save on the issue of *res judicata*. The headnote to *Knott v. Knott* (3) is:

"During the pendency of a matrimonial suit in the High Court on an issue as to adultery, conflict of jurisdiction may arise from the simultaneous prosecution in a court of summary jurisdiction under the provisions of the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1925, of proceedings incidentally raising the same issue. The issue as to adultery is paramount, the High Court alone having power to dissolve the marriage if adultery be established, while the jurisdiction exercised by the inferior court provides other relief during the continuance of matrimonial status. Proceedings in the inferior court should accordingly be stayed pending the decision of the paramount issue in the High Court."

SIR BOYD MERRIMAN, P., and BUCKNILL, J., discussed the respective jurisdictions and the methods of harmonising them. After referring to the fact that an appeal from justices would lie to a Divisional Court of the Probate, Divorce and Admiralty Division, SIR BOYD MERRIMAN, P., said ([1935] P. 166):

"In a case like the present, however, the court already has seisin of the cardinal issue of adultery, and ought, unless the statute compels the opposite conclusion, to be able to try that issue upon the evidence of the witnesses, unembarrassed by the fact that a Divisional Court have accepted or rejected, on evidence necessarily viewed at second hand, a decision of the justices given at a time when the very issue was pending in this court. It might very well be that, on seeing the demeanour of the witnesses, the judge trying the suit would come to a conclusion different from that arrived at by the justices and affirmed by this court upon the notes of the evidence reported by the clerk of the justices. Though such a result might be justifiable as a matter of logic, it would obviously be most unfortunate, and might very well be characterised in the robust words of AVORY, J., in *R. v. Middlesex JJ. Ex p. Bond* (1) on which we based our decision in *Higgs v. Higgs* (2). On further consideration therefore I am not prepared to depart from the decision of this court in *Higgs v. Higgs* (2). Though I recognise the distinction to which counsel has called attention, I think that, whatever may be the ultimate relief sought, the substance of the matter is that, when the issue of the adultery of the wife is pending in both courts, it should be decided exclusively by this court."

SIR BOYD MERRIMAN, P., concluded his judgment by saying (*ibid.*, 169):

"It remains to consider what is the proper order to be made. In my opinion the finding of the justices should be set aside on the ground that they should not have proceeded to a determination of the matter after their attention had been called to the conflict of jurisdiction and to the authorities, and that the matter should be remitted to them for re-hearing, but that such hearing should be stayed until the determination of the issue of the wife's adultery by this court. This will keep the complaint alive. I need scarcely add that if in this, or in any other case in which this question arises, this court were satisfied that the suit was not being duly prosecuted, but was merely being used for the purpose of prolonging the payments under the order, the court would have ample power to deal with this matter in such a way that the justices would regain jurisdiction."

The principles and the practice laid down by SIR BOYD MERRIMAN, P., in *Knott v. Knott* (3) and in his earlier decision in *Higgs v. Higgs* (2) are, of course, followed and are not in question, but it does not seem to me that a reference to those authorities and to the practice which is followed in cases in courts of summary jurisdiction gives conclusive guidance in regard to the point which is now before us and which concerns the hearing of a civil action for debt brought in the county court. I see no reason why the learned judge was obliged to accede

to this application. He might have done so; it was within his discretion, and he considered the matter fully. But I cannot see that it can be said that he had no option but to postpone a determination of the matter raised in the action, namely, whether the husband did or did not owe a particular sum to his wife. In the notice of appeal it is stated that the judge was wrong in law in refusing the application for an adjournment. I cannot take that view at all. I see no error of law on the part of the judge. The same considerations apply, I think, in regard to the other proceedings, and with even greater force. As I indicated earlier, it does not seem to me that a consideration as to the conduct during marriage of one of the spouses ought to affect the decision of the court in the proceedings under the Married Women's Property Act, 1882. The first ground of appeal in regard to these other proceedings is stated as being that the wife's rights depend on, or were liable to be affected by, her conduct during marriage. I am not persuaded that that is so, and it seems to me that the judge had before him the issues defined in the pleadings and he was concerned to consider, on evidence, in whom was the ownership of the property and of the various chattels. No complaint is made as regards the determination by the judge, as matters of fact, of those issues. For those reasons, in my judgment, the judge did not fall into any error of law and there is no reason to criticise the decisions at which he arrived.

- A** **ROXBURGH, J.:** I agree with MORRIS, L.J., that the two appeals must be differentiated. As regards the second appeal, which relates to the ownership of property, I cannot see how the issue of adultery is relevant to the determination of those matters, and I cannot see any reason why there should have been an adjournment. As regards the first appeal, on the other hand, the position is quite different. In that case there is a common question of fact to be determined, namely, the question of adultery, which is plainly relevant both to the subject-matter of the first appeal and also to the matrimonial cause. I cannot accept *Knott v. Knott* (3) as the foundation for a broad proposition that, whenever a county court is faced with an issue of adultery, then, if there is a matrimonial cause pending, the court is absolutely debarred from adjudicating on that issue.
- D** It seems to me that there is nothing in *Knott v. Knott* (3) to suggest a broad proposition of that kind. On the other hand, it would generally be convenient that the decision of such an issue in the county court should be postponed until after its decision in the High Court, but usually not unconditionally. In almost every case it would be proper to require some term as a condition of granting the adjournment. In this case it is quite plain that the county court judge was prepared to adjourn both cases, though I am only concerning myself with the first. He was prepared to adjourn the case on certain terms. Counsel for the husband submitted that, when the husband refused to accept the terms which were suggested and of which the county court judge approved (if he was not even doing more than that, namely, insisting on them), the county court judge ought to have made an order that the case be adjourned on certain terms. For my own part, I cannot see how he could possibly have done that. The question of adjournment had to be decided then and there. He was either to go on with the case or he was not. As far as I know, he had no power to make an order in invitum on the husband to pay 30s. a week during the pendency of the divorce proceedings. All that he could do was what he seems to have done, namely, say: "You, the husband, want an adjournment. I will give you an adjournment if you will accept certain terms". When the husband refused to accept those terms, I cannot see what the county court judge could have done except go on with the case, which is what he did.

JENKINS, L.J.: I agree.

Appeals dismissed.

Solicitors: *Gibson & Weldon*, agents for *Thomas Magnay*, Gateshead (for the husband); *Isadore Goldman & Son*, agents for *Crute & Sons*, Newcastle-upon-Tyne (for the wife).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

INLAND REVENUE COMMISSIONERS *v.* PEARLBERG.

[COURT OF APPEAL (Denning and Morris, L.JJ.), January 19, 1953.]

Income Tax—Recovery of unpaid tax—Assessments under sched. A—No appeal against assessment—Denial of liability by taxpayer—No defence to summons by Crown—Income Tax Act, 1918 (c. 40), s. 169—Finance Act, 1941 (c. 30), sched. I, para. 5.

The taxpayer was charged with income tax under sched. A in respect of certain properties on the ground that under s. 12 (1) of, and sched. I, Part I, para. 1 to, the Finance Act, 1941, he was the landlord at the material time, and he was served with a notice under para. 1 against which he did not appeal. He was also personally assessed and charged in respect of other properties, but he did not appeal against the assessment within the time prescribed by the Finance Act, 1942, sched. X, para. 6 (3). On a summons by the Commissioners of Inland Revenue for leave to sign final judgment under R.S.C., Ord. 14, for the two sums thus charged, the taxpayer sought leave to defend on the ground that he had been wrongly assessed.

HELD: with regard to the first group of properties, the taxpayer having brought no appeal against the notice, under para. 5 of Part I of sched. I to the Act of 1941 it was to be conclusively presumed that the amount of tax specified in the notice was due from him; with regard to the second group, the taxpayer not having appealed against the assessment, under s. 169 of the Income Tax Act, 1918, the tax was recoverable by the Crown; and, therefore, he was not entitled to leave to defend and the commissioners were entitled to judgment.

FOR THE INCOME TAX ACT, 1918, s. 169, and THE FINANCE ACT, 1941, sched. I, see HALSBURYS STATUTES, Second Edn., Vol. 12, pp. 92 and 543.

APPEAL by the taxpayer from a decision of HAVERS, J., in chambers, dated Dec. 15, 1952.

The Commissioners of Inland Revenue claimed £438 7s. for income tax due partly under assessments made under r. 8 of No. VII of sched. A to the Income Tax Act, 1918, in respect of certain properties and recoverable from the taxpayer, not being the person named in the assessments, as the landlord of the respective properties on Jan. 1, 1952, under s. 12 (1) of the Finance Act, 1941, and sched. I thereto, and partly under assessments to income tax on the taxpayer as landlord. Regarding the first group of properties, a notice had been served on the taxpayer in accordance with para. 1, Part I, of sched. I to the Act of 1941, but the taxpayer had not given notice of appeal against that notice, nor had he appealed against the second assessment. The commissioners issued a summons under R.S.C., Ord. 14, for leave to sign final judgment, and the taxpayer asked for leave to defend on the ground that he had been wrongly assessed. On Dec. 8, 1952, the master gave leave to sign final judgment, and on Dec. 15, 1952, HAVERS, J., dismissed the taxpayer's appeal.

Cyril King, Q.C., and D. C. Miller for the taxpayer.
Sir Reginald Hills for the Crown.

DENNING, L.J.: The master and the judge in chambers have both given judgment in favour of the Commissioners of Inland Revenue against the taxpayer on a claim for income tax by the commissioners under sched. A amounting to £438 7s. The taxpayer now appeals to this court asking that he should have liberty to defend the claim. The tax is claimed in respect of properties which fall into two groups. In the first group the taxpayer is charged with tax, not on the ground that he was the person assessed, but on a ground introduced by s. 12 (1) of the Finance Act, 1941, whereby an assessment is

“ . . . valid as against all persons although not made on the person who should have been assessed . . . ”

Proceedings have been instituted against him "as having been the landlord" at the material times, and a notice has been served on him in accordance with Part I, para. 1, of sched. I to that Act, specifying the land and the amount of tax claimed against him. He has not given a notice of appeal from that notice. Under para. 5 of the schedule it is provided:

A "Where no appeal is brought . . . it shall be conclusively presumed that the person on whom the notice was served was the landlord of the land [at the material time] and that the amount of tax specified in the notice is due from him so far as it still remains unpaid . . ."

In the second group of properties the taxpayer has himself been assessed and charged. He has not given a notice of appeal within the twelve months permitted by para. 6 (3) of sched. X to the Finance Act, 1942.

B The taxpayer has made two affidavits. With regard to the first group of properties he swears that he never owned the properties, that he has never been in receipt of the rents or profits from them, that he is and has at all material times been an undischarged bankrupt, that he is not the landlord, and, therefore, that he ought not to be charged. With regard to the second group of properties he swears that he was at no time the owner, occupier or landlord of them. The issue which he raises in those affidavits is that he is not rightly chargeable with tax, for one or other of the reasons he has mentioned. The whole question in the case is whether that is an issue which the taxpayer is allowed to have tried in these proceedings in the High Court? The correct answer has been, I think, given by counsel for the Crown, namely, that the right way for him to have raised any of these matters was by appeal to the commissioners in the way provided by the Income Tax Acts, and, as he did not raise the matters by way of appeal, he is not allowed to raise them now. If we were to allow the taxpayer to raise these matters, it would mean that the High Court would become the tribunal to decide questions of fact and law on tax assessments, whereas they have been decided to the general satisfaction for a great many years now by the Commissioners of Income Tax, with an appeal on points of law by Case Stated to the High Court.

E The provisions which exclude the taxpayer from raising the question of liability are these. So far as the first group of properties is concerned, there is a conclusive presumption against him under sched. I, Part I, para. 5, to the Act of 1941. So far as the second group of properties is concerned, once there is an assessment duly made and not appealed from, then, under s. 169 of the Income Tax Act, 1918, the tax charged may be sued for and recovered from the person charged therewith in the High Court as a debt due to the Crown. In my opinion, therefore, all issues on the merits of these cases, as to fact or law, should have been determined on appeal to the commissioners and cannot be raised at this stage. If there has been no appeal to the commissioners the debts become absolute and conclusive, and their legal effect cannot be denied. The position was the same in the old days of the Latin information. I remember that in those matters G ROWLATT, J., refused to go into the merits. He always told the debtor that he ought to have appealed to the commissioners. So now, although since the Crown Proceedings Act, 1947, the procedure—by writ in the High Court—is different, nevertheless, the assessment having been made, or the notice served, and no appeal made, the debt is absolute, and we have no alternative but to award judgment. In my opinion, the appeal should be dismissed.

H MORRIS, L.J.: I agree.

Appeal dismissed.

Solicitors: Warren & Warren (for the taxpayer); Solicitor of Inland Revenue (for the Crown).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

R. v. WIMBLEDON JUSTICES. *Ex parte* DERWENT.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Croom-Johnson and Pearson, JJ.), January 23, 1953.]

Housing—Purchase price—Limitation—House constructed under building licence—Condition limiting rent included in licence—Letting at excessive rent—Informations laid more than six months after date of letting—Competency of proceedings—Building Materials and Housing Act, 1945 (c. 20), s. 7 (1). A

A prosecution under the Building Materials and Housing Act, 1945, s. 7 (1), for letting a house constructed under the authority of a building licence at a rent in excess of the maximum rent permitted by the terms of the licence must be brought within six months from the date of the letting.

Prohibition—Justices—Prohibition against proceeding in excess of jurisdiction. B

The fact that justices can be required to state a Case for the opinion of the High Court on a question of jurisdiction does not preclude an order of prohibition being issued prohibiting them from entertaining a proceeding in excess of their jurisdiction.

AS TO LIMITATION OF TIME UNDER SUMMARY JURISDICTION, see HALSBURY, Hailsham Edn., Vol. 21, p. 598, para. 1043; and FOR CASES, see DIGEST, Vol. 33, pp. 325-327, Nos. 392-395. C

Cases referred to:

- (1) *Stray v. Docker*, [1944] 1 All E.R. 367; [1944] K.B. 351; 113 L.J.K.B. 244; 170 L.T. 300; 108 J.P. 116; 31 Digest, Replacement, 729, 8117.
- (2) *R. v. Income Tax Special Purposes Comrs.*, (1888), 21 Q.B.D. 313; 53 J.P. 84; *sub nom. R. v. Income Tax Special Comrs. Ex p. Cape Copper Mining Co., Ltd.*, 57 L.J.Q.B. 513; 59 L.T. 455; 2 Tax Cas. 332; 16 Digest 306, 1181. D

APPLICATION for writ of prohibition to issue to Wimbledon, Surrey justices, to prohibit them from proceeding with the hearing of seven informations.

On June 12, 1952, the seven informations were laid against the applicant by the Wimbledon Corporation under the Building Materials and Housing Act, 1945, s. 7 (1), charging that he had let seven sets of premises, in respect of which building licences had been issued, at rents in excess of the maximum rents permitted by the building licences subject to which they were issued. The building licences were issued to the applicant by the borough council on dates between Nov. 2, 1948, and Mar. 7, 1950, subject to the provision that the premises were not to be let at rents in excess of certain figures varying between £125 and £208 per annum according to the size and nature of the premises. On dates between Nov. 1, 1949, and Aug. 12, 1951, the applicant let the seven sets of premises in question at rents which exceeded the permitted rents by £23 to £25. E

It was contended on behalf of the applicant that under the Summary Jurisdiction Act, 1848, s. 11, the justices had no jurisdiction to hear and determine the case, as the informations were laid in all cases more than six months after the lettings had taken place and that a letting was not a continuing offence. F

M. R. Nicholas for the applicant.

Sachs, Q.C., and *Elson Rees* for the justices. G

LORD GODDARD, C.J.: Counsel for the applicant in these cases moves for orders of prohibition to justices for the county of Surrey sitting at Wimbledon, prohibiting them from continuing to hear seven summonses alleging offences by him against the Building Materials and Housing Act, 1945, s. 7 (1). H

Despite a very strenuous and clear argument by counsel for the justices I am of opinion that this case seems to me to involve a simple question of construction. Under the Building Materials and Housing Act, 1945, s. 7 (1), it is provided that where a person obtains a licence from a local authority enabling

him to build a house the authority can impose a condition limiting the price at which the house may be sold or the rent at which it may be let. We have not gone into the merits of these cases, and we decide them on the ground of jurisdiction. The offence of selling or letting a house above the figure limited in the licence is made a summary offence by the sub-section. It is elementary that summary jurisdiction is entirely a creation of statute, and the proceedings of justices are governed by the Summary Jurisdiction Acts. Section 11 of the Summary Jurisdiction Act, 1848, provides:

A “ . . . In all cases where no time is already or shall hereafter be specially limited for making any such complaint or laying any such information in the Act or Acts of Parliament relating to each particular case, such complaint shall be made and such information shall be laid within six calendar months from the time when the matter of such complaint or information respectively arose.”

B It would seem to be clear from that section that, if a case is brought before justices and on the face of the proceedings it can be seen that the offence alleged to have been committed took place more than six months before the information was laid, justices have no power to enter on the matter at all, because they have no jurisdiction to sit as a court of summary jurisdiction in the case of an offence alleged to have been committed more than six months before.

C Therefore, what we have to consider is whether or not the offence which is laid here took place more than six months before the information was laid. On the information that was laid in the first case it was said that on Apr. 27, 1950, the defendant did unlawfully let a house known as 5, Church Hill, Wimbledon, for a term of seven years from Mar. 25, 1950, at a rent of £245 per annum exclusive of rates notwithstanding that it was a condition of the granting of the building licence dated June 30, 1949, under which the said house was erected, that the said house should not be let at a rental in excess of £220 per annum exclusive of rates, contrary to s. 7 (1) of the Building Materials and Housing Act, 1945. The point was taken before the justices that they could not enter on the hearing of the case because on the face of the information the offence had been committed more than six months previously. Thereupon it occurred to the prosecution, in order to enable jurisdiction to be given to the justices, as they thought, to ask the justices to amend the information by inserting, immediately after the words “ at a rental in excess of £220 per annum exclusive of rates ”, these words: “ and that the said house continued to be and is still let at the said rent which is in excess of the rent so limited.”

D The question we have to decide is whether that discloses any offence under the Act. I need hardly say that there are many Acts of Parliament with which this court is very familiar in which a certain act is constituted an offence, and it is provided that for every day that act continues or remains unabated there shall be a continuing offence, and a penalty is fixed for every day, or week, or month, that the state of affairs exists. There are no such words as that, and it is not contended that there are, in this statute. The Building Materials and Housing Act, 1945, s. 7 (1) is in these words:

E “ Where a house has been constructed under the authority of a licence granted for the purposes of a defence regulation (hereinafter referred to as ‘ a building licence ’) and the licence, whether granted before or after the passing of this Act, has been granted subject to any condition limiting the price for which the house may be sold or the rent at which it may be let, any person who, during the period of four years [which has now been extended to eight years by the Housing Act, 1949, s. 43 (1)] beginning with the passing of this Act, sells or offers to sell the house for a greater price than the price so limited (hereinafter referred to as ‘ the permitted price ’), or, as the case may be, lets or offers to let the house at a rent in excess of the rent so

limited (hereinafter referred to as 'the permitted rent'), shall be liable on summary conviction to a fine not exceeding the aggregate of—(a) such amount as will in the opinion of the court secure that he derives no benefit from the offence; and (b) the further amount of £100; or to imprisonment for a term not exceeding three months, or to both such fine and such imprisonment”,

so it is a serious offence.

We are asked to say that the words “lets or offers to let” are to be construed as meaning that an offence is committed during the whole time of the lease. In my opinion, such a construction is impossible. A person lets a house once and for all when he demises the house by means of the lease, and it is conceded in this case—because counsel for the respondents could not argue otherwise—that in a case of sale the offence takes place once and for all when the house is sold, i.e., when the conveyance is executed, or even when the house is offered for sale. How can we possibly give a different construction to the words “sells or offers to sell” from the words “lets or offers to let”? It would be impossible. The words appear in the same section, and, if we gave a construction such as we are asked to give here in the case of “let or lets”, we should have to give the same construction to the word “sell”. Therefore, if a man sold a house in contravention of the section, years afterwards he might be prosecuted. We are asked to say that Parliament must have assumed that a local authority might not be able to find out that an offence had been committed at once, and, therefore, we ought to give some benevolent construction to the section and convert into an offence that which the statute does not say is an offence. I think it is much more probable, as these rents and prices have to be registered and are to be regarded as land charges and open for inspection (see s. 8 (1)), that Parliament assumed that intending lessees and intending purchasers would search the register of charges and find out if they were being overcharged. Then, if they were being overcharged, they would take proceedings to protect themselves. It seems to me that it would have been possible, though it would be putting a burden on local authorities, to have made it a condition of giving a licence that the local authority should have stipulated that before a house was let or a sale completed, the lessor or vendor should send them the documents so that they could see that the terms of the licence were being fulfilled. But, whether or not it is desirable that the law should be amended is not for this court. We can find nothing in this section which enables us to construe the words “lets or offers to let” as providing for a continuing offence for the purposes of this section, any more than, as is admitted, we can construe “offers to sell” as a continuing offence.

That is the short and conclusive answer to the question of construction which has been raised, and I do not think any of the cases that have been cited give any assistance. *Stray v. Docker* (1) was much relied on by counsel for the respondents, but that was a case under a different Act (the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920) and under quite different words. It was pointed out in the course of the argument that it would appear that ASQUITH, J., would have accepted the particular words as one finds them there and have decided the case differently from what he did.

Therefore, the court has no doubt on the true construction of this sub-section that the offence was committed once and for all when the house was demised, that is to say, when the lease was executed, which was on Apr. 27, 1950. But counsel for the respondents argues that we ought not to deal with these cases by way of prohibition. Earlier in my judgment I pointed out that the words of s. 11 of the Summary Jurisdiction Act, 1848, limit the jurisdiction of justices. They take away jurisdiction to deal with any case where the offence has been committed more than six months before the information was laid. If that is so, and justices have no jurisdiction, this court is entitled, and ought, to issue prohibition to

- prevent them from going on with a case. They most properly adjourned these cases in order that this point might be argued, so that, if prohibition were refused, they could continue the hearing of the cases, but now they will be prohibited from going on. It is certainly the most convenient course to take to prevent a lot of expense being incurred in hearing these seven summonses, and I think the applicant is entitled to this relief of prohibition because, if a court has no jurisdiction, no consent can give it jurisdiction. I do not deny that justices may, if
- A this court is not asked to prohibit them from doing it, proceed to hear a case, and the point can be taken before them: "You have no jurisdiction to convict in this case, and if you do convict, we shall ask for a Special Case." The statutory provisions which provide for the stating of Cases by justices enable Cases to be stated on questions of jurisdiction, but the fact that that can be done is no reason why, if the court is satisfied that there is a lack of jurisdiction in the justices, they should not issue prohibition, which is the very object with which that writ has been framed. It is the direction of a superior court to an inferior court to prevent the inferior court acting without jurisdiction, and it would be acting without jurisdiction if the justices convicted in these cases, where the offences have been committed more than six months before. It is an entirely different case from those which from time to time come before this court, for instance, proceedings of
- B a Rent Control Tribunal who, before they can say whether they have jurisdiction or not, have to inquire into certain facts. The well-known case on the subject entitling the court to say that a court may be entitled to inquire into facts to discover whether they have jurisdiction or not is the judgment of LORD ESHER in *R. v. Income Tax Special Purposes Comrs.* (2), where he pointed out that it is legitimate when the jurisdiction of justices or inferior bodies depends on the
- C existence of certain facts for them to inquire into those facts to find out whether they have jurisdiction or not, and the court will then review the finding of fact because, if this court came to the conclusion that the facts were wrongly found, they would say that the justices acted without jurisdiction. But that is not this case because the defect appears on the face of the proceedings. The information clearly shows an offence which was committed once and for all on Apr. 27, 1950.
- D It follows, therefore, that the court has no jurisdiction to inquire into that offence when the information was not laid till June 12, 1952. The result is that the order will go in all these cases.
- E

CROOM-JOHNSON, J.: The proceedings in this case started with an information on June 12, 1952, alleging, inter alia, that the applicant had unlawfully let a house, 3, Church Hill, Wimbledon, on June 7, 1951, for a term of

F seven years for a consideration which consisted of a total money rent in excess of that which was provided as being the maximum in a licence under s. 7 (1) of the Building Materials and Housing Act, 1945. On the face of that information it was apparent, therefore, that the proceedings were being taken in respect of a matter which had arisen and an offence which had been committed more than

G six months before the information. On the point being taken before the justices, they adopted a method of getting rid of this, I should have thought, palpable, objection by amending the information so as to allege that the house continued to be and was still let—that is, at the date of the information—"for the said consideration which is in excess of the rent so limited." The justices decided that that amendment should be made and were, apparently, proceeding on that basis. (Perhaps it is worth just a passing observation that when justices are being

H invited to make an amendment which affects, or may affect, the liberty of the subject and there are penal consequences of the gravity of those which are indicated in s. 7 (1), they should proceed with very great hesitation and with very great caution). The result was an application to this court by the applicant by which he asked us to interfere by issuing an order of prohibition to prevent the justices going on with the amended information.

It has now been suggested by the respondents through their counsel that the

proper construction of s. 7 (1) is that where a house has been let at an excessive rent, at any time when money in respect of that rent is payable an offence is still being committed. That means that a continuation of the original offence of the letting is being committed by the landlord. The answer to that, it seems to me, depends on the proper construction of s. 7 (1), which contains provisions which deal not only with the limitation of the rent of houses constructed under certain building licences, the terms of which are permitted by the statute, but also with sales, and, therefore, with limitations on the purchase prices of houses. With regard to both these subject-matters the legislature has provided that it is an offence either to sell or offer to sell or to let or offer to let at an excessive figure. It is said that when one comes to the words, "lets or offers to let", so long as the term continues, the house is still being let. I should have had great difficulty in appreciating, as a matter of construction, how those words in a penal provision in a statute of this sort could achieve that result, but my difficulties are considerably increased by the admission that, in the case of a sale, no such construction of the words "sell or offers to sell" is possible. I have read and re-read this part of s. 7 (1). I have looked at other sections which deal with other remedies, and I am unable to see, by any canon of construction with which I am acquainted, that it is possible to construe the words "lets or offers to let" as resulting in a continuing offence. As a general rule, the court is not eager to find continuing offences provided by a statute—certainly not without express words which make clear that that was the intention of the legislature when the statute was passed. I cannot see anything here which indicates anything of the sort. It would have been easy to put in some such provision as has been suggested by my Lord, to the effect that, if a contravention of the statute is not put right, there shall be deemed to be a continuing offence, and providing, for example, for a daily, weekly, or monthly penalty. There is nothing of that sort here. Such provisions in statutes are well known, and I think that this courageous effort to support the action of the justices fails. The defect in the informations as they originally were is not cured by the amendments which the justices allowed. In other words, the justices should be prohibited from continuing with the hearing of these matters in the form in which they have permitted them to be amended.

It is said as a sort of *tabula in naufragio* that the remedy of prohibition is not open to this court to impose, but I do not wish to add anything about that. I concur with my Lord's judgment.

PEARSON, J.: I agree. I think it is plain, when one considers carefully all the provisions of s. 7 (1) together with the provisions of the interpretation section, s. 9 (3) (b), that a person lets a house if he demises a house or agrees to demise it, and the offence under s. 7 (1) of letting a house at a rent in excess of the permitted rent is completed with the execution of the lease or the conclusion of the agreement to let the house. That appears strongly from the provisions of s. 7 (1), and support for it can be derived from the provisions of s. 7 (2), that in certain circumstances a house shall be deemed to have been let at a rent in excess of the permitted rent, which, of course, implies that it is something which has already taken place at a moment of time. There is similar wording in s. 7 (4), referring to the rent at which the house was let, showing that it is a past event which has occurred, and, again, in s. 7 (5), the wording is:

"In determining for the purposes of this section the consideration for which a house has been sold or let . . ."

There it is contemplated as a past event, already complete. Then there is an interesting instance in s. 7 (7) (b):

"... where any person is convicted of the offence of letting a house at a rent in excess of the permitted rent, the court may, if the interest created by the letting has not expired at the time of the conviction . . ."

I think the language of that paragraph, as well as the language of the Act in general, is carefully chosen and is accurate language. It means that the letting is a demise which creates an interest forthwith. It is the interest which continues and the act of demise has already taken place. I would say, finally, that I think that *Stray v. Docker* (1), operates to confirm the view which this court has taken of the meaning of the Act in this case because both HUMPHREYS, J., and ASQUITH, J., distinguish clearly between the two conditions which, under the

A Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 10, had to be fulfilled before the Act operated. HUMPHREYS, J., said ([1944] K.B. 355):

“The section prescribes that there must be a letting after a certain date, and it must also be proved that the rent charged, which includes payment in respect of the use of furniture, yields to the landlord a profit which, having regard to all the circumstances of the case, is extortionate.”

B He went on to say (*ibid.*):

“In my view, the real offence created by the section is not the letting of the dwelling-house to which the Act applies, although that must necessarily be an incident in the commission of the offence, but the charging to the

C tenant of a rent which in all the circumstances yields to the landlord an extortionate profit.”

There is similar reasoning in the judgment of ASQUITH, J., in the same case. Having regard to those factors, I think it is clear that there is only one possible answer to the question of construction, and that is the answer which has been

D given, and so I concur in the order proposed.

Order of prohibition to issue.

Solicitors: *Kenneth Brown, Baker, Baker* (for the applicant); *E. M. Neave*, town clerk, Wimbledon (for the justices).

[*Reported by* MICHAEL MALONEY, Esq., *Barrister-at-Law.*]

HARRIS v. BRIGHT'S ASPHALT CONTRACTORS, LTD., ALLARD & SAUNDERS, LTD. (Third Parties).

[QUEEN'S BENCH DIVISION (Slade, J.), January 13, 14, 15, 16, 19, 20, 1953.]

F *Negligence—Damages—Personal injury—Measure of damages—Diminished expectation of life—Loss of future wages through death supervening—Work “above” fragile roof—Provision of scaffolds—Building (Safety, Health and Welfare) Regulations, 1948 (S.I., 1948, No. 1145), reg. 5, reg. 31 (3) (a), (b).*

G The plaintiff, an asphalter employed by the defendants, while repairing factory premises was removing an asphalt drip edge from the side of a flat roof. There was an asbestos roof adjoining and some two feet below, and to do the work the plaintiff knelt nine inches from the edge of the flat roof, leaning forward. Owing to some unascertained reason, while he was so working he fell on and through the asbestos roof, dropping some thirteen feet to the factory floor below, and sustaining serious injuries. At the time of the

H hearing of an action for damages for negligence brought by him against the defendants for failing to provide a safe system of work and/or breach of a statutory duty, his expectation of life was eighteen months.

HELD: (i) on the facts, though the work was being carried out in a normal manner, the plaintiff was being subjected to an unnecessary risk which could reasonably have been foreseen by the defendants and reasonably could have been guarded against.

(ii) the defendants were in breach of their statutory duty under the Building (Safety, Health and Welfare) Regulations, 1948, reg. 5, to provide "scaffolds" for all work that could not safely be done "on or from the ground, or from part of the building, or from part of a permanent structure . . ."

(iii) there was no breach of reg. 31 (3) (a), which requires the provision of "ladders, duck ladders or crawling boards" where "workmen have to pass over or work above fragile roofs", since "above" in the regulations meant directly and vertically above.

(iv) in assessing damages for loss of expectation of life it was not proper to award an amount on the basis of the plaintiff's wages for the period between the date of his probable death and the age to which he was likely to have lived if he had not had the accident.

Roach v. Yates ([1937] 3 All E.R. 442), and *Phillips v. London & South-Western Ry. Co.*, (1879) (5 Q.B.D. 78) explained.

AS TO DAMAGES FOR PERSONAL INJURIES, see HALSBURY, Hailsham Edn., Vol. 23, p. 724, para. 1016; and FOR CASES, see DIGEST, Vol. 36, pp. 125, 126, Nos. 831-838.

Cases referred to:

- (1) *Wilson & Clyde Coal Co., Ltd. v. English*, [1937] 3 All E.R. 628; [1938] A.C. 57; 106 L.J.P.C. 117; 157 L.T. 406; Digest Supp.
- (2) *Smith v. Baker & Sons*, [1891] A.C. 325; 60 L.J.Q.B. 683; 65 L.T. 467; 55 J.P. 660; 36 Digest 95, 683.
- (3) *Caswell v. Powell Duffryn Associated Collieries, Ltd.*, [1939] 3 All E.R. 722; [1940] A.C. 152; 108 L.J.K.B. 779; 161 L.T. 374; Digest Supp.
- (4) *Roach v. Yates*, [1937] 3 All E.R. 442; [1938] 1 K.B. 256; 107 L.J.K.B. 170; Digest Supp.
- (5) *Phillips v. London & South-Western Ry. Co.*, (1879), 5 Q.B.D. 78; 41 L.T. 121; 43 J.P. 749; *subsequent proceedings*, 5 C.P.D. 280; 17 Digest 176, 784.
- (6) *Flint v. Lovell*, [1935] 1 K.B. 354; 104 L.J.K.B. 199; 152 L.T. 231; Digest Supp.
- (7) *Rose v. Ford*, [1937] 3 All E.R. 359; [1937] A.C. 826; 106 L.J.K.B. 576; 157 L.T. 174; Digest Supp.
- (8) *Benham v. Gambling*, [1941] 1 All E.R. 7; [1941] A.C. 157; 110 L.J.K.B. 49; 164 L.T. 290; 2nd Digest Supp.

ACTION by the plaintiff, Thomas Harris, an asphalter, claiming damages for personal injuries from the defendants, Bright's Asphalt Contractors, Ltd., by whom he was employed in November, 1950, when the defendants were engaged in carrying out repairs to factory premises at 126-128 New King's Road, Fulham, occupied by the third parties, Allard & Saunders, Ltd.

The work to be done included work on a flat roof, at one side of which there was an asphalt drip edge which extended down eight and a half inches vertically and two feet below this was a gutter nine inches wide. From this gutter rose a second roof to a roof ridge, at an angle of thirty degrees. This roof had originally been glazed, and the glazing bars were two feet apart, but the glass had been replaced by sheets of asbestos laid between the glazing bars. On Nov. 24, 1950, the plaintiff, who had been instructed by his employers to strip the whole of the flat roof, and had been left temporarily in charge of the work, was engaged in chipping away the asphalt from the drip edge. He was doing this in a proper way, kneeling nine inches away from the edge of the roof, when, for an unexplained reason, he overbalanced and fell on to the asbestos roof some two feet below. This roof, being fragile, broke and he fell through to the floor of the factory about thirteen feet below and was injured. At the time of the hearing it was found as a fact that the plaintiff's expectation of life was eighteen months. The judge also found that

the plaintiff knew that the asbestos roof was fragile, that in the circumstances there was a risk to the plaintiff, that it was an unnecessary risk which should have been foreseen, and could easily have been guarded against by the defendants, and that the plaintiff had not been guilty of contributory negligence.

Crichton, Q.C., and *Leonard Lewis* for the plaintiff.

Beney, Q.C., and *Elson Rees* for the defendants.

Gerrard, Q.C., and *Stephen Chapman* for the third parties.

A **SLADE, J.**, stated the facts and continued: The first question I have to ask myself is: What is the duty which an employer owes to his servant? I am not dealing at the moment with his duty as an occupier of premises, but independently of such occupation. Counsel for the defendants cited *Wilsons & Clyde Coal Co., Ltd. v. English* (1), where the well-known definition of those duties by B LORD HERSCHELL in *Smith v. Baker & Sons* (2) was repeated with approval. In *Wilsons & Clyde Coal Co., Ltd. v. English* (1) LORD WRIGHT cites ([1937] 3 All E.R. 641) this passage from LORD HERSCHELL's opinion in *Smith v. Baker & Sons* (2):

C “It is quite clear that the contract between employer and employed involves on the part of the former the duty of taking reasonable care to provide proper appliances, and to maintain them in a proper condition and so to carry on his operations as not to subject those employed by him to unnecessary risk.”

D In case there is any doubt about the meaning of the word “unnecessary”, I would take the duty as being a duty not to subject the employee to any risk which the employer can reasonably foresee, or, to put it slightly lower, not to subject the employee to any risk that the employer can reasonably foresee and against which he can guard by any measures, the convenience and expense of which are not entirely disproportionate to the risk involved. I am prepared to approach this case on whichever of those definitions imposes the lowest duty on the defendants.

E I have to decide, therefore, whether the accident which happened to the plaintiff was one which the employers could reasonably have foreseen, and I find as a fact that it was. If I apply the unnecessary risk test, I find that it was a risk which could reasonably have been foreseen and which should have been foreseen, and that it was unnecessary in the sense that it could have been prevented or guarded against by the simplest measures. If the test is whether the duty is not to expose an F employee to a risk which can be reasonably foreseen, I find as a fact that this was such a risk. If the test is that an employee should not be exposed to those types of risk which can be reasonably foreseen, and which also could have been guarded against without undue inconvenience or expense, again I find that this was such a risk. I find it could have been guarded against, as I say, in the simplest manner by the provision of three or four nine inches wide boards at an G angle to the ridge on which the plaintiff could have stood to do the chipping of the drip edge. It seems to me almost impossible to contend that there is not a risk in kneeling in a position only nine inches from an edge with a fall of thirteen to fifteen feet to a surface sufficient to cause the terrible injuries which the plaintiff suffered. In the result, therefore, it becomes, strictly speaking, unnecessary for me to decide the question of breach of statutory duty, but I said I would H do so in case this matter goes further.

It is conceded that the Building Regulations apply to the work in this case, and the breaches alleged are, first, one of reg. 5. It is admitted that reg. 5 applies to the defendants. Before reading reg. 5 I should say that I have read the definition of “scaffold” in reg. 3. I note that it is expressed, among other things, to include “any working platform”, and that it means “any temporary structure on or from which persons perform work”. I interpret that to mean that, if the three

or four boards which I have mentioned were used to catch a man who overbalanced from a leaning position, that would not constitute a scaffold, but, if they were used as a platform on or from which to do the work, they would constitute a scaffold within the meaning of the definition, and I so hold. Regulation 5 provides:

“Suitable and sufficient scaffolds shall be provided for all work that cannot safely be done on or from the ground or from part of the building, or from part of a permanent structure . . .”

For the same reason that I have found that the defendants were in breach of their common law duty, I find that, so far as planks could have been used as a platform on or from which to do the work, there was a breach of the statutory duty imposed by reg. 5 in the sense that the work could have been done—I will not say “should have been done” because the evidence shows it was perfectly proper to do it from the kneeling position—but in the sense that the work could have been done with complete safety by the use of three or four boards and by the plaintiff doing the drip edge from the security of those four boards—in other words, the kneeling method is a normal method of doing work on a roof when, if the workman overbalances, which is a foreseeable risk, he can come to no appreciable harm by virtue of the distance which he can fall, but it is not a normal or proper way of doing it when, if he overbalances, he will fall a substantial distance to the ground and risk very serious injuries.

With regard to the other two breaches alleged, they are both breaches of reg. 31 (3). In both cases I have looked at the obligations under the regulations which are set out in reg. 4 and noted that it shall be the duty of every contractor and employer of workmen to which the regulations apply to comply with reg. 5, and with such requirements of reg. 31

“as relate to any work, act or operation performed or about to be performed by such contractor or employer of workmen.”

Regulation 31 (3) reads in this way:

“Where work is being done on or near roofs . . . covered with fragile materials through which a person is liable to fall a distance of more than ten feet—(a) where workmen have to pass over or work above such fragile materials, suitable and sufficient ladders, duck ladders or crawling boards, which shall be securely supported, shall be provided and used.”

The words “pass over” are, in my view, inapplicable to the present case. If, therefore, this regulation is to apply it must be that the plaintiff had to work above a fragile roof. What does the word “above” mean? Does it mean above in the vertical plane of the fragile roof, or does it mean above merely in the sense of at a greater height? I think it means the former, and I think that the argument of counsel for the defendants to that effect is reinforced by the fact that the three protections required, namely, ladders, duck ladders or crawling boards, are appropriate only to someone passing over the fragile roof or working above it. In my view, obviously they are designed to protect a man from falling through the fragile roof, and he will not be protected from doing so if he is not working vertically above the roof, but is liable to slip forward into the vertical plane of the fragile roof. At any rate, I hold that “working above” means working over in the sense of higher than the fragile roof in the vertical plane from the fragile roof, and, therefore, that reg. 31 (3) (a) is inapplicable, and the defendants committed no breach of it.

I now look at reg. 31 (3) (b) which provides:

“Prominent notices stating that the coverings are fragile shall be affixed at the approaches thereto.”

It is not necessary for me to decide precisely what the words “approaches thereto” mean. I should have thought that they applied to work being done on

or near roofs. "Approach" can only mean something of such a character that, if a notice were affixed to it, it would give a warning to a person who was about to work on or near the roof. I am satisfied here that there was a breach of this regulation in that no notice, prominent or otherwise, stating that the coverings were fragile had been affixed anywhere, but I hold that the claim fails so far as there was a breach of that regulation, because I hold that the breach of the regulation had no bearing whatever on the accident. The plaintiff knew at the material time that the roof was fragile, and, therefore, it would be a work of supererogation to acquaint him by means of notices of that of which he already knew. It would not be so, of course, if he merely ought to have known and did not know; but if he actually knew it was fragile, a warning would be purely otiose. I, therefore, find as a fact that breach of this regulation was not a cause in any shape or form of the accident.

- B [HIS LORDSHIP considered the evidence, found as a fact that the plaintiff was not guilty of contributory negligence, and continued:] That brings me to the question of damages, which I regard as the most difficult point of all that I have to decide in this case. The plaintiff has an expectation of life which the doctors put at a minimum of six months and a maximum of two years. At the time of the accident the plaintiff was thirty-five, and his health was excellent. He is now thirty-seven. Counsel for the plaintiff submitted that in dealing with the general damages I must deal with the loss of earnings for the period between the plaintiff's death—at the latest, I am told, at the age of thirty-nine, and the age to which he would have lived if he had not had the accident. I have before me no actuarial figures, but I shall take judicial notice that a man in first class physical health would normally live to an age of at least sixty. That means that counsel D for the plaintiff was inviting me to award as part of the general damages some sum to represent the loss of earnings when the plaintiff was no longer alive for twenty-one years, from thirty-nine to sixty. When I expressed some little surprise counsel for the plaintiff countered by referring me to the headnote in *Roach v. Yates* (4), a decision of the Court of Appeal, and binding on me, which, if I thought that the headnote of the report in the LAW REPORTS was supported E by the judgments, I should, of course, unhesitatingly follow. The headnote in the report in the LAW REPORTS reads in this way:

F "In a collision between a pedal bicycle ridden by the plaintiff, a bricklayer thirty-three years of age, and a car driven by the defendant, occasioned by the negligence of the latter, the plaintiff sustained serious injury to the brain rendering him permanently, not only unfit for work, but incapable of looking after himself and dependent both day and night upon the care of a nurse, and shortening his expectation of life from thirty to sixteen years."

Therefore, his loss of expectation of life was fourteen years. At the time of the accident he was earning an average wage of £3 10s. a week, which is £182 a year. That meant that in the course of the following sixteen years he would have been G able to earn sixteen times £182 if his wages had remained the same, and, if the argument of counsel for the plaintiff was right, he would be entitled to damages for the remaining fourteen years that he did not live also at £3 10s. a week. The headnote continues:

- H "The plaintiff having brought an action against the defendant for damages for personal injury, it was agreed between the parties that the plaintiff's pecuniary losses and expenses by reason of the accident down to the date of the action amounted to £542 and in respect thereof and of all his other damage past and prospective the trial judge awarded him the sum of £2,742 in all."

Subtracting the £542 special damages, that means that the general damages awarded by the trial judge were £2,200.

"The plaintiff, being dissatisfied with that sum, appealed: *Held*, by the Court of Appeal, that in assessing the amount due to the plaintiff a proper, though not necessarily the only, method to adopt was to allow him (i) the special damages of £542; (ii) in respect of his prospective loss of wages the sum which he would have earned during what, but for the accident, would have been his normal life according to actuarial tables, subject to deductions for all contingencies, that sum to be not less than £2,000."

I emphasise those words, "the sum which he would have earned during what, but for the accident, would have been his normal life." His normal life was another thirty years. In fact, of those thirty years he was going to be alive for sixteen and dead for fourteen if the prognostications of the medical men proved correct. Therefore, the Court of Appeal are saying, according to this headnote, that you have to base the damages on sixteen years loss of wages during life (which, of course, would be an indisputable head of damages) and also on the further fourteen years that the plaintiff would not be alive. Further, it was held:

"(iii) in respect of nursing attendance, a sum sufficient to cover a reasonable weekly payment for that purpose during the period of his life as shortened by the accident, that sum being estimated at upwards of £2,000; and (iv) in respect of his past and future physical and mental pain and suffering, and the shortening of his life, a sum, in estimating which the following considerations should be kept in view . . ."

namely, that no amount of money, however large, could fully compensate the plaintiff for his injuries.

I propose to take those four heads of damages. No. (i), as I have said, is the special damages, and no question arises on that. With regard to No. (ii) I have been with counsel most carefully through the judgments of the Court of Appeal in *Roach v. Yates* (4), and that portion of the headnote which is stated to have been held by the Court of Appeal seems to me to be wholly unsupported by the judgments. In the judgment of GREER, L.J., I can see no reference at all to assessing the value of imaginary earnings after the death of the injured party. There was no separate judgment on the part of MACKINNON, L.J., who merely said that he agreed. There are observations in the judgment of SLESSER, L.J., which do lend support to the proposition stated in para. (ii) of the headnote, but I am satisfied that they were merely dicta. What I think happened was this. GREER, L.J., at the end of his judgment said ([1937] 3 All E.R. 446):

"My brothers and I . . . have to decide what shall be awarded in this case as damages to this unfortunate man, and we have come to the figure of £6,542. [i.e., £6,000 apart from special damages]; that is the figure that, independently, each member of this court thinks is a proper figure to award in this case."

I read GREER, L.J., as having arrived at that sum without any reference to imaginary earnings after death, and that SLESSER, L.J., was saying no more than that he agreed that that was the proper sum, particularly when one bore in mind the loss of earnings after death, and took into consideration that that element derived some assistance from the decision in *Phillips v. London & South Western Ry. Co.* (5). Moreover, so far as it is possible to glean from the arithmetic in *Roach v. Yates* (4), I cannot think that the figure of £6,000 could have been arrived at by taking into consideration the imaginary earnings of the plaintiff for the fourteen years that he ought to have been alive, but would be prevented from being alive by the accident. The wages being, as I have said, £182 a year, it is indisputable that he would be entitled to general damages for the loss of earnings from the date of judgment for the ensuing sixteen years, i.e., £2,912. One would have to take into consideration, of course, all the hazards of life apart

from the accident, and that figure might properly be discounted to £2,000. Item (iii) accounted for "upwards of £2,000", and then there was pain and suffering and loss of expectation of life in item (iv), the damages in respect of which I take to have been £2,000. It looks to me as though the item in para. (ii) of the headnote was £2,000. If one takes the sixteen years of life only, one gets the figure of sixteen times £182, which is £2,912, and that might properly be discounted to a figure of £2,000, but if one has to take into consideration another fourteen years, one has thirty times £182, subject to being discounted, and £2,000 would seem to be more apt on the footing that the remaining fourteen years were excluded. At any rate, it is sufficient for me to say that I am unable to find from the judgments in *Roach v. Yates* (4) that the Court of Appeal decided any such thing as is ascribed to them in para. (ii) of the headnote, and so I think that the matter is *res integra*.

I have, however, looked at the case to which SLESSER, L.J., referred: *Phillips v. London & South Western Ry. Co.* (5). This was a claim by a doctor who was injured in a railway accident. It was tried with a special jury before FIELD, J., who, in summing-up to the jury, referred to the prospect of the plaintiff's speedy death. Whether "speedy" meant speedy in the literal sense or much earlier than the normal expectation of life because of the accident I am not clear. The plaintiff was proved to have been earning between £6,000 and £7,000 a year. The jury assessed the damages at £7,000. The plaintiff appealed to the Queen's Bench Division on the ground that the verdict of £7,000 damages was grossly inadequate. The Queen's Bench Division ordered a new trial, and the defendants appealed from that order to the Court of Appeal. The defendants argued in the Court of Appeal that no misdirection had been found by the Queen's Bench Division and that an appellate court ought not to interfere with the jury's verdict in the absence of misdirection. The Court of Appeal held that the Queen's Bench Division were right in ordering a new trial, and they did so, as I understand the decision, not on the basis that there was any misdirection by FIELD, J., but on the basis, which has now become so very well known and was stated, among other places, by GREER, L.J., in *Flint v. Lovell* (6), that the award of damages was so grossly inadequate as to lead to the inference that it was entirely erroneous. In dealing with the summing-up of FIELD, J., JAMES, L.J., did, I think, use expressions which are capable of being construed as referring to damages being allowable in respect of a period after death and during the period the injured party would have lived but for the accident, but, in doing so and citing from the passages of the summing-up of FIELD, J., JAMES, L.J., says (5 Q.B.D. 87):

"The case could not have been put more favourably for the plaintiff than it was thus put by FIELD, J."

I think he is merely saying there that, so far as misdirection was being alleged by the respondents in the Court of Appeal, there was nothing in their argument on misdirection because it could not have been put more favourably for them, and that the ground on which the order of the Queen's Bench Division for a new trial was upheld was that, in the view of the Court of Appeal, to award only the equivalent of one year's salary, without including the salary for whatever period the plaintiff would live and a sum for all his pain and suffering, was so inadequate that the jury must have omitted to take into consideration matters which they ought to have taken into consideration, and that on that ground they agreed with the Queen's Bench Division that a new trial should be ordered.

I am unable to find anything in that case which would be binding on me as laying down the principle that a plaintiff in circumstances like those in the present case is entitled to have taken into consideration the fact that he is prevented from earning wages over the period between the date of his death and the date to which he would normally have lived but for the accident. I, therefore, award no general damages on that basis because I do not think it is a matter which

I am entitled to take into consideration. Nothing one can do can lengthen the plaintiff's life by the period by which it has been shortened as a result of the accident—restitutio in that sense is impossible—and I cannot think it right that I should give damages for loss of earnings during a period during which ex hypothesi he will not be alive to earn them. If I were to give them, I would not know on what basis to assess them. The plaintiff might normally have been expected to live for twenty-one years longer than he is now likely to live. If I were to take his wages as remaining the same and multiply £494 a year by twenty-one, discount that by a large amount because the capital sum would then be in his hands and it would not become payable, so to speak, for the first year until he actually died, and discount it by all the other hazards of life, and supposing I arrived at a purely hypothetical figure of £5,000 after allowing for all the discounts, as a dead man has not got himself to keep and cannot spend the money, I would be giving him the £5,000 not only on the footing that he was alive and able to earn the salary, when in fact he was dead, but also on the footing that the money would not be spent.

This point was present to the mind of LORD ATKIN in *Rose v. Ford* (7), where he says ([1937] 3 All E.R. 363):

“Can the damages include a calculation of loss of income which the deceased would have received during normal expectation of life, but would not have saved so as to increase his estate? I express no opinion.”

Of course, in *Rose v. Ford* (7), LORD ATKIN was dealing, not with a person who was still alive, but with a claim under the Fatal Accidents Acts, and I am fully alive to the provisions of s. 1 (2) (c) of the Law Reform (Miscellaneous Provisions) Act, 1934, which provides that where the death of a person has been caused by the act or omission which gives rise to the cause of action, the damages shall be calculated without reference to any loss or gain to his estate consequent on his death, but it is at least strange, if the argument submitted to me based on *Roach v. Yates* (4) is correct, that no one has yet thought it necessary to argue in a case where the injured person has died that damages of that kind do not arise consequent on death as do the loss of a life interest, the cesser of an annuity, or funeral expenses, but are something which accrued to the injured party, as, indeed, it is suggested that they pass to a plaintiff where the action is commenced after his death by virtue of the statutory abolition by this Act of the actio personalis. In my judgment, therefore, save in so far as the loss of earnings after death is to be considered under the item of damages for loss of expectation of life, in the sense that they are one of the elements which indicate that a person earning a reasonable livelihood is more likely to have an enjoyable life, I must exclude from the general damages any sum for loss of wages between the date of death and the date of the plaintiff's normal expectation of life apart from the accident. They fall to be taken into consideration in assessing the damages for loss of expectation of life.

I now have to quantify the damages that I ought to award under the head of prospective loss of wages, limiting that to the actual duration of life. It, accordingly, becomes necessary for me to determine on the evidence how long the plaintiff is likely to live. On the evidence I find that eighteen months is a fair period. I, therefore, take a year and a half, that is seventy-eight weeks, at his present wage of £9 10s. 1d. a week, less £224 4s. 6d., deducted under the Law Reform (Personal Injuries) Act, 1948, making a figure of £517 2s. 0d. With regard to future nursing attendance, the plaintiff is in hospital, and I think that the possibility of such an expense being incurred is so remote that its possibility will be adequately met by an award of the sum of £25. Dealing with the shortening of life, in *Benham v. Gambling* (8) the figure was reduced from £1,200 to £200. It concerned a child of three, a child of very tender years. I think so far as it is humanly possible to assess these damages on any basis whatever, the proper figure to take in the case of the plaintiff, with an A1 prospect of life, thirty-five

years of age at the time of the accident, and bearing in mind the fact that he would have continued to receive wages sufficiently adequate not to cause him to live in penury or anything of that kind, for damages for loss of expectation of life is £500, and I award that figure. The most serious item is past and future physical and mental pain. I am concerned with the distressing amount of pain and suffering, both physical and, I emphasise, mental, which this poor man has now suffered for just over two years and which, on the forecast that I have accepted, he will go on suffering for a further eighteen months, making a total of three years and eight months. Not only did he suffer a fracture dislocation of the spine with spinal cord injury resulting in complete paralysis of the lower limbs, but he has had tremendous pain and trouble in connection with his bladder, from recurrent bedsores as a result of the immobility of the lower limbs, and from urinary infections. He has had a suprapubic operation and another operation on the neck of the bladder. His abdomen is grossly distended, there is great enlargement of both the spleen and the liver, he is incontinent of urine, and the pressure sores are still septic. It is impossible that he should ever recover sufficiently to be a useful member of the community or even to lead a life that gives pleasure to himself or his family. I remember what I have been enjoined to remember by case after case in the higher courts, that no amount of damages would compensate him for what he has suffered, for what he has lost, and for what he will continue to suffer and lose. I do not pretend to award a sum which will do so, but I have to award a sum for this terrible physical and mental suffering over the last two years and two months and the next one year and six months, and I assess it at £5,000.

Judgment for plaintiff.

Solicitors: *A. L. Philips & Co.* (for the plaintiff); *Kingsbury & Turner* (for the defendants); *L. Bingham & Co.* (for the third parties).

[*Reported by* MICHAEL MALONEY, Esq., *Barrister-at-Law.*]

E D'AVIGDOR-GOLDSMID v. INLAND REVENUE COMMISSIONERS.

[HOUSE OF LORDS (Viscount Simon, Lord Porter, Lord Morton of Henryton, Lord Reid, Lord Asquith of Bishopstone), December 10, 11, 15, 16, 17, 18, 1952, February 5, 1953.]

F *Estate Duty—Passing—Property deemed to pass—Money received under a policy of assurance—"Interest purchased or provided"—Beneficial interest arising—Finance Act, 1894 (c. 30), s. 2 (1) (d)—Finance Act, 1939 (c. 41), s. 30 (1).*

On May 3, 1904, the deceased took out a policy of assurance on his life for £30,000 with profits in consideration of the payment of annual premiums. In 1907, on his marriage, the deceased brought into his marriage settlement the policy together with other property, and covenanted with the trustees to pay the premiums on the policy. In 1930 the trusts of the marriage settlement were terminated, and by a deed of re-settlement dated June 10, 1930, the trust property, including the policy, was settled on such trusts as the deceased and the plaintiff (the deceased's eldest son) should by deed jointly appoint, and in default of and until and subject to the any appointment on trusts therein specified. The deceased covenanted in the re-settlement to pay the premiums on the policy. On Nov. 10, 1934, the deceased and the plaintiff appointed that the policy and also certain other property (derived from the deceased) should be held in trust for the plaintiff absolutely, and the deceased was released from his covenant to pay the premiums. The deceased paid all the premiums on the policy falling due prior to Nov. 10, 1934, but thereafter until the maturity of the policy the premiums

were paid by the plaintiff. On Apr. 14, 1940, the deceased died, and the Crown claimed estate duty under the Finance Act, 1894, s. 2 (1) (d), as extended by the Finance Act, 1939, s. 30, in respect of the proceeds of the policy (or part thereof).

HELD: the "interest purchased or provided" within s. 2 (1) (d) was the benefit of the policy and not the proceeds of the policy; the "beneficial interest" referred to in the paragraph was a beneficial interest in the policy; the whole of that interest passed to the plaintiff in 1934; and, therefore, no beneficial interest in the policy "accrued or arose on the death of the deceased", and s. 2 (1) (d) did not apply to render estate duty payable on the amount of the policy moneys.

A.-G. v. Dobree ([1900] 1 Q.B. 442) and *A.-G. v. Robinson* ([1901] 2 I.R. 67), distinguished and criticised.

Inland Revenue Comrs. v. Scott's Trustees (1918 S.C. 720), criticised.

Lord Advocate v. Hamilton's Trustees (1942 S.C. 426), approved.

Adamson v. A.-G. ([1933] A.C. 257), distinguished by LORD PORTER.

Decision of the COURT OF APPEAL ([1951] 2 All E.R. 543), reversed.

AS TO INTEREST PURCHASED OR PROVIDED BY THE DECEASED, see HALSBURY, Hailsham Edn., Vol. 13, p. 242, para. 233; and FOR CASES, see DIGEST, Vol. 21, pp. 15, 16, Nos. 73-80.

Cases referred to:

- (1) *Lord Advocate v. Hamilton's Trustees*, 1942 S.C. 426; 2nd Digest Supp.
- (2) *A.-G. v. Robinson*, [1901] 2 I.R. 67; 21 Digest 15, 73, q.
- (3) *Richardson v. Inland Revenue Comrs.*, [1909] 2 I.R. 597; 21 Digest 15, r.
- (4) *Tennant v. Lord Advocate*, 1938 S.C. 224; *on appeal*, H.L., [1939] 1 All E.R. 672; [1939] A.C. 207; 108 L.J.P.C. 65; 160 L.T. 441; Digest Supp.
- (5) *A.-G. v. Dobree*, [1900] 1 Q.B. 442; 69 L.J.Q.B. 223; 81 L.T. 607; 64 J.P. 24; 21 Digest 17, 97.
- (6) *Inland Revenue Comrs. v. Scott's Trustees*, 1918 S.C. 720; 55 S.L.R. 654; [1918] S.L.T. 97; 21 Digest 15, 73i.
- (7) *A.-G. v. Smyth*, [1905] 2 I.R. 553; 21 Digest 10, h.
- (8) *Adamson v. A.-G.*, [1933] A.C. 257; 102 L.J.K.B. 129; *sub nom. A.-G. v. Adamson*, 148 L.T. 365; Digest Supp.
- (9) *A.-G. v. Murray*, [1904] 1 K.B. 165; 73 L.J.K.B. 66; 89 L.T. 710; 68 J.P. 89; 21 Digest 16, 79.
- (10) *A.-G. v. Hawkins*, [1901] 1 K.B. 285; 70 L.J.Q.B. 195; 83 L.T. 531; 64 J.P. 791; 21 Digest 15, 76.
- (11) *A.-G. v. Pearson*, [1924] 2 K.B. 375; 21 Digest 15, 75.
- (12) *Westminster Bank, Ltd. v. A.-G.*, [1939] 2 All E.R. 72; [1939] Ch. 610; 108 L.J.Ch. 294; 160 L.T. 432; Digest Supp.

APPEAL by the taxpayer from an order of the Court of Appeal dated July 16, 1951, reported [1951] 2 All E.R. 543, discharging an order of VAISEY, J., dated Dec. 20, 1950, reported [1951] 1 All E.R. 240, dismissing the Crown's claim for estate duty made under the Finance Act, 1894, s. 2 (1) (c), or, alternatively, under s. 2 (1) (d) of that Act as extended by the Finance Act, 1939, s. 30 (1), in respect of moneys payable under a policy of assurance on the life of Sir Osmond D'Avigdor-Goldsmid, Bt., deceased.

VAISEY, J., held that the Crown's claim, both under s. 2 (1) (c) and also under s. 2 (1) (d) of the Act of 1894, was bad. The Court of Appeal (SIR RAYMOND EVERSHED, M.R., JENKINS and BIRKETT, L.JJ.) upheld the decision of VAISEY, J., in relation to s. 2 (1) (c), but reversed his decision in relation to s. 2 (1) (d), and gave liberty to apply in chambers for an inquiry as to the extent of the claim having regard to the Finance Act, 1939, s. 30. The taxpayer appealed against the decision of the Court of Appeal so far as it related

to the claim under s. 2 (1) (d) of the Act of 1894. The Crown did not cross-appeal in respect of the decision on s. 2 (1) (c) of that Act.

Millard Tucker, Q.C., S. Pascoe Hayward, Q.C., and Wilfrid Hunt for the taxpayer.

The Attorney-General (Sir Lionel Heald, Q.C.), the Solicitor-General (Sir Reginald Manningham-Buller, Q.C.) and J. H. Stamp for the Crown.

A

The House took time for consideration.

Feb. 5. The following opinions were read.

VISCOUNT SIMON: My Lords, this is an appeal from an order of the Court of Appeal (SIR RAYMOND EVERSHED, M.R., JENKINS and BIRKETT, L.JJ.), which discharged an order dated Dec. 20, 1950, made by VAISEY, J., in the matter of a policy of assurance on the life of the plaintiff's father, Sir Osmond D'Avigdor-Goldsmid, Bt., deceased, on an originating summons wherein the appellant was the plaintiff and the respondents were the defendants. The question at issue in this appeal is whether estate duty should be paid on a sum of money amounting to £48,765, which was received in discharge of a life policy taken out by the deceased on May 3, 1904, for £30,000 with profits, under annual premiums of £695. At the time when the deceased took out the policy he was unmarried, but on his marriage in 1907 he brought into his marriage settlement the policy, together with certain freehold estates and investments. By the settlement the policy, with all bonus additions, was assigned by the deceased to trustees on trust to receive the policy moneys at maturity and hold the same on the trusts therein declared, and the deceased covenanted with the trustees to pay the premiums on the said policy, which he did, as long as he had any interest in it. By subsequent dispositions, which it is not necessary to set out, the appellant, who was his eldest son, became absolutely entitled to the policy as from Nov. 10, 1934, more than five years before the death of his father, which occurred on Apr. 14, 1940. The appellant paid out of his own moneys the premiums under the policy from the time he became absolute owner of it.

The Crown claimed estate duty on the £48,765, either under s. 2 (1) (c) of the Finance Act, 1894, or under s. 2 (1) (d). As regards the first claim, VAISEY, J., decided that no estate duty arose. The Court of Appeal came to the same conclusion and this conclusion is not now challenged by the respondents. But on the alternative claim to duty under s. 2 (1) (d) of the Act of 1894, the Court of Appeal reversed the decision of VAISEY, J., that no duty was payable and held that the sum in question was property which must be deemed to pass on the death of the deceased within para. (d).

Paragraph (d) brings within the charge of estate duty

“any annuity or other interest purchased or provided by the deceased, either by himself alone or in concert or by arrangement with any other person, to the extent of the beneficial interest accruing or arising by survivorship or otherwise on the death of the deceased.”

Assuming, therefore, that the life policy is covered by the words “other interest” in para. (d) it lies on the Crown to prove that it was “provided by the deceased” and also that a “beneficial interest” in the policy accrued or arose on the death of the deceased. The policy was taken out and kept up by the deceased and assigned to the appellant with other assets in circumstances which made it the absolute property of the appellant in 1934 and onwards, and it may, therefore, be regarded as an “other interest . . . provided by the deceased”. The crucial question in the case is whether a beneficial interest in the policy arose at the deceased's death. The appellant contends that it did not, and if he is right the Crown's claim must fail.

A life policy is a piece of property which confers on the owner of it the right, if certain conditions continue to be satisfied, to claim and be paid the policy moneys on the death of the person whose life is assured. These rights, therefore, belonged to the appellant from 1934 and were the beneficial interest in the policy which belonged to him from that moment. When the death occurred, he held these rights, and the quality of these rights was not changed by the death, which was merely the occasion when the rights were realised. There was, therefore, no new or additional beneficial interest in the policy which arose on the death of the appellant's father. For six years past, he had had absolute and unfettered ownership of the policy. As VAISEY, J., pointed out ([1951] 1 All E.R. 248), he

"could have sold it, mortgaged it, given it away, destroyed it, settled it, or (being a policy on his father's life) he could have surrendered it at the moment when his father was in extremis, at the point of death."

If he had done any of these things, the Crown could not have claimed to aggregate the policy moneys with the rest of the estate for the purposes of duty. It follows that no estate duty is payable on the £48,765, for no beneficial interest in the policy accrued or arose on the death of the deceased.

I prefer to base my decision on this simple ground by taking the words of the statute and seeing whether the Crown brings the case within the section. We were referred to a large number of previous decisions which were alleged to throw light on the problem raised. It is enough to say that the Scottish decision of *Lord Advocate v. Hamilton's Trustees* (1) is in line with the conclusion at which I have arrived, and the argument in LORD WARK's opinion sets out a course of reasoning which I accept and apply in the present case. The judgment of PALLES, C.B., in *A.-G. v. Robinson* (2) has received the close attention which is proper to be given to any pronouncement of that very learned judge, and the Chief Baron nine years later thought it right in *Richardson v. Inland Revenue Comrs.* (3) ([1909] 2 I.R. 624) to add some observations on his decision in *Robinson's case* (2) on the ground that it had been misapprehended. I confess that I do not find it easy to grasp the Chief Baron's argument and in particular do not appreciate the meaning of his statement ([1901] 2 I.R. 90) as to "an exact description of money secured by a policy of insurance". The liability of the subject under a taxing statute ought not to be arrived at by a course of subtle and sophistical argument and, even in the case of the most learned judicial pronouncements, it is well to recognise that on rare occasions bonus dormitat Homerus. I move that the appeal be allowed with costs.

LORD PORTER: My Lords, I have had an opportunity of reading the opinion which the noble Lord on the Woolsack has just delivered. I agree with it and have little to add.

It is plain that the Court of Appeal reached their conclusion by following the reasoning of PALLES, C.B., in *A.-G. v. Robinson* (2), a case which has, I think, influenced a number of decisions in this country, but has not been the subject of any direct approval in your Lordships' House. Indeed, in *Tennant v. Lord Advocate* (4), LORD RUSSELL OF KILLOWEN expressly leaves open the question whether it correctly construes the language of the relevant Acts. He says ([1939] 1 All E.R. 675):

"For myself, I am not prepared to accept without some further consideration the correctness of the first step. Three authorities were cited as establishing it—namely, *A.-G. v. Dobree* (5), *A.-G. v. Robinson* (2) and *Inland Revenue Comrs. v. Scott's Trustees* (6). No doubt language is used in some of the judgments in those cases which might give colour to the view that what passed on the death was the cash, and not the policy, or the value of the policy, but in none of those cases was it material that any such question should be decided."

The property referred to in those cases was a policy or policies of life insurance, and the first step to which the noble Lord referred was the proposition that the property which was subject to the duty consisted of the policy moneys, i.e., of the cash payable and paid by the insurance company and of nothing else. In other words, the property was the policy moneys, not the rights existent in the contract of insurance. That was, I think, undoubtedly the opinion of the Chief Baron, and it seems to have received a degree of acceptance by some of those members of other courts, and of the Court of Appeal in the present case, who hold that the "interest" consists of the right to receive the policy money when it becomes due at the death of the assured, and that the beneficial interest in that interest accrues or arises for the first time on the death. The Chief Baron in *Robinson's* case (2) expresses this view in plain terms when he says ([1901] 2 I.R. 89):

" 'Interest . . . to the extent of the beneficial interest', is not a very happy expression; but the meaning is clear. The thing subjected to taxation is 'the beneficial interest accruing or arising, by survivorship or otherwise, on the death of the deceased, in any annuity or in any other interest in property purchased or provided by the deceased', as mentioned in the section. The words 'accruing or arising' are used in contradistinction to 'passing'. They indicate, not the transfer upon death to another of something which the deceased or some other person had before or at the death, but the springing up, upon the death, and the then vesting in another, of property which previously had not been existing in any one. This is an exact description of money secured by a policy of insurance."

His further explanation of the grounds for his decision, which are to be found in *A.-G. v. Smyth* (7), gives rise to certain difficulties, but in no way affects this part of his opinion.

If it is accurate to say that the interest which is aimed at in s. 2 (1) (d) is the policy money when received and not the contract of insurance represented by the policy, there does spring up for the first time on the death of the assured an interest which then and then only arises or accrues, and the Crown's contention is right. But, in my opinion, LORD RUSSELL's doubts are fully justified, and I cannot accept the view that some fresh interest accrues or arises in the beneficial holder of a policy on the death of the deceased life. From the date of the assignment to him in 1934, the appellant was the absolute owner of the policy and, subject to payment of the premium, entitled to receive the sum insured, with any bonus, when the stipulated time of payment, viz., the death, had been reached. He did not get a new interest: he obtained the fruition of the interest which he already held. As one of your Lordships expressed it in the course of argument, the value of the chose in action is increased, the interest of the beneficiary is not altered.

The Crown's claim under s. 2 (1) (c) of the Act of 1894 has been dropped and I find myself in agreement with the views of VAISEY, J., as respects the claim under s. 2 (1) (d). Like him, I prefer the decision and the principle laid down in the Scottish case *Lord Advocate v. Hamilton's Trustees* (1) to those enumerated on behalf of the Crown, which I refrain from discussing further since they have been analysed in the opinion about to be delivered by LORD MORTON OF HENRYTON and I cannot usefully add to his remarks.

There is, however, another aspect of the case put forward by the Attorney-General which requires some consideration. He presented it in the following form:

"If the 'other interest' was the policy and not the money payable and paid under its terms on the death, and no new beneficial interest then arose or accrued, in that case, on the principles laid down in your Lordships' House in *Adamson v. A.-G.* (8) and on the arguments presented on behalf of the appellant, there was an increase in the value of the interest and

that interest, however small, fell to be taxed even in the state of the law as existing when *Adamson's* case (8) was decided. That sum would no doubt have been small at that time, but today that fact is immaterial inasmuch as it has now been provided by s. 28 of the Finance Act, 1934, that—

“ For the purposes of para. (d) of sub-s. (1) of s. 2 of the Finance Act, 1894, where an annuity or other interest has been purchased or provided by the deceased, either by himself alone or . . . by arrangement with any other person, the extent of any beneficial interest therein accruing or arising by survivorship or otherwise on the death of the deceased shall be ascertained, and shall be deemed always to have been ascertainable, without regard to any interest in expectancy the beneficiary may have had therein before the death.”

The result is, says the Attorney-General, that the whole value of the dutiable property is subject to tax.

My Lords, the difference in value between the moment when an assured man is in articulo mortis and the moment of his actual decease must be infinitesimal and I am not convinced, as at present advised, that the law would pay attention to so minute a sum. But there is, in my opinion, another reason for rejecting the argument. In *Adamson's* case (8) there was, as the majority of their Lordships held, a change in the interest of the beneficiaries: before the death they had a contingent interest which might have been divested; after it they had a vested interest. The reasoning is best seen in the observations of LORD WARRINGTON OF CLYFFE ([1933] A.C. 277). He says:

“ In the present case the interest of each child was unquestionably provided by the deceased, and is therefore to be deemed to be included in the expression ‘ property passing on the death of the deceased ’, but only to the extent of the beneficial interest accruing or arising on the death of the deceased. Before his death each child had a beneficial interest, but one that might be destroyed either by an exercise of the power of appointment or by the death of the child in the lifetime of the deceased: on his death without exercising his power the beneficial interest of each child became absolute and indefeasible.”

Your Lordships' House so decided in *Adamson's* case (8), and LORD WARRINGTON's words set out the ground on which the decision was based. On that reasoning there was as a result of the death a change in the rights which each child enjoyed. Until it occurred he might have got all or nothing or some intermediate sum: afterwards his rights were finally determined. The case differs from the present one in which the rights of the appellant have not changed. He is, and has been since 1934, full and absolute owner of the policy. All that has happened is that, though its value is greater, his interest is the same. It follows that, in my view, this alternative argument, like that previously presented, should not succeed. I would allow the appeal.

LORD MORTON OF HENRYTON: My Lords, immediately before Oct. 22, 1907, Sir Osmond Elim D'Avigdor-Goldsmid (hereafter referred to as “ Sir Osmond ”) was the owner of a policy of assurance on his own life for the sum of £30,000 with profits. He had already paid the first four annual premiums. Sir Osmond was married once only, on Oct. 23, 1907. The appellant was the eldest son of the marriage, and was born on June 10, 1909. On and in consideration of his marriage Sir Osmond made a settlement dated Oct. 22, 1907. By the settlement, Sir Osmond settled certain freehold estates, certain investments, and the said policy of assurance on certain trusts, and covenanted to pay the premiums on the policy. This covenant was repeated in the re-settlement hereafter mentioned. By virtue of (a) the Goldsmid Estate Act, 1928, (b) an appointment by Sir Osmond dated June 10, 1930, (c) a disentailing deed of the same date, (d) a re-settlement of the same date, the policy and a freehold

property No. 27, Wood Street, in the city of London, came to be held by trustees on such trusts and in such manner generally as Sir Osmond and the appellant should from time to time by any deed or deeds revocable or irrevocable jointly appoint, and in default of and until and subject to any such appointment on the trusts mentioned in the re-settlement. By a deed of appointment dated Nov. 10, 1934, under the hands and seals of Sir Osmond and the appellant, in exercise of the joint powers of appointment conferred by the re-settlement, they appointed that (i) the policy and (ii) the said premises No. 27 Wood Street should thenceforth be held by the trustees and Sir Osmond respectively in trust for the appellant absolutely and in fee simple for his own use and benefit, discharged from all the trusts powers and provisions declared by the re-settlement. The trustees, by the direction of the appellant, and the appellant thereby released and discharged Sir Osmond from all his covenants in the re-settlement contained for the payment of premiums on and otherwise relating to the policy and it was provided that a term of ninety-nine years limited by the re-settlement should as regards the premises affected by that appointment cease and be extinguished. The effect of this appointment was that, upwards of five years prior to the death of Sir Osmond, the appellant became the absolute beneficial owner of the policy and of No. 27 Wood Street, to the entire exclusion of Sir Osmond. The legal estate in No. 27 Wood Street was vested in the appellant soon after the said appointment, and the policy was assigned to him. As from the date of the appointment, the appellant could at any time have surrendered or sold the policy had he so desired, but he preferred to keep it up, which he did until it matured. Sir Osmond died on Apr. 14, 1940, and thereupon the policy moneys became payable, and the appellant received the sum of £48,765 thereunder.

Sir Osmond, pursuant to his covenant in the settlement, paid twenty-three premiums in addition to the four paid by him before the settlement was executed. After the re-settlement and before the appointment he paid a further four premiums pursuant to his covenant in the re-settlement. Six premiums became payable after the policy appointment, and all of these were paid by the appellant.

At the date of the appointment, No. 27 Wood Street was let under a lease dated July 25, 1934, for a term of twenty-one years from Mar. 25, 1934, at a yearly rent of £700. This property was destroyed by enemy action in 1940 and the lease was disclaimed on Dec. 25, 1940. The total rent received by the appellant from this property between the date of the appointment and the said disclaimer was £3,083 15s. 3d., of which £464 0s. 3d. was received after the death of Sir Osmond.

The respondents put forward a claim to estate duty on the policy moneys. This claim was based originally on the Finance Act, 1894, s. 2 (1) (d), as extended by the Finance Act, 1939, s. 30 (1). In the later correspondence, however, the claim was based primarily on s. 2 (1) (c) of the said Act and limited to duty on 27/33rd parts of the money received, but the claim under s. 2 (1) (d) was maintained as an alternative claim. In consequence of these claims to duty the appellant as plaintiff on Sept. 3, 1949, issued an originating summons in the Chancery Division making the respondents the defendants. The summons raised the question whether on the death of Sir Osmond estate duty became payable as claimed by the respondents on the policy or the said sum which became payable thereunder (A) under s. 2 (1) (c) or (B) under s. 2 (1) (d) aforesaid, and if under (A) on what proportion of the policy moneys or whether (as claimed by the appellant) no duty became payable. VAISEY, J., held that no estate duty became payable on the death of Sir Osmond in respect of the policy, or on the value of it or any part of such value, or on the said sum of £48,765. On an appeal by the present respondents the Court of Appeal (SIR RAYMOND EVERSHED, M.R., JENKINS and BIRKETT, L.JJ.) declared that estate

duty became payable on the death of Sir Osmond in respect of the whole value of the policy, by virtue of the Finance Act, 1894, s. 2 (1) (d), as extended by the Finance Act, 1939, s. 30 (1), subject to the reduction provided for by the last-mentioned sub-section and it was ordered that the parties were to be at liberty to apply in chambers for an inquiry as to the amount of such duty. The Court of Appeal affirmed the decision of VAISEY, J., with regard to the claim for duty under s. 2 (1) (c) on the ground that the appellant was not a "donee", since he derived his title under the marriage settlement and was within the marriage consideration. The appellant was given liberty to appeal, and the respondents were given liberty to enter a cross-appeal. There is no cross-appeal, and, accordingly, the only question before your Lordships' House is as to the claim for estate duty under the Finance Act, 1894, s. 2 (1) (d). I agree with VAISEY, J., that this claim is unfounded, and I suspect that the Court of Appeal might have arrived at the same conclusion if that court had felt itself unfettered by authority. The Master of the Rolls, in delivering the judgment of the court, referred to a number of cases and expressed himself thus ([1951] 2 All E.R. 562):

"In this state of the authorities, and, particularly, in view of the express and unqualified approval accorded to *A.-G. v. Robinson* (2) by this court in *A.-G. v. Murray* (9), it seems to us that, notwithstanding *Lord Advocate v. Hamilton's Trustees* (1), our duty is to apply to the present case the law as laid down in *A.-G. v. Dobree* (5) and *A.-G. v. Robinson* (2)."

My Lords, it will be necessary shortly to refer to these and other cases, but for the moment I shall address my mind simply to the words of s. 2 (1) (d) of the Finance Act, 1894. That sub-section is as follows:

"Property passing on the death of the deceased shall be deemed to include the property following, that is to say:— . . . (d) Any annuity or other interest purchased or provided by the deceased, either by himself alone or in concert or by arrangement with any other person, to the extent of the beneficial interest accruing or arising by survivorship or otherwise on the death of the deceased."

An exemption from this provision was referred to in the course of the argument. It is contained in s. 15 of the Act of 1894, which exempts by sub-s. (1):

" . . . a single annuity not exceeding £25 purchased or provided by the deceased . . . for the life of himself and of some other person and the survivor of them, or to arise on his own death in favour of some other person . . ."

There are three conditions which must be satisfied in order to give rise to a claim for duty under s. 2 (1) (d), viz., (i) there must be an annuity "or other interest"; (ii) it must have been purchased or provided by the deceased either by himself alone or in concert or by arrangement with some other person; and (iii) a beneficial interest therein must accrue or arise by survivorship or otherwise on the death of the deceased. I have inserted the word "therein" in condition (iii), although it does not appear in the paragraph, because it is manifest from the wording of the section that the duty is payable only if a beneficial interest *in the "annuity or other interest"* accrues or arises on the death of the deceased. If there were any doubt on this point it would be removed by the use of the word "therein" twice in the Finance Act, 1934, s. 28. The relevant part of that section is as follows:

"For the purposes of para. (d) of sub-s. (1) of s. 2 of the Finance Act, 1894, where an annuity or other interest has been purchased or provided by the deceased, either by himself alone or in concert or by arrangement with any other person, the extent of any beneficial interest therein accruing or arising by survivorship or otherwise on the death of the deceased shall

be ascertained, and shall be deemed always to have been ascertainable, without regard to any interest in expectancy the beneficiary may have had therein before the death."

A As to condition (i), I am content to assume, for the purposes of this appeal, that the policy is an "other interest" within the meaning of the paragraph, although I have long felt, and still feel, grave doubt whether the legislature ever intended this curious phrase to apply to the absolute beneficial ownership of a policy of assurance. There is no decision of this House on the point, and it is to be noted that "money received under a policy of assurance" is singled out from other property and expressly subjected to estate duty in certain circumstances, by s. 2 (1) (c) of the Act of 1894, incorporating the Customs and Inland Revenue Act, 1889, s. 11.

B Condition (ii) is admittedly satisfied, in accordance with, and subject to, the provisions of the Finance Act, 1939, s. 30, by reason of the inclusion of No. 27 Wood Street in the property appointed to the appellant on Nov. 10, 1934.

C Has condition (iii) been satisfied in the present case? In my opinion, it has not. The only "other interest" purchased or provided by the deceased (Sir Osmond) was the policy. That was what he owned in October, 1907, that was what he settled on Oct. 22, 1907, and that was what was appointed to the appellant on Nov. 10, 1934. The question to be decided is whether a beneficial interest in the policy accrued or arose on Sir Osmond's death. To that question there can, in my view, be only one answer. The whole beneficial interest in the policy passed to the appellant absolutely in 1934. No interests in expectancy were created, and the beneficial interest of the appellant in the policy immediately after his father's death was exactly the same as his beneficial interest in the policy immediately before his father's death. True it is that the property in which the appellant had a beneficial interest became more valuable by reason of the death, but he had at all material times the same beneficial interest in that property. The Attorney-General, if I understood him correctly, described this as a "metaphysical conception", but, to my mind, it is a plain statement of fact; and if it is a correct statement of fact it is manifest that condition (iii) is not satisfied in this case. I think that confusion has arisen in certain earlier cases because the court has regarded the moneys ultimately paid under the policy, instead of the policy itself, as the "other interest purchased or provided".

F The first case to which reference should be made is *A.-G. v. Dobree* (5). In that case, the deceased settled a policy on his own life in trust for his wife for life with remainders over. He covenanted to pay the premiums and did so. The wife survived him and a Divisional Court (DARLING and CHANNELL, JJ.) held that estate duty was payable, under s. 2 (1) (d), on the sum payable under the policy. *Dobree's* case (5) differs from the present case, for neither the wife nor her legal personal representatives could take anything unless she survived her husband, whereas in the present case it was certain, from 1934 onwards, that the appellant or his legal personal representatives would take the whole of the policy moneys, whether or not he survived Sir Osmond. It may be necessary to decide hereafter whether this difference was enough to justify the decision in *Dobree's* case (5). For the moment I would only observe that both DARLING, J., and CHANNELL, J., appear to have thought that the "other interest" provided by the deceased was the sum paid by the assurance company on the death of the deceased and not the contractual right conferred by the policy. With this view I cannot agree. In one respect at least *Dobree's* case (5) would seem to be wrongly decided, for if any beneficial interest accrued or arose on the death of the deceased, it was the wife's beneficial interest for her life, and duty was only payable on the principal value of the interest, ascertained in accordance with the Finance Act, 1894, s. 7 (5). Curiously

enough, this point seems to have been overlooked in certain later cases to which our attention was directed.

A.-G. v. Robinson (2) must be more fully considered, as the decision of the Court of Appeal in the present case was based largely on it. In that case, the court (PALLES, C.B., and JOHNSON and BOYD, JJ.) had to decide (inter alia) whether estate duty became payable under the Finance Act, 1894, s. 2 (1) (d), on the death of John Robinson, who died on Dec. 17, 1898, in respect of four policies of assurance. By his marriage settlement dated June 8, 1843, the deceased settled the four policies and his intended wife settled a sum of £3,500 belonging to her. The trusts, as stated in the report and in the judgment of PALLES, C.B., were as follows:

"upon trust as to the moneys secured by the policies (when received) to pay the income thereof to the wife for life and after her death as to the principal moneys for the children of the marriage; and the trusts of the intended wife's moneys were to apply, after the marriage, so much of the income thereof as might be necessary to pay the premiums upon the policies, and to pay the residue thereof to the deceased, the intended husband, for life, and after his death to the intended wife for life, and after the death of the survivor in trust for the children of the marriage."

From the date of the marriage the policies were kept up out of the income of the wife's moneys. The wife predeceased the husband, and the husband by his will appointed the moneys which should become payable under the policies as to £500 to one of his two sons and the balance in equal shares to his other son and to his daughter. It will be observed that the trusts in favour of the children are very briefly stated, but it is clear that the survivor of the husband and wife had power to appoint among the children (and possibly remoter issue) of the marriage, and it may fairly be assumed that in default of appointment the children took the policy moneys in equal shares.

The case is distinguishable from the present case. Immediately before the death of their father, the children were defeasibly entitled, in equal shares, to the policy and the fruits thereof. Their father's will took effect at his death. Thereupon the children became entitled absolutely and indefeasibly, but in different shares. In such a case it may be that beneficial interests accrued or arose on the father's death, within the meaning of s. 2 (1) (d), but the reasons given by the learned Chief Baron for his decision are open to criticism. My noble and learned friend on the Woolsack has already referred to one passage ([1901] 2 I.R. 90). I share his difficulties as to this passage, and I would add that I find it equally difficult to understand the reasoning by which, in *Richardson v. Inland Revenue Comrs.* (3) ([1909] 2 I.R. 624) the learned Chief Baron sought to explain his finding that the deceased "purchased or provided" the policy moneys. I have studied the judgment of the Chief Baron (with which his brethren agree) with the care and respect which is due to any utterance of that great judge, but I can derive no assistance from it in the present case.

A.-G. v. Hawkins (10) is not directly in point, but it is interesting to note that both members of the court mentioned, by way of contrast, the case of an absolute assignment of the whole beneficial interest in a policy to a beneficiary, and clearly took the view that such a case would not fall within s. 2 (1) (d): see per KENNEDY, J. ([1901] 1 K.B. 292, 293), and per PHILLIMORE, J. (ibid., 295, 296). In reading the latter passage, it is necessary to note the "errata" which appear at the beginning of the volume.

In *A.-G. v. Murray* (9) the decision of the Court of Appeal was directed to the question whether a policy of assurance effected by a father on his son's life and settled on his son's marriage was or was not "purchased or provided" by the son in concert or by arrangement with the father, within the meaning of s. 2 (1) (d), but in the course of the case it was argued that a policy was not an "other interest" within s. 2 (1) (d) and also that:

"The whole beneficial interest in the contingent debt passed under the settlement on the marriage, and the wife had no greater beneficial interest in it by reason of the husband's death than she had as soon as the marriage took place";

and reference was made to *A.-G. v. Dobree* (5) and *A.-G. v. Robinson* (2). COZENS-HARDY, L.J., in delivering the judgment of the court, said ([1904] 1 K.B. 172):

"Secondly, it is contended that a policy of insurance is not an interest within sub-s. (1) (d). We have not been able to appreciate this argument. A policy is plainly property within the scope of s. 2, and we can see no ground for excluding it from sub-s. (1) (d). We are content to adopt the reasoning of PALLES, C.B., in *A.-G. v. Robinson* (2), and we do not think any good object would be attained by attempting to further elaborate it."

The Court of Appeal in the present case read the last sentence just quoted as "express and unqualified approval accorded to *A.-G. v. Robinson* (2)". It will have appeared already that I cannot share that approval.

In *Inland Revenue Comrs. v. Scott's Trustees* (6) the Inner House had to consider the terms of a settlement of policies by a father on somewhat unusual trusts for the benefit of his daughters and their issue. The facts differed widely from the facts of the present case, and need not be set out at length, but I share the doubts expressed by LORD SANDS as follows (1918 S.C. 726):

"These policies belonged, after the creation of the trust, to certain trustees for behoof of certain beneficiaries. Now, no doubt when a man dies who has insured his own life the policy upon his life is part of his estate, and in respect of that part of his estate a beneficial interest accrues to his executors. But I confess I entertain some doubt as to whether, where one already holds as one's own property a policy of insurance on the life of another party, any beneficial interest that was not in the holder before accrues to him at the time of the death of the person whose life is insured. The policy which he had in bonis simply matures."

I would add that even if estate duty was payable in *Scott's* case (6)—as to which I express no opinion—I see no reason why it should have been payable on the whole of the policy moneys, rather than on the principal value of the daughters' life interests.

I gratefully adopt the words of the Master of the Rolls in summarising the next three cases.

In *A.-G. v. Pearson* (11), liability to duty under s. 2 (1) (d) on the policy moneys in question was not disputed, but it was claimed that the exemption from aggregation afforded by the Finance Act, 1894, s. 4, to property in which the deceased never had an interest was applicable. ROWLATT, J., held that the exemption did not apply. The question with which we are now concerned was, therefore, not in issue. But ROWLATT, J., said of s. 2 (1) (d) ([1924] 2 K.B. 387):

"That the policy moneys in a case like this are liable to duty under that sub-section is clear upon the authorities beginning with the Irish case of *A.-G. v. Robinson* (2)."

Tennant v. Lord Advocate (4) was another case on the question of aggregation, liability to duty under s. 2 (1) (d) being admitted. LORD RUSSELL OF KILLOWEN said ([1939] 1 All E.R. 675):

"For myself, I am not prepared to accept without some further consideration the correctness of the first step."

(He was referring here to a contention that what passed on the death was "the cash payable by the insurance company and nothing else".)

"Three authorities were cited as establishing it—namely, *A.-G. v. Dobree* (5), *A.-G. v. Robinson* (2), and *Inland Revenue Comrs. v. Scott's Trustees* (6). No doubt language is used in some of the judgments in those cases which might give colour to the view that what passed on the death was the cash, and not the policy, or the value of the policy, but in none of those cases was it material that any such question should be decided. Indeed, it is not easy to see how the question can ever become material. The policy must, if valued, be valued as a matured policy, and with reference to the solvency of the insurance company, with the result that the value of the policy will be the same as the value of the moneys payable thereunder. However, I would wish to keep the question open, in case it should ever hereafter be necessary to decide between the two alternatives."

With respect to these observations, it is proper to note that counsel for the Crown had not been called on to argue. His Lordship went on to decide that the policy moneys were aggregable, expressing agreement with the decision of ROWLATT, J., in *A.-G. v. Pearson* (11).

In *Westminster Bank, Ltd. v. A.-G.* (12), the point at issue was again aggregation, and was decided in favour of the Crown on the authority of *Tennant v. Lord Advocate* (4) which had been decided between the conclusion of the hearing and the delivery of the reserved judgment of the Court of Appeal. But CLAUSON, L.J., delivering the judgment of the court, said ([1939] 2 All E.R. 74):

"The first step is to ascertain with precision what it is that is deemed to pass, on the death of Sir Frederick, in respect of the policy moneys by reason of the operation of s. 2 (1) (d). The answer is in the words of the sub-section: ' . . . [the] interest . . . provided by the deceased . . . to the extent of the beneficial interest accruing or arising . . . on the death of the deceased '. The interest provided by the deceased is the amount of the policy moneys, including the bonuses. It is not, however, the whole of that sum which is deemed to pass. That sum is deemed to pass only to the extent of the beneficial interest accruing or arising on the death of the deceased. In the present case, the extent of the beneficial interest so arising is commensurate with the life interests which spring into being on the death of Sir Frederick—that is to say, the life interests, whether vested or contingent, on attaining twenty-one or marrying, of the five children of Mrs. Van der Goes living at the testator's death. It follows that that which passes in respect of the policy moneys is so much thereof as is equivalent to the value of those life interests therein."

No one of these three cases is directly in point, but if ROWLATT, J., and CLAUSON, L.J., took the view that the "interest provided" was the policy moneys and not the policy itself, I cannot agree with them, and I do not think LORD RUSSELL OF KILLOWEN would have agreed with them, if it had been necessary for him to decide the point.

Lastly, I come to *Lord Advocate v. Hamilton's Trustees* (1). In that case the deceased, who died in 1936, had in 1912 settled certain policies on his life on trusts for the benefit of his sons and daughter. The sons were to become absolutely entitled on attaining the age of twenty-five and the daughter's share was settled on her for life with remainders over. The trust deed stated that these provisions in favour of the children "shall vest in them respectively at the date hereof". The policies became fully paid in 1914 and 1915, and the premiums payable in the meantime were borrowed by the trustees from the deceased. On the deceased's death, duty was claimed under s. 2 (1) (d) on the amount of the policy moneys less the amount borrowed from the deceased by the trustees in order to pay the premiums, and the claim was rejected by the Inner House, affirming the Lord Ordinary (LORD KEITH) on the grounds that

(i) "in the circumstances the property sought to be charged had not been provided by the deceased", and that

"(ii) there was no beneficial interest accruing or arising on the death of the deceased, in respect that the whole interest in the policies had passed to the beneficiaries twenty-four years before the truster's death, their interest having fully vested."

A It is unnecessary for the present purpose to consider the first of these two grounds, but, in my view, the second ground was correct. LORD KEITH used language which applies very aptly to the present case. He said (1942 S.C. 434):

B "In the present case, it is undoubted that an interest vested in the beneficiaries under the deed of trust at the date thereof, and the death of the truster made no difference to that interest. If the sons had pre-deceased their father, their shares of the proceeds of the policies would have been paid over to their executors. I have difficulty in seeing how a beneficial interest accrued or arose to them, by survivorship or otherwise, on the death of the deceased. What accrued to them or to the trustees was a present right to demand payment from the insurance company in respect of a previously existing beneficial interest."

C I agree with the reasoning which I have just quoted. I would allow the appeal and restore the order of VAISEY, J.

D LORD REID: My Lords, in 1934 there were transferred to the appellant an insurance policy on the life of Sir Osmond D'Avigdor-Goldsmid and also property the income from which was sufficient to pay the insurance premiums. The appellant was under no obligation to keep up the policy or to retain the property transferred to him: he became the absolute owner of both the policy and the property. In fact, he paid the premiums and kept up the policy, and on the death of Sir Osmond in 1940 he received from the insurance company £48,765. Estate duty is claimed on this sum under the Finance Act, 1894, s. 2 (1) (d). That sub-section is in the following terms:

E "Property passing on the death of the deceased shall be deemed to include the property following, that is to say:— . . (d) Any annuity or other interest purchased or provided by the deceased, either by himself alone or in concert or by arrangement with any other person, to the extent of the beneficial interest accruing or arising by survivorship or otherwise on the death of the deceased."

F I shall assume that the policy (or the money payable under it) was an "other interest" within the meaning of this enactment and it was conceded that, in view of the Finance Act, 1939, s. 30, this interest must be regarded as having been provided by Sir Osmond. The only question to be decided in this case is whether any beneficial interest within the meaning of the sub-section arose or accrued on the death of Sir Osmond. I think that the terms of the sub-section make it reasonably clear that what is meant is a beneficial interest in or in respect of the interest provided. If "beneficial interest" merely meant a financial benefit, then the Crown must succeed because the policy was obviously worth much more immediately after the death of Sir Osmond than it had been immediately before. But I have no doubt that that is not its meaning. In the first place the words "beneficial interest" in s. 2 (1) (d) are in marked contrast with the word "benefit" in s. 2 (1) (b) where the phrase used is "to the extent to which a benefit accrues or arises": in the absence of strong reasons to the contrary one must assume that when Parliament uses different words in similar contexts in the same section it means different things, and I find nothing in the Act to rebut this presumption. And, secondly, in the decided cases that has not been held to be its meaning. In the cases where the Crown has succeeded it has been because it was held that some right or property of a

different kind from that previously enjoyed by the beneficiary arose or accrued on the death or the right of the beneficiary was in some way enlarged or altered and not merely because the beneficiary's existing right became more valuable after the death.

In the present case, the appellant was absolute and unfettered owner of the policy before Sir Osmond's death, and he remained absolute and unfettered owner after the death. That is not disputed. The argument of the Attorney-General, as I understood it, was twofold. In the first place he argued that the interest provided by Sir Osmond was not the policy, but the money paid under it, and that this money (or the right to receive it) came into existence for the first time on the death of the assured. There is high authority for this, but, with all respect to the learned judges who have expressed that opinion, I find it hard to understand. If the sum assured were the interest to which the sub-section refers, then the rest of the argument might be valid. But that would seem to involve as a consequence that the interest did not exist and, therefore, could not be provided before the death. To my mind, it is plain that something did exist and was provided in 1934 when the policy was assigned to the appellant: indeed, as the policy had been taken out in 1907 it must have been of very considerable value in 1934 either by way of surrender value or as a realisable asset. And, moreover, it appears to me to be equally plain that nothing was provided after 1934. So I find it impossible to avoid the conclusion that what was provided was the policy, and to say that the policy was provided is merely a short way of saying that what was provided was the contractual right against the insurance company which the assured obtained when he entered into a contract with the company or took out the policy. That contractual right was assigned to the appellant, and it was by virtue of that contractual right alone that the appellant ultimately obtained payment of the £48,765. It is true that the company was only bound to pay if the assured, and, in his turn, the appellant, fulfilled their part of the contract by paying premiums, etc., but, this having been done, the contractual right originally acquired by the assured remained in force until the date of payment arrived and the money was paid.

It was then argued that, if what was provided was the policy, a new beneficial interest in respect of it arose at the death, because then for the first time there arose a right to sue for the sum due under the policy: before the death the appellant only had a contingent future right, but after the death he had a new and different right—a right to get the money. This argument is not based on any peculiarity of a contract of insurance, and if it is right it seems to me necessarily to lead to the conclusion that, whenever a creditor is owed money payable at a future date, his right after the date of payment has come is a new right different from the right which he had before that date. That seems to me to be a novel doctrine, and to neglect the fact that the rights of contracting parties flow from the contract: a new right would require a new contract. From the beginning the creditor's right was to be paid on a certain day, and the coming of that day does not create a new right, it merely enables him to enforce his old right, and I do not see why it should make any difference if the date of payment is determined, not by the calendar, but by the occurrence of an event, such as death, whose date cannot be predicted. Nor do I see why it should make any difference that the creditor has had to perform his part of the contract between the date when it was made and the date of payment. I must, therefore, also reject this argument.

The Attorney-General also submitted an argument based on the analogous case of an annuity. He argued, in effect, that if the policy transferred to the appellant had not been for payment of a lump sum on the death of Sir Osmond, but had been for payment of an annuity payable to Sir Osmond's executors or assigns for a period of, say, ten years commencing at Sir Osmond's death, then s. 2 (1) (d) would certainly have applied. If that were so, it would be a

strong argument because, looking to the initial words of the sub-section "any annuity or other interest", it would be difficult to hold that Parliament intended that a different rule should apply merely because the policy moneys were payable in ten instalments instead of in a lump sum. But I am not at all convinced that this argument with regard to annuities is right: in that case also no duty is payable unless a beneficial interest accrued or arose on the death. The Attorney-General laid stress on the terms of s. 15 of the Act of 1894.

A That section exempts certain small annuities from duty. It does not say, and I do not think that it means, that, no matter what the circumstances may be, every annuity of the kinds which it mentions would necessarily fall within the scope of s. 2 but for its provisions. It is an exempting section, and it appears to me to be more natural to read it as meaning that an annuity which would otherwise fall within the scope of s. 2 is exempted if it complies with the requirements of s. 15. That would leave it open to say, in a particular case, that an annuity does not need to be exempted because the circumstances are such that it never came within the scope of s. 2.

B I shall not detain your Lordships by discussing the authorities again. They cannot all be reconciled, and I have thought it desirable to examine the whole matter afresh and to deal as directly as I could with the main arguments submitted for the respondents. I agree with your Lordships that this appeal should be allowed.

C

LORD ASQUITH OF BISHOPSTONE (read by LORD REID): My Lords, I respectfully concur with the opinions, which I have had the advantage and pleasure of reading in print, of the noble viscount on the Woolsack and of LORD MORTON OF HENRYTON. Disengaged from certain clinging and obscur-ing draperies, the point seems to me a short one. It turns on the meaning, in the Finance Act, 1894, s. 2 (1) (d), of two terms: "other interest" and "beneficial interest". "Other interest" in this context seems to me to cover, and on the facts of this case specifically to denote, the benefit of the policy: viz., the contractual rights conferred by it, whether on its original holder or its assignée. These rights included the right to exact payment of the insurance moneys in an agreed and specified event, viz., the death of Sir Osmond. The policy, the vehicle of this right, was assigned out and out, to Sir Osmond's son, the appellant, over five years before his father's death.

E

The "beneficial interest" referred to in the concluding lines of the material paragraph was a beneficial interest in the "other interest" referred to in its opening lines. It is a clumsy collocation of terms, no doubt, but it must mean a beneficial interest in a contractual right to exact £x if and when Sir Osmond should die. This beneficial interest has never altered in quality from the time of the assignment till the day of Sir Osmond's death, or until the day after it. The death has not generated a new beneficial interest. What it has done is to enhance the value of the "other interest" in which the beneficial interest subsisted. The "other interest" (consisting of the contractual rights under the policy) bore in its womb the "promise and potency" of this enhancement from the start. To say that the "beneficial interest" therein sprang into life "on the death" seems to me wholly false. If I buy an apple tree and it subsequently bears fruit, I was beneficially interested in the fruit from the start.

F

In these circumstances, I can see no answer to the reasoning which has moved my Lords to allow the appeal and like them I would allow it.

G

Appeal allowed.

Solicitors: *Frere, Cholmeley & Nicholsons* (for the taxpayer); *Solicitor of Inland Revenue.*

[*Reported by G. A. KIDNER, ESQ., Barrister-at-Law.*]

COUTTS & CO. v. INLAND REVENUE COMMISSIONERS.

[HOUSE OF LORDS (Earl Jowitt, Lord Porter, Lord Reid, Lord Asquith of Bishopstone), May 19, 20, 21, 1952, February 5, 1953.]

Estate Duty—Passing—Property deemed to pass—Policy of assurance—Premiums paid by trustees of settlement—Death of assured—Cesser of payment of premiums—Claim on capital needed to produce premiums—Cessation of “interest” in property—Interest of remaindermen—Finance Act, 1894 (c. 30), s. 2 (1) (b). A

Trustees under a deed of appointment and re-settlement held policies of assurance on the life of B., and, in accordance with directions in that deed, they paid out of the annual income of the trust the premiums on those policies. B. died in 1946, and, as no further premiums were payable, the income of the tenant for life, H.B., was increased by the amount which had previously been required to pay the premiums. At B.'s death H.B. had no issue, and three daughters of B. would become entitled under the settlement if, as happened, nothing occurred to defeat their rights. The Crown claimed estate duty under the Finance Act, 1894, s. 2 (1) (b), in respect of the “slice” of the trust fund required to produce the income necessary to pay the premiums, it being contended that B.'s daughters had a beneficial interest within s. 2 (1) (b) in the sums paid as premiums which ceased on the cessation of the payment of the premiums on B.'s death, and so the benefit to H.B. arose by the cesser of their interests in the premiums. B C

HELD: the real interest of the daughters was not in the premiums, but in the sums assured, and they lost nothing when the premiums ceased to be paid; a person's “interest” could not cease within the meaning of s. 2 (1) (b) unless he lost something of actual or potential value which he might have had if the deceased had lived longer; the right of the daughters with regard to the premiums was in substance only an ancillary right for the protection of their real interest, and once that interest required no further protection, rights for its protection came to an end; and, therefore, there was no cesser of an interest within the meaning of s. 2 (1) (b), and the Crown was not entitled to claim and receive estate duty. D E

Decision of the COURT OF APPEAL ([1951] 2 All E.R. 353), reversed.

AS TO PROPERTY IN WHICH AN INTEREST WAS LIMITED TO CEASE ON THE DECEASED'S DEATH, see HALSBURY, Hailsham Edn., Vol. 13, p. 236, para. 226; and FOR CASES, see DIGEST, Vol. 21, pp. 9, 10, Nos. 34-42. F

Cases referred to:

- (1) *Re Hodson's Settlement*, [1939] 1 All E.R. 196; [1939] Ch. 343; 108 L.J.Ch. 200; 160 L.T. 193; Digest Supp.
- (2) *Westminster Bank, Ltd. v. A.-G.*, [1939] 2 All E.R. 72; [1939] Ch. 610; 108 L.J.Ch. 294; 160 L.T. 432; Digest Supp.
- (3) *A.-G. v. Milne*, [1914] A.C. 765; 83 L.J.K.B. 1083; 111 L.T. 343; 21 Digest 46, 296. G

APPEAL by the trustees of a re-settlement from a decision of the Court of Appeal, dated June 20, 1951, reported [1951] 2 All E.R. 353, affirming an order of ROMER, J., dated Dec. 13, 1950, reported [1951] 1 All E.R. 102, whereby it was declared that estate duty became payable in connection with the death of the deceased, Captain Brassey, under the Finance Act, 1894, s. 2 (1) (b), in view of the cesser on his death of the right of tenants in remainder to have the premiums on certain policies of assurance on the life of the deceased which were subject to the trusts of the re-settlement paid out of the income of the trust funds. H

The appellants contended that the “interest” under s. 2 (1) (b) of the Finance Act, 1894, was the right to receive the sum assured and that the payment of the premiums was merely incidental to that interest.

Russell, Q.C., and R. Cozens-Hardy Horne for the appellants.

Pennyquick, Q.C., and J. H. Stamp for the Crown.

The House took time for consideration.

Feb. 5. **EARL JOWITT:** My Lords, I have had the advantage of reading the opinions about to be delivered by my noble and learned friends, LORD PORTER and LORD REID. I agree with them, and have nothing to add. I beg
A to move that the appeal be allowed.

The following opinions were read.

LORD PORTER: My Lords, the circumstances of this case are stated in the opinion about to be delivered by my noble friend LORD REID and need not be repeated, but for clarity's sake it is desirable to set out one or two salient facts. The dispute concerns the right of the Crown to estate duty on the death
B of Captain Brassey. On his death those entitled to his estate, so far as concerns the claim in this case, were one Hugo Brassey, who was immediately interested. In certain events, however, the estate would pass to his three sisters, daughters of Captain Brassey. It is admitted that at the death these ladies had a vested right in the property. Part of that property consisted of four policies, for
C £40,000 in all, on the life of Captain Brassey, and all of it was the subject of a trust of which the appellants were trustees. By the terms of that trust they were directed to, and did in fact, purchase the policies for £11,000 as representing, or approximately representing, their surrender value at the date of purchase and were also directed to pay, and did pay, the premiums necessary for keeping on foot the four policies, but were not to be responsible for any omissions or neglect to keep up or restore them. Under the provisions of the trust both
D Captain Brassey and Hugo Brassey had certain powers of disposition which might have put an end to the ladies' interest. Hugo, however, never exercised his powers, and though Captain Brassey did exercise his by will, thereby substituting a testamentary interest in the ladies in lieu of their previous interest, it may be stated with sufficient accuracy for the determination of the matter now in issue that Hugo Brassey was entitled to the present enjoyment of the
E income of the estate, but, *inter alia*, subject to a liability to pay the premiums on the policies, amounting to £1,976 13s. 4d. a year. In these circumstances, no doubt, the ladies could have applied during Captain Brassey's life to the appropriate court to compel performance of the obligation to pay the premiums and to maintain the policies, an application to which, in a proper case, the court would, no doubt, have acceded, though whether they would have done
F so in the present case is a matter of controversy. I will, however, assume that it would have done so. The position, therefore, before Captain Brassey's death was that Hugo Brassey was entitled to the whole of the income subject to certain obligations which are immaterial to the present case, but was under a liability to pay the yearly premiums in favour of the *cestuis que trustent* who, for this purpose, consisted of himself and the three ladies. After the
G death he was entitled to the whole income discharged from such a liability.

In these circumstances the Crown claims estate duty under the terms of s. 2 (1) (b) of the Finance Act, 1894, calculated in accordance with the provisions of s. 7 of that Act. If the Crown is right, admittedly the sum due must be ascertained in accordance with the provisions of s. 7, and no more need be said
H about it except that the result would be that the maintenance of the policies would, in a monetary sense, result in an obligation to pay estate duty far in excess of the insurance money recoverable.

Whether the Crown's claim is or is not justified, depends on the correct construction of s. 2 (1) (b) in the light of the facts of the case. That section reads as follows:

"Property passing on the death of the deceased shall be deemed to include the property following, that is to say:— . . (b) Property in which

the deceased or any other person had an interest ceasing on the death of the deceased, to the extent to which a benefit accrues or arises by the cesser of such interest . . .”

If it is to succeed, the Crown must establish that there is property in which some person had an interest and that the interest ceased on the death of the deceased. In the present instance the other persons are the three ladies, and, undoubtedly, they had an interest in certain property, but what that interest was, and whether it had ceased on Captain Brassey's death, is a matter of dispute. The Crown say that the property is the whole property included in the trust, and that the interest is the right to have the premiums paid thereout, that the ladies are interested in the payment because without it the policies would lapse, that that interest ceased on the death of the assured, and, therefore, under the plain terms of the Act, the Crown is entitled to claim and receive estate duty. The appellants, as I understand them, agree that the property is that whole property, but contend that the interest is the right to receive the sum assured and that the payment of the premiums is merely incidental to that interest. What the sisters are interested in is, they maintain, the sum assured and nothing else; the right to receive that sum in certain events always subsisted in the ladies and their interest has not changed; they do not hold a different interest or hold it in a different capacity as a result of Captain Brassey's death; the only change effected thereby is that, whereas before it the policy money was not immediately payable, afterwards it became an accrued debt. If, they say, there had been no question of insurance and premium, but merely a debt “debitum in praesenti” but not “solvendum” until the death of a particular person, there would be no cesser of interest—from first to last the interest would be the money receivable on the death and that interest would not have changed its character as a result of becoming immediately payable.

Does it, then, make a difference that it was necessary to pay the premiums in order to keep the property in being? The answer to this question appears to me to depend on what is the interest which the other person possesses in the property. If it be the expectation of receiving the capital sum payable on the death, the destination of the property has not been altered nor has its character changed: the only effect of the death has been to make it presently payable. The right to receive it has not ceased. If, on the other hand, it be the right to have the premiums paid, then, of course, the ladies' interest in that right has ceased. If property is to be deemed to pass, still there must be not only property and a person or persons interested but also a cessation of that interest. The first inquiry, therefore, is in what does that interest consist? I cannot think that in any ordinary sense the interest is the right to have the premiums paid. What the ladies were interested in was the receipt of the policy money. The death did not affect that interest so as to make it cease, it removed a prerequisite to the insurance company's liability. It was merely an event on which the insurance money became payable. The ladies' interest was unchanged. If the question were whether Hugo Brassey had obtained an advantage by reason of the death, undoubtedly he did, but the benefit accruing or arising is but one element towards the establishment of the Crown's claim. An interest in property and a cesser of that interest are further requisites for the respondents' success.

The accumulation cases, *Re Hodson's Settlement* (1) and *Westminster Bank, Ltd. v. A.-G.* (2), are in a different category. In each case the decision was that the property was deemed to pass under s. 1 of the Act and not under s. 2, because the persons ultimately entitled ceased to enjoy the right to have a portion of the estate, which might ultimately pass to them, increased by an accumulation of the income and the person immediately entitled benefited by the receipt of income which he was no longer obliged to accumulate by way

of addition to the capital of the fund. Such a decision has, in my view, no direct application to the facts of the present case. The ladies have not ceased to enjoy anything. On the contrary, the property in which they are interested has become more valuable.

A Having regard to the opinion which I have expressed I have not found it necessary to discuss the alleged remoteness of the ladies' interest or to consider the effect, if it has any, of the circumstance that Captain Brassey did, as he was entitled, appoint an ultimate interest to the ladies by his will in place of their interest under the settlement. Both circumstances are, I think, irrelevant to the question involved in this case. I would allow the appeal.

B LORD REID: My Lords, the appellants, who are trustees under a deed of appointment and re-settlement of 1935, held policies for £40,000 on the life of Captain Brassey. In accordance with directions in that deed they paid out of the annual income of the trust premiums on those policies amounting to £1,976 per annum. Captain Brassey died in 1946, and on his death, as no further premiums were payable, the income of the tenant for life, Hugo Brassey, was increased by the amount which had previously been required to pay the premiums. The Crown contends that, in consequence of that change, estate C duty became payable on a sum of over £100,000 and the amount of duty claimed is over £60,000. In general, if it is alleged that a statutory provision brings about a result which is so startling one looks for some other possible meaning of the statute which will avoid such a result, because there is some presumption that Parliament does not intend its legislation to produce highly inequitable results. But I do not think that that is the proper way to approach D this case.

When estate duty was introduced by the Finance Act, 1894, the rates of duty were low. For an estate of between £100,000 and £150,000 the rate of duty was six per cent. and even for the largest estates it was only eight per cent. The Act provided a method of valuation of benefits accruing on the E cesser of an interest which generally inflated the real value of such benefits and often resulted in the statutory valuation very greatly exceeding any possible real value. No doubt this was administratively a convenient course, and, as the rates of duty were such that the additional burden thrown on the taxpayer was in any case relatively small, it may have been thought that practical F convenience outweighed any small injustice which might result. But, as the rates of duty were increased from time to time, the effect of the disparity became more serious. This was, of course, well known to those who advised G Parliament in these matters, but, nevertheless, Parliament has not chosen to make any alteration. In my view, the glaring disparity which appears in the present case cannot properly be attributed to the Act of 1894, but must be attributed to the fact that Parliament has not chosen to make any change to meet vastly different circumstances, and it is, therefore, not a matter which can properly be regarded as material in construing the Act of 1894. That Act is a taxing statute and must be construed as such, but it ought not to be more strictly construed because of the effect of subsequent enactments. LORD DUNEDIN, in *A.-G. v. Milne* (3), said ([1914] A.C. 778): " . . . the expressions used must be given fair play " even if the result of combining them with later H enactments is to produce claims such as that made by the Crown in this case.

The Crown's claim is based on s. 2 (1) (b) of the Act of 1894 which is as follows:

" Property passing on the death of the deceased shall be deemed to include the property following, that is to say:— . . (b) Property in which the deceased or any other person had an interest ceasing on the death of the deceased, to the extent to which a benefit accrues or arises by the cesser of such interest; but exclusive of property the interest in which

of the deceased or other person was only an interest as holder of an office, or recipient of the benefits of a charity, or as a corporation sole."

The deceased, Captain Brassey, had no interest in the property, but it is said that other persons had such an interest, that it ceased on his death, and that by its cessation a benefit accrued to Hugo Brassey.

It was admitted for the Crown that, in order to bring the sub-section into operation, there must have been some living person who had an interest which ceased on the death of the deceased. Those first entitled on the death of Hugo Brassey were his issue, but at the date of Captain Brassey's death he had no issue, and it is admitted that, unless there had happened to be someone alive at that date with a more remote interest under the settlement, the Crown would have had no claim. But it so happened that there were three daughters of Captain Brassey who would ultimately have become entitled under the settlement if nothing occurred to defeat their rights. Those rights could have been defeated in a number of ways: first, by the exercise by Captain Brassey and Hugo Brassey of an overriding power under the settlement; secondly, by Hugo Brassey barring the entail; thirdly, by Hugo Brassey exercising his general power of appointment in default of issue; and, lastly, by Captain Brassey exercising a power of appointment by will. It was argued for the appellants that this made the sisters' rights so remote that they ought to be disregarded, but I cannot accept that argument. It was conceded that they had a vested right and whether the defeasance of that right was more or less likely cannot, in my judgment, be material. So it is necessary to see what the interest of the three sisters was. No doubt, they had an interest in the sense that, if nothing occurred to prevent them, they would in due course take beneficial rights under the settlement. It so happens that this interest did cease at the date of Captain Brassey's death, because he exercised his testamentary power of appointment. But the Crown's case is not based on that. Even if that were regarded as the cesser of an interest in the statutory sense, it would not bring the sub-section into operation because it had nothing to do with the benefit which accrued to Hugo Brassey and it is that benefit which the Crown is seeking to tax. The benefit to Hugo Brassey was the increase of his income when he became entitled to the money which had previously been required to pay the premiums, and he would have got that benefit on Captain Brassey's death whether Captain Brassey died testate or intestate or whether he exercised his power of appointment or not. The Crown's case is based on the cesser of quite a different interest which the sisters are said to have had during Captain Brassey's life. They are said to have had a "beneficial interest in possession" in the sums paid as premiums. The argument, as I understand it, is that on Captain Brassey's death payment of premiums ceased, and, therefore, this interest ceased also: the benefit to Hugo Brassey arose because the premiums were no longer payable, and, therefore, arose by the cesser of the sisters' interest in the premiums. Counsel for the respondents, in his lucid argument for the Crown, made it clear that he was not concerned with the sisters' right ultimately to come into enjoyment of anything under the settlement. He was only concerned with their right during Captain Brassey's life in relation to the money for the premiums, and he argued that this was a separate and independent right and that his case would have been just the same if Captain Brassey had not exercised his testamentary power of appointment and the sisters had retained their rights in remainder under the settlement after Captain Brassey's death. So the Crown's case depends on the right of tenants in remainder with regard to money for premiums being a separate and independent "interest" within the meaning of s. 2 (1) (b). The Act is an Act which applies to the United Kingdom, and the word "interest" is an ordinary word of the English language. So one ought not to give to the word a technical meaning peculiar to English or Scots law unless there is some

indication that such a technical meaning is intended. I can find no such indication in this Act. The Act gives some assistance in determining what is meant by an "interest". Section 2 comes into operation if the property does not "pass" under s. 1. So an "interest" is some right with regard to the property, e.g., an annuity payable out of the income from it, which can cease without the property passing. Then a benefit to someone must accrue or arise by the cesser of the interest. That would be satisfied if, by reason of the cesser of the annuity, the person who previously got the income from the property less the amount necessary to pay the annuity now gets the whole income. It was argued for the appellants that there cannot be an interest within the meaning of the sub-section unless the person who had the interest before the death was actually enjoying something which ceased to be payable to him on the death and thereafter went to benefit someone else. In the ordinary case that would be so, but I do not think that it is necessary in this case to decide whether that must be so in every case. One can imagine a case in which a sum out of the income from the property is being accumulated during the life of A so that the benefit of the accumulations will later go to X. It might not be difficult then to say that X had an interest ceasing on A's death in the sums which were being accumulated. X would get the benefit of them ultimately and the longer A lived the more he would get. If that be so, it might be that, even if there were only a chance of X ever taking any benefit, X could still be regarded as having an interest. But the facts of this case are, to my mind, essentially different. In this case the real interest of the tenants in remainder was not in the premiums, but in the sums assured. Payment of the premiums was only a means to an end. The tenants in remainder lost nothing when the premiums ceased to be paid: on the contrary they gained by the addition of £40,000 to the capital. I find it very difficult to see how a person's "interest" in any real sense can cease unless by the cesser he loses something of actual or at least of potential value which he might have had if the deceased had lived longer. Whatever may have been the technical nature of the right of the tenants in remainder with regard to the premiums it was in substance only an ancillary right for the protection of their real interest which was to get in the £40,000. Once that interest required no further protection (because the money was paid) rights for its protection came to an end, but I cannot regard that as the cesser of an interest within the meaning of the Act. If this be right it is unnecessary to express any opinion about the decisions in *Re Hodson's Settlement* (1) and *Westminster Bank, Ltd. v. A.-G.* (2). In my judgment, this appeal should be allowed.

My noble and learned friend **LORD ASQUITH OF BISHOPSTONE** is unable to be present this morning. He has asked me to say that he has read the speech which I have just delivered and that he agrees with it.

Appeal allowed.

Solicitors: *Norton, Rose, Greenwell & Co.* (for the appellants); *Solicitor of Inland Revenue.*

[*Reported by G. A. KIDNER, Esq., Barrister-at-Law.*]

Re A JUDGMENT SUMMONS (No. 25 of 1952).

Ex parte HENLYS, LTD.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Jenkins and Morris, L.J.J.),
January 12, 26, 1953.]

*Debt—Committal—Bar to committal order—Extortion—Creditor requiring
payment of costs of bankruptcy notice—Debtors Act, 1869 (c. 62), s. 5.*

Creditors served a bankruptcy notice on the debtor in respect of a judgment debt amounting, with taxed costs, to £449. Negotiations ensued on the terms on which the notice should be withdrawn, and it was agreed *inter alia* that the debt should be repaid by instalments. When the first instalment was paid, the solicitors for the creditors insisted that in addition the debtor should bear certain costs, which they described as "additional costs of the bankruptcy notice", and also the costs of the arrangement under which payment by instalments was being made, and they claimed that £12 12s. be added to the debt. The debtor's solicitors reluctantly paid that amount in addition to the instalment. The debtor failed to maintain payment of the instalments and the creditors presented a bankruptcy petition against him. The petition was dismissed on the ground that the demand and payment of the additional £12 12s. was extortion. The creditors now applied for an order under the Debtors Act, 1869, s. 5, committing the debtor to prison for his failure to pay the debt.

HELD: (i) notwithstanding s. 107 (4) of the Bankruptcy Act, 1914 (under which in certain circumstances the court may, on an application under s. 5 of the Act of 1869, make a receiving order against the debtor), procedure under s. 5 of the Act of 1869 was not available only in respect of a judgment or order on which the judgment creditors might have founded a petition in bankruptcy, and proceedings under s. 5 (until converted under s. 107 (4) of the Act of 1914) were wholly distinct from bankruptcy proceedings; as the dismissal of the petition did not extinguish the judgment debt, there was in existence a judgment under which a debt was due to the judgment creditors in the payment of which the debtor had made default within s. 5; and, accordingly, the court had jurisdiction to make an order under that section.

(ii) in exercising its discretion under s. 5 of the Act of 1869, the court was not constrained to refuse to entertain proceedings at the instance of the judgment creditors merely because the bankruptcy petition presented by them in respect of the same debt had been dismissed on the ground of extortion.

Decision of *HARMAN, J.* ([1952] 2 All E.R. 772), reversed.

Observations by *JENKINS, L.J.*, on the nature of and considerations applicable to proceedings under the Debtors Act, 1869, s. 5.

AS TO COMMITTAL FOR NON-PAYMENT OF JUDGMENT DEBT, see *HALSBURY*, *Hailsham Edn.*, Vol. 2, pp. 448-450, paras. 615-619; and FOR CASES, see *DIGEST*, Vol. 5, pp. 1032-1043, Nos. 8436-8514.

Cases referred to:

- (1) *Re Shaw. Ex p. Gill*, (1901), 83 L.T. 487, 754; 4 Digest 159, 1492.
- (2) *Re Debtor (No. 883 of 1927)*, [1928] Ch. 199; 97 L.J.Ch. 120; 138 L.T. 440; Digest Supp.
- (3) *Re Otway. Ex p. Otway*, [1895] 1 Q.B. 812; 64 L.J.Q.B. 521; 72 L.T. 452; 4 Digest 156, 1467.
- (4) *Ex p. Edwards. Re Chapman*, (1884), 13 Q.B.D. 747; 4 Digest 528, 4836.
- (5) *Re Clark. Ex p. Clark*, [1898] 1 Q.B. 20; 66 L.J.Q.B. 875; 77 L.T. 417; 4 Digest 25, 200.
- (6) *Re Otway. Ex p. Otway*, (1888), 58 L.T. 885; 5 Morr. 115; 4 Digest 153, 1445.

APPEAL by creditors against an order of HARMAN, J., dated Oct. 20, 1952, and reported [1952] 2 All E.R. 772, dismissing a judgment summons.

HARMAN, J., held that the doctrine under which extortion operated as a bar to a bankruptcy petition applied equally in an application under the Debtors Act, 1869, s. 5, and, the creditors having been guilty of extortion, the court, in the exercise of its discretion, should dismiss the application.

- A P. M. O'Connor for the creditors.
C. H. Duveen for the debtor.

Cur. adv. vult.

Jan. 26. SIR RAYMOND EVERSHED, M.R. : I will ask JENKINS, L.J., to deliver the first judgment.

The following judgments were read.

B

JENKINS, L.J. : The judgment debt in question had previously been the subject of abortive proceedings by the judgment creditors against the debtor in bankruptcy, and the issue in the appeal is, in effect, whether the judge was right in holding, as he did, that, in view of the course and outcome of those proceedings, he ought not, in the exercise of his discretion, to entertain the judgment creditors' application under the Debtors Act, 1869, in respect of the same debt.

C

The judgment to which the summons relates was dated Apr. 25, 1951, and remained wholly unsatisfied on Nov. 16, 1951, when a bankruptcy notice in respect of it was served by the judgment creditors on the debtor. The service of this bankruptcy notice was followed by negotiations between the parties, the upshot of which was that the judgment creditors agreed to withdraw it on terms that the debtor should pay £100 forthwith and the balance of the debt by monthly instalments of £50 payable on Dec. 1, 1951, and thereafter on the first day of each calendar month until the whole amount was satisfied. These terms were offered on behalf of the judgment creditors by a letter from their solicitors to the debtor's solicitors dated Nov. 20, 1951, which concluded:

D

E

"If your client accepts the proposition we shall be glad to receive cash for £100 or a draft or your cheque by return, and confirmation that the monthly arrangement will be adhered to."

This offer of the terms I have mentioned was accepted on behalf of the debtor by his solicitors on the following day (Nov. 21, 1951) both orally and by a letter enclosing their cheque for the initial payment of £100. On Nov. 22, 1951, the judgment creditors' solicitors replied acknowledging the debtor's solicitors' cheque and insisting on the introduction into the bargain embodied in the two earlier letters of the following new term:

F

G

"We must also insist that our additional costs of the bankruptcy notice and these arrangements be paid by your client, and as we have had to instruct Messrs. Flowerdews to serve and we have incurred expense thereby in addition to the expense of preparing and issuing the bankruptcy notice and the subsequent correspondence with you, our costs will be £12 12s. which must be added to the amount of the debt."

To this new demand the debtor's solicitors replied on Nov. 23, 1951, enclosing the £12 12s. with the following comment:

H

"... as our client cannot afford to commit an act of bankruptcy or run the risk of having a bankruptcy petition presented against him it is with great reluctance that we enclose you cash for the £12 12s. demanded by you in the last paragraph of your letter."

In the course of the hearing before us it was argued (though, perhaps, somewhat faintly) on behalf of the judgment creditors that, inasmuch as the agreement for payment of the debt by instalments was concluded before the demand for

the £12 12s. costs was made, the payment of that sum by the debtor was a purely voluntary payment forming no part of the conditions on which the bankruptcy notice of Nov. 16, 1951, was withdrawn. I cannot accept this argument. It is plain from the debtor's solicitors' letter of Nov. 23 that they regarded the debtor as having no option but to comply with the demand for the £12 12s. if he was to stave off the prospect of being after all made bankrupt on a petition by the judgment creditors. It is also plain from the peremptory terms of the demand for the £12 12s. contained in their letter of Nov. 22, that this was precisely the impression which the judgment creditors' solicitors intended to produce, or, in other words, that they were using the threat of bankruptcy proceedings based on the notice of Nov. 16 as a means of exacting payment of the £12 12s. The threat having been successfully applied, it can hardly lie in the mouths of the judgment creditors to say that the payment was a purely voluntary payment on the part of the debtor, inasmuch as the threat was an empty one which could not have been carried into execution in view of the agreement previously reached for payment of the debt by instalments. It may be that this agreement, which outside bankruptcy would have been a mere nudum pactum from which the judgment creditors could have resiled at any time, might have been relied on by the debtor as a compounding for the judgment debt to the satisfaction of the judgment creditors within the meaning of the Bankruptcy Act, 1914, s. 2, and as constituting, accordingly, a compliance with the notice of Nov. 16, but it was clearly not so treated by either side when the additional demand for the £12 12s. was made and acceded to, and if the point had been raised at the time on behalf of the debtor it would, I think, have been at least open to argument. In my view, therefore, the matter must be judged on the footing that as a condition of withdrawing the bankruptcy notice of Nov. 16 the judgment creditors exacted from the debtor £12 12s. in respect of costs which were not lawfully due from him.

The debtor failed to pay the instalment of £50 due on Jan. 1, 1952, and the judgment creditors served on him a second bankruptcy notice in respect of that amount, erroneously described as the balance of the judgment. The debtor complied with this notice, but once more failed to pay the instalment due on Feb. 1, on which second default the judgment creditors served on him a third bankruptcy notice in respect of the whole balance of the judgment debt and costs. The debtor failed to comply with this third notice, and a bankruptcy petition founded on such failure was presented against him by the judgment creditors. The petition was resisted on the part of the debtor on the ground that the exaction of the £12 12s. costs as a condition of the withdrawal of the first bankruptcy notice amounted to "extortion" within the meaning of the authorities hereinafter referred to, and, therefore, in accordance with those authorities, disqualified the judgment creditors from founding a bankruptcy petition on the debt to which the offending bargain related. This objection was upheld by the registrar, who on May 2, 1952, dismissed the petition with costs. The papers before us include no note of the registrar's reasons for his decision, but it is not in dispute that this was the ground on which he proceeded.

The rule applied by the registrar is well-established so far as proceedings in bankruptcy are concerned. There have been numerous decisions bearing on it, but I only find it necessary to refer to two of them. In *Re Shaw. Ex p. Gill* (1) a creditor had fraudulently proposed to the debtor that he (the creditor) should consent to a composition offered by the debtor to his creditors, the debtor secretly paying him the balance of his debt. This fraudulent scheme was rejected by the debtor, and thus frustrated. It was, nevertheless, held in the Court of Appeal (reversing a decision of the Divisional Court) that the creditor who had made the dishonest proposal (albeit without success) had by his conduct disqualified himself from presenting a petition founded on the act of bankruptcy constituted by the debtor's declaration of his insolvency at the meeting of

creditors at which the composition had been offered, such conduct constituting "sufficient cause" for refusing a receiving order within the meaning of the Bankruptcy Act, 1883, s. 7 (3). The petition had been presented jointly by the offending creditor and an innocent one, but, inasmuch as the debt owing to each of them taken alone was below the statutory minimum of £50, the innocent creditor could only succeed if the offending creditor was entitled to do so. The facts in *Re Shaw* (1) were, of course, widely different from those in the present case, but the following passages from the judgment of RIGBY, L.J., are of assistance (83 L.T. 755):

"The question therefore, and I think the sole question in substance in this appeal, is whether the other creditor, Gill, has so conducted himself that he has no right in accordance with the rule in bankruptcy to avail himself of an act of bankruptcy committed on July 23, 1899, that act of bankruptcy being a declaration of insolvency made at a meeting of creditors, or whether he has, within the meaning of cases that have already been decided or according to the principle on which those cases have been decided, precluded himself from relying upon that act of bankruptcy. Now, it was admitted, and could not be denied, that if a creditor goes to his debtor and says: 'You owe me so much, I can proceed in bankruptcy against you; you will not like that; pay me something extortionate, something altogether beyond what you owe me at law, or I will file a petition,' that petition cannot be made the basis of a receiving order; and very properly, for though the petition itself will only be that which is within the right, so far as there is a right, of a creditor, and will only have the effect of distributing the property according to the rules of bankruptcy, yet the previous conduct of the creditor would make it plain that he was using, or attempting to use, the bankruptcy proceedings as the means of unduly extorting what was not due to him . . . Now, the fact of the proposed fraud is not in any way denied, but certain suggestions are made which I must altogether repudiate. I am not going in any way to assume that because a man has proposed or even carried out a fraud he is to be deprived of rights which he has at law in general. I do not suggest that PHILLIMORE, J., was rather hasty in using the word 'outlaw'; but no one proposes to make the person concerned an outlaw at all. The only question is whether, after what he did under the circumstances in which he did it, he has a right to present a petition against Shaw founded on an act of bankruptcy committed at the meeting of July 23, or, perhaps I may add, whether he can give any further right than he would have had to Sutcliffe, the other petitioner. I say he could not . . . It is not necessary to bring the case within that doctrine that the petition should actually have been presented at the time the fraud is attempted. If in the same transaction the fraud has been attempted, I think that a debt which has been used as a means of extortion cannot afterwards be made use of as a means of getting a receiving order. That being so, I do not think we have any discretion but to reverse the decision of the Divisional Court and to restore matters to the position in which they were left by the registrar when he refused to make a receiving order."

Somewhat nearer in its facts to those of the present case is the case in this court of *Re Debtor* (No. 883 of 1927) (2). There the petitioning creditors had obtained judgment against the debtor for £500 and costs in respect of a dishonoured cheque. They had also obtained judgment with costs against other parties in related litigation for which last mentioned costs the debtor was plainly in no way liable. The petitioning creditors presented a bankruptcy petition against the debtor founded on his non-compliance with a bankruptcy notice in respect of the judgment for £500 and costs. Negotiations ensued, in the course of which the petitioning creditors offered to consent to the dismissal of their

petition on terms that the debtor should pay £100 in reduction of the judgment debt of £500, should provide the guarantee of a specified individual in respect of the balance, and should pay as between solicitor and client the whole of the costs, not only of the action against him, but also of the related action against other parties, the amount of all such costs being put at £160. The debtor did not accede to the whole of these demands, but he did make payments on account of £50 and £144 15s. 4d., of which latter sum £94 15s. 4d. was in respect of solicitor and client costs, so that £100 only out of these two payments went in reduction of the judgment debt of £500. Agreement was later reached for payment of the balance of £400 by instalments, but the debtor made default in payment of the instalments agreed, and the petitioning creditors served a further bankruptcy notice and presented a further petition in respect of the balance of the debt. This second petition was opposed on behalf of the debtor on the ground that the petitioning creditors' demands for the payment by him as between solicitor and client of costs for which he was only liable as between party and party, and for the payment by him as between solicitor and client of costs for which he was not liable at all, amounted to extortion. It should be noted that while the costs actually extracted from the debtor in excess of the amount properly due came in the result to only £15, being the difference between solicitor and client and party and party costs of the action against him, the petitioning creditors had attempted to make him pay in respect of costs no less than £160 as compared with a legitimate claim amounting to no more than some £80. The court upheld the debtor's objection.

In the course of the judgments the earlier authorities, including *Re Shaw* (1), were reviewed. LORD HANWORTH, M.R., said ([1928] Ch. 206):

"As I have already said, the debtor ought to be made a bankrupt, and in the ordinary course the receiving order would have been a perfectly right order to be made by the registrar; but there is a principle which must be jealously guarded—namely, that the process of the Bankruptcy Court must not be abused. A number of cases have established that. In *Re Otway*. *Ex p. Otway* (3) the petitioning creditor endeavoured to obtain £25 from a debtor as a condition for agreeing to adjournment of the petition. The attempt failed; but although the petitioning creditor did not succeed the court held that he had attempted to extort money from the debtor for his own purposes, and it declined to allow him to have the advantage of using the process of the court in bankruptcy against the debtor. That is a case where an unsuccessful attempt was made, and yet the creditor was debarred from making use of bankruptcy proceedings . . . It is said here that all that was done was that some £15 was obtained from the debtor in respect of costs which he did not owe, costs which were the difference between party and party costs and solicitor and client costs. That is not an accurate way of putting it; the attempt was to obtain not only those costs but also a further sum of £160 in respect of costs which the debtor had no concern with at all. The whole principle of bankruptcy is that when an act of bankruptcy has been committed there shall be a fair distribution between all the creditors, and it is for that reason that the title of the trustee relates back to the earliest act of bankruptcy; and thus where in *Ex p. Edwards*. *Re Chapman* (4) payments were made as the price of an adjournment to the petitioning creditor's solicitor, and he paid them away to the petitioning creditor and agreed to the adjournment, he was held liable to replace the money, as what had been done gave an advantage to the particular creditor, which would not be shared on the basis of equality in bankruptcy proceedings."

Finally, he said (*ibid.*, 209):

"In these circumstances, it appears to be quite impossible that the court should allow the misuse of its procedure by saying that a receiving order

ought to be made in this case. The case falls within the Bankruptcy Act, 1914, s. 5 (3), as being one where the court is satisfied that for sufficient cause no order ought to be made."

SARGANT, L.J., said (*ibid.*):

A "I now come to what appears to me to be the ground on which the
appeal succeeds. It relates to the action of the petitioning creditor in ob-
taining a sum of £15 in excess of the costs to which he was legally entitled,
and, what is much more important, the attempt to obtain £160 for costs as
between solicitor and client in respect of a matter for which the debtor was
in no way liable. To my mind, that was a demand which comes within the
B phrase 'extortion', as it has been used in the cases to which the Master of
the Rolls has referred and to which I will not refer again . . . To my mind
the attempt to obtain so large a sum as £160 for costs due from some other
person for which the debtor could not by any stretch of imagination be
deemed to be personally liable, was a very strong instance of an attempt
to use bankruptcy proceedings—the threat of bankruptcy—for the purpose
C of obtaining a collateral advantage unconnected with the bankruptcy for
the benefit of the petitioning creditor. It is said that the possible defect in
the proceedings was cured, because the petition on which adjudication was
asked for was a subsequent petition commenced after the sum of £15 had been
provided and the demand for £160 refused. To my mind, looking at the facts
in this case, I think there is such a connection between the two petitions by
the same creditor against the same debtor, with the debt alleged in the
second petition increased by the treatment of this sum of £15 as part of
D what was due and remained due from the debtor, that the circumstance
that the material petition is a subsequent petition and not the original
petition makes no real difference. The petition seems to me to be tainted
just as in *Re Shaw* (1), and to a very aggravated extent, having regard to
the large amount of the sum sought to be added to the liability of the
debtor."

E LAWRENCE, L.J., said (*ibid.*, 211):

"It cannot, in my opinion, be too clearly understood that bankruptcy
proceedings, which are in their nature quasi criminal, must not be used for
the purpose of obtaining a collateral advantage. An attempt to do so, even
though unsuccessful, will be sufficient to disentitle a petitioning creditor to
F an order, and, therefore, the fact that in the present case the debtor refused
to pay the costs of the Sherbourne Trust, Ltd., and that that demand was not
insisted upon, does not absolve the petitioning creditors from the conse-
quences of having made that demand. The principle upon which the court
acts in these cases is that it treats a demand of this nature as evidence that
bankruptcy proceedings were taken not with the bona fide intention of
G obtaining adjudication but for some collateral purpose."

It may be observed that the bargains held "extortionate" in *Re Shaw* (1)
and *Re Debtor* (2) both had reprehensible features going far beyond anything to
be found in the present case, the former involving actual fraud and the latter
a demand for costs which could not unfairly be characterised as "extortionate"
in the ordinary sense of the expression. The bargain in the present case was not
H fraudulent, nor, viewed without regard to the authorities, could it, to my mind,
fairly be described as "extortionate" in the ordinary sense. That is not to say,
however, that it may not have been in a technical sense "extortionate" within
the meaning attributed to that expression by the authorities, and as such
obnoxious to the well-established rule. For the present purpose I find it unneces-
sary to express any concluded opinion one way or another on this aspect of the
case. The registrar held in the bankruptcy proceedings that the bargain here in
question did infringe the rule. There has been no appeal from his decision, and

for the purposes of the present proceedings between the same parties it must, in my view, be taken as conclusively established that the bargain was extortionate within the meaning of the rule, and, accordingly, had the effect of disqualifying the judgment creditors from taking any proceedings in bankruptcy founded on the debt to which it related.

On the dismissal of their petition on the ground of "extortion", the judgment creditors procured the issue of the summons under the Debtors Act, 1869, s. 5, to which the present appeal relates, in respect of the unpaid balance of their judgment debt. Before HARMAN, J., what was called a preliminary objection to the jurisdiction of the court was taken on behalf of the debtor, to the effect that the dismissal of the judgment creditors' petition on the ground of extortion, which disqualified them from presenting any further petition in respect of the same debt, deprived the court of jurisdiction to entertain at their instance a summons under the Debtors Act, 1869, s. 5, in respect of the debt in question. The formal order of Oct. 20, 1952, recites the preliminary objection to the jurisdiction, declares the court to "uphold the said preliminary objection", and dismisses the summons. This is unfortunate, for the judge, while deciding in favour of the debtor, was at pains to explain in his judgment that he did so, not as a matter of jurisdiction, but as a matter of discretion. The concluding paragraph of his judgment is in these terms ([1952] 2 All E.R. 775):

"It seems to me that I am bound to hold that this act [the demand and the receipt of the £12 12s.] is one of which the court of bankruptcy, in its bankruptcy jurisdiction, would disapprove. It seems to me that I ought logically to exercise the jurisdiction under s. 5 of the Debtors Act, 1869, in the same sense and to hold that the vice which would debar a petition in bankruptcy also bars a judgment summons. In that case, it is not, I think, that I have no jurisdiction to make this order, as it was submitted to me, but that, in the exercise of my discretion, guided by the analogy of the bankruptcy authorities which are binding on me, I ought to hold that this is a relief to which the creditors have disentitled themselves, and I so hold. I, therefore, dismiss the summons."

Earlier in his judgment he had discussed the bankruptcy rule in regard to "extortion", and expressed agreement with the registrar's view that the demanding of the £12 12s. amounted to "extortion" within the meaning of the rule, while acquitting the judgment creditors or their solicitors of any "moral obloquy" in the matter. I think the judge was right in holding that the so-called "preliminary objection" went to the discretion, not the jurisdiction of the court, and before us the argument on behalf of the debtor was mainly directed to the question of discretion. But in view of the form of the order, and as both aspects of the case were canvassed in the course of the hearing of the appeal, I think I should deal with both in this judgment.

The alleged want of jurisdiction, in my view, clearly cannot be substantiated. The Debtors Act, 1869, s. 5, provides:

"Subject to the provisions hereinafter mentioned, and to the prescribed rules, any court may commit to prison for a term not exceeding six weeks, or until payment of the sum due, any person who makes default in payment of any debt or instalment of any debt due from him in pursuance of any order or judgment of . . . any . . . competent court. Provided . . . (2) That such jurisdiction shall only be exercised where it is proved to the satisfaction of the court that the person making default either has or has had since the date of the order or judgment the means to pay the sum in respect of which he has made default, and has refused or neglected, or refuses or neglects, to pay the same. Proof of the means of the person making default may be given in such manner as the court thinks just; and for the purposes of such proof the debtor and any witnesses may be summoned and examined on oath, according to the prescribed rules . . . For the purposes of this

section any court may direct any debt due from any person in pursuance of any order or judgment of . . . any . . . competent court to be paid by instalments, and may from time to time rescind or vary such order."

A The dismissal of the petition on the ground of extortion plainly did not have the effect of extinguishing the judgment debt, but merely disqualified the judgment creditors from presenting a bankruptcy petition founded on it. They still had a valid unsatisfied judgment in respect of which they could have proved in any bankruptcy of the debtor brought about by the petition of some creditor other than themselves, and outside bankruptcy they could still avail themselves of any remedy in the way of execution against the property of the debtor open to them as unsatisfied judgment creditors. It follows, in my view, that at the time when the summons was issued, and at the time when it came before the judge, there was still in existence an effective judgment in pursuance of which a debt was due from the debtor to the judgment creditors, and in payment of which debt the debtor had made default, within the meaning of s. 5 of the Act of 1869. Prima facie, therefore, the judge had jurisdiction under the Act, if he thought fit to do so, to make an instalment order, and also (subject to proof to his satisfaction of the debtor's means to pay in accordance with proviso (2) to s. 5) to make an order for committal.

B
C The main argument against this conclusion consists in the contention that the procedure under the Debtors Act, 1869, s. 5, is only available in respect of a judgment or order on which the judgment creditor might have founded a petition in bankruptcy, and that, in view of the dismissal on the ground of extortion of the petition founded on the present judgment debt, and its consequent disqualification as the foundation of any subsequent petition in bankruptcy by the judgment creditors, the judgment debt here in question does not answer that description. This contention turns on the Bankruptcy Act, 1914, s. 107 (4), which provides:

E
F "Where, under s. 5 of the Debtors Act, 1869, application is made by a judgment creditor to a court having bankruptcy jurisdiction for the committal of a judgment debtor, the court may, if it thinks fit, decline to commit, and in lieu thereof, with the consent of the judgment creditor and on payment by him of the prescribed fee, make a receiving order against the debtor. In such case the judgment debtor shall be deemed to have committed an act of bankruptcy at the time the order is made, and the provisions of this Act except Part VII thereof shall apply as if for references to the presentation of a petition by or against a person there were substituted references to the making of such a receiving order."

G
H According to the argument I am now stating, this provision has the effect of confining the operation of s. 5 of the Act of 1869 to cases in which, independently of s. 107 (4) of the Bankruptcy Act, 1914, a receiving order might have been made at the instance of the judgment creditor if he had proceeded by way of petition in bankruptcy and not by way of summons under s. 5 of the Act of 1869. I do not agree. In the first place, I think the words "may, if it thinks fit" in s. 107 (4) are wide enough to enable the court to have regard to all relevant circumstances, including the question whether the debt is one on which a bankruptcy petition might properly have been founded, and that the sub-section is, therefore, not incompatible with the position that there may be some debts which can properly be made the subject of proceedings under s. 5 of the Act of 1869 although they would not have been available for the purpose of founding a bankruptcy petition. Secondly, non constat that the power conferred by s. 107 (4) is limited to cases in which a receiving order could have been made independently of that provision: see *Re Clark: Ex p. Clark* (5). Thirdly, I am not satisfied that the disqualification of a judgment creditor on the ground of "extortion" from presenting a bankruptcy petition founded on a given judgment debt would necessarily preclude the court from making a receiving order in lieu

of committal on a summons under the Debtors Act, 1869, issued on his application in respect of the same debt, for such a receiving order is made by the court of its own motion in the interests of the debtor (see *Re Clark* (5)) and not at the instance of the judgment creditor, although it can only be made with his consent. Finally, this argument seems to me inconsistent with *Re Otway. Ex p. Otway* (6) where it was held that an order for payment of alimony pendente lite could be the subject of proceedings under the Debtors Act, 1869, s. 5, although the sum ordered to be paid was not a judgment debt in respect of which a receiving order could be made under the Bankruptcy Act, 1883, s. 103 (5) (corresponding to the Bankruptcy Act, 1914, s. 107 (4)).

A further argument, which, perhaps, goes to the discretion rather than to the jurisdiction of the court, is to the effect that an application under the Debtors Act, 1869, s. 5, is a form of proceeding in bankruptcy, and that the court would stultify itself if, after disqualifying a judgment creditor from presenting a bankruptcy petition on the ground of extortion, it admitted the same creditor to a different form of relief in bankruptcy in respect of the same debt. It is, no doubt, true that there are certain administrative links between the two forms of proceeding. The jurisdiction of the High Court under s. 5 of the Act of 1869 (except in relation to orders of the Divorce Division) is assigned to the judge in bankruptcy. The Bankruptcy Rules include provisions in regard to proceedings under the Act of 1869, and proceedings under that Act may be converted into proceedings in bankruptcy by an order under s. 107 (4) of the Act of 1914. On the other hand, the jurisdiction under s. 5 of the Act of 1869 with respect to orders of the Divorce Division is assigned to that Division, which, of course, has no jurisdiction in bankruptcy, and there are county courts without jurisdiction in bankruptcy to which jurisdiction under s. 5 of the Act of 1869 is nevertheless assigned. Moreover, unless and until converted into bankruptcy proceedings properly so called by an order under s. 107 (4) of the Act of 1914, proceedings under s. 5 of the Act of 1869 are wholly distinct and different from bankruptcy proceedings properly so-called in nature, object and effect, and I see no sufficient reason in the administrative links to which I have referred for holding that circumstances held sufficient to disqualify a creditor from maintaining the latter should automatically also disqualify him from maintaining the former. In my view, therefore, the objection based on jurisdiction fails.

As to the submission that the judge was right to refuse to entertain the summons in the exercise of his discretion, I have no doubt that the jurisdiction under the Debtors Act, 1869, s. 5, is discretionary, nor would I dispute that there may be cases in which the conduct of a judgment creditor has been such as to make it right for the court in the exercise of its discretion to refuse him any assistance under that section, but the proposition here is, in effect, that whenever it is shown that the judgment creditor has presented a bankruptcy petition in respect of the same debt and such petition has been dismissed on the ground that he has been guilty of "extortionate" conduct in the sense in which that expression is used in the authorities above referred to, or, indeed, whenever the court is apprised of conduct on the part of the judgment creditor which would in bankruptcy proceedings have been held to amount to extortion in that sense, the court ought in the exercise of its discretion to refuse his summons under s. 5 of the Act of 1869 without considering whether the conduct in question was in fact such as to make it unfair, oppressive, or unconscionable to allow him to proceed under that section. This proposition seems to me untenable. As I have said, the two forms of proceeding are wholly different in nature, object and effect. The object of proceedings in bankruptcy is to make the debtor's assets available for rateable distribution amongst his creditors. No creditor is entitled to have recourse to such proceedings for the purpose of obtaining some collateral advantage for himself. Moreover, the threat of bankruptcy, with the deprivation of property and status which it involves, may be a potent instrument of oppression and of

"extortion" in no mere technical sense. These, in effect, are the considerations dwelt on in the authorities to which I have referred, and they amply account for the strictness of the rule against "extortion" which has been laid down and firmly maintained by the courts in bankruptcy, and for the penalty for breach of that rule which it has been found necessary to provide in the shape of disqualification from founding any subsequent bankruptcy proceedings on any debt in relation to which a charge of "extortionate" conduct has been made

A good.

To proceedings under the Debtors Act, 1869, s. 5, wholly different considerations apply. In such proceedings the questions for the court are in effect: (i) Is there a judgment or order against this debtor for the payment of money in respect of which he is in default? If so, (ii) Has he now or has he since the date of the judgment or order had means to pay the amount in respect of which he is in default? If so, (iii) Has he refused or neglected, or does he now refuse or neglect, to pay such amount? And finally, (iv) Given affirmative answers to the three preceding questions, is there any sufficient reason why he should not be committed to prison by way of punishment for such refusal or neglect? In practice, the court in the first instance almost invariably makes an order for payment by instalments estimated to be within the means of the debtor and only proceeds to committal in the event of the debtor refusing or neglecting to pay the instalments and being proved to have, or to have had at the relevant time, the means to pay them. It is, no doubt, true that from the judgment creditor's point of view the summons affords a means of enforcing payment of his debt, but in law the issue is not whether the court should take measures to enforce payment of the debt for the benefit of the judgment creditor, but whether (on proof of means and default) the judgment debtor merits punishment in the form of committal for his refusal or neglect to comply with the judgment or order. The function of the judgment creditor is to bring the facts to the notice of the court. Once that is done, the issue is between the court and the debtor.

That being, as I understand it, the nature of proceedings under the Debtors Act, 1869, s. 5, why should the court be constrained, in the exercise of its discretion under the section, to refuse to entertain such proceedings at the instance of a judgment creditor merely because a bankruptcy petition presented by him in respect of the same debt has been, or, in the view of the court, would have been, dismissed on the ground of "extortion" in the sense in which that expression is used in the bankruptcy cases? There is certainly nothing in the cases to suggest that the disqualification consequent on "extortionate" conduct extends beyond proceedings in bankruptcy, so as to apply to proceedings of a wholly different nature, such as those under the Debtors Act, 1869, s. 5, or that any conduct which would be deemed "extortionate" in bankruptcy should by analogy disqualify a judgment creditor from making any application under that section. I see no sufficient reason for such extension or analogous application and reject it as unwarranted by principle or authority.

It should be borne in mind that, as appears from the cases to which I have referred, and, indeed, from the present case, there may be "extortionate" conduct in the bankruptcy sense even though the collateral benefit obtained is trifling in comparison with the amount of the debt, and, what is more, even though there was no more than an attempt at "extortion" which in fact resulted in no advantage at all.

If the court is bound in the exercise of its discretion under the Debtors Act, 1869, s. 5, to treat the existence of a disqualification in relation to proceedings in bankruptcy (actual or potential) on account of "extortionate" conduct on the part of the judgment creditor as extending to proceedings under that section, the extraordinary result would ensue that a judgment debtor summoned under s. 5 could say to the court (in effect): "It is true that there is an unsatisfied judgment against me for £500; it is true that I have ample means to pay, but

I do not choose to pay, and you, in the exercise of your discretion, must not order me to pay or commit me to prison for not doing so, because the judgment creditor served me with a bankruptcy notice in respect of this debt, and offered to withdraw it on my undertaking to pay in addition to the debt £25 for costs for which I was not legally liable. In fact, I gave no such undertaking, and paid him nothing, but the bankruptcy petition founded on that notice, which he later presented, was dismissed on the ground that his offer amounted to extortionate conduct. You must, therefore, let me go scot free." To bring the example nearer home, the registrar's decision in the present case should in principle have been the same, and, on the view of the matter taken by the judge, he would (as he himself in effect recognised) have been equally constrained to dismiss the summons in the exercise of his discretion if the £12 12s. had been merely demanded and never, in fact, paid. In the absence of authority requiring me to do so, I decline to subscribe to a view of the law which is capable of producing such results. A B

For the reasons I have endeavoured to state, I think the judge was wrong in holding, as I understand him to have done, that the mere fact that there had been conduct on the part of the judgment creditors which amounted to extortion within the meaning of the bankruptcy rule obliged him to exercise his discretion adversely to them. I would, therefore, allow the appeal and remit the case to the judge in bankruptcy to be dealt with on the merits. What account (if any) should be taken of the £12 12s. (e.g., by deducting it from the unpaid balance of the judgment for the purposes of any instalment order made) is entirely a matter for him, as to which I say nothing. C

MORRIS, L.J.: For the purposes of the present appeal it can be assumed, though it need not be decided, that the demand which was made for £12 12s., which was in fact followed by the payment of that sum, should be regarded as an "extortion" within the meaning of that word as it has been used in bankruptcy law when considering whether a receiving order should be made. D

The Bankruptcy Act, 1914, s. 5 (3), provides that:

"If the court is not satisfied with the proof of the petitioning creditor's debt, or of the act of bankruptcy, or of the service of the petition, or is satisfied by the debtor that he is able to pay his debts, or that for other sufficient cause no order ought to be made, the court may dismiss the petition." E

In *Re Debtor* (2) it was held that there would be sufficient cause to satisfy the court that no receiving order ought to be made if extortion amounting to an abuse of the process of the court was shown to have taken place or to have been attempted. **LORD HANWORTH, M.R.,** said ([1928] Ch. 206): F

"... but there is a principle which must be jealously guarded—namely, that the process of the bankruptcy court must not be abused. A number of cases have established that. In *Re Otway* (3) the petitioning creditor endeavoured to obtain £25 from a debtor as a condition for agreeing to adjournment of the petition. The attempt failed; but although the petitioning creditor did not succeed the court held that he had attempted to extort money from the debtor for his own purposes, and it declined to allow him to have the advantage of using the process of the court in bankruptcy against the debtor. That is a case where an unsuccessful attempt was made, and yet the creditor was debarred from making use of bankruptcy proceedings." G H

In the earlier case of *Re Shaw* (1), **RIGBY, L.J.,** said (83 L.T. 755):

"If in the same transaction the fraud has been attempted, I think that a debt which has been used as a means of extortion cannot afterwards be made use of as a means of getting a receiving order."

Though in the present case the judge negatived any conclusion that the demand made involved any moral obloquy, I proceed on the assumption that the court would not make a receiving order based on a petition in respect of the debt owing to the creditors. But the debtor, who does not contend that any merits march with the point he takes, submits that because the debt has been used as a means of what the Bankruptcy Court has felt obliged to regard as an "extortion", the court should not afterwards allow such a debt to be the basis of an application under the Debtors Act, 1869, s. 5. It is, apparently, further submitted that the court will not lend its aid for the recovery of the debt by any means which can only be invoked by leave of the court. This seems to me to involve some sort of notion that the debt has become tainted for all occasions when the contact of the court with it demands any exercise of discretion. But the debt represents the balance of what the court has adjudged to be due, and the concern of the court must be to assist a creditor to obtain just satisfaction by all proper means. Because those who acted for the creditors, all unwittingly (as the judge held), brought about the position that a bankruptcy petition could not now successfully be presented, is the court to be fettered in coming to a conclusion on an application under the Debtors Act, 1869, s. 5 ? Though the judge did not uphold a contention that he had no jurisdiction, he did hold, as I read his judgment, that he was obliged to refuse relief. He said ([1952] 2 All E.R. 775):

"... it is not, I think, that I have no jurisdiction to make this order, as it was submitted to me, but that, in the exercise of my discretion, guided by the analogy of the bankruptcy authorities which are binding on me, I ought to hold that this is a relief to which the creditors have disintituled themselves, and I so hold. I, therefore, dismiss the summons."

The view formed by the judge made it unnecessary for him to hear evidence as to whether the debtor had or had had since the judgment the means to pay the debt due from him. If the judge had been satisfied that there had been wilful default on the part of the debtor, yet he would have felt obliged to decline to make an order.

It is common ground that the point now raised is a novel one and that there is no reported authority on the subject. That being so, it seems to me that there is nothing which precludes the creditors from invoking the procedure of the Debtors Act, 1869, s. 5, and nothing which need fetter or limit or pre-dispose the exercise by the court of the discretion vested in it by s. 5 when all the evidence is available and examined and when all the facts and circumstances are considered.

It was not suggested that the creditors will be denied such a remedy as the issue of a writ of fieri facias. It seems to me to be strange and illogical if the creditors may have the general assistance of the court but must inevitably be denied it in any form which may require the active exercise of a discretion. Though the court will jealously and zealously guard against any abuse of process, and though the creditors have placed themselves by their own action in difficulties so far as the court of bankruptcy is concerned, yet a debt remains which the court has adjudged to be due and the court must be concerned to see that there is no wilful and deliberate failure or refusal to comply with its orders. I can see no let or hindrance to the operation of and the applicability of the Debtors Act, 1869, and I am not persuaded that reasoning compels the view that the creditors have disintituled themselves from having a judgment summons heard. I would, therefore, allow the appeal.

SIR RAYMOND EVERSLED, M.R. : I also am of the same opinion. For the reasons which have been stated by my brethren, I do not think, by reason of the procedural affinity which exists between bankruptcy proceedings, on the one hand, and proceedings under the Debtors Act, 1869, on the other, including the terms of the Bankruptcy Act, 1914, s. 107 (4), that where circumstances exist which would be regarded as extortion in bankruptcy proceedings,

and would, accordingly, disqualify the petitioning creditors from obtaining a receiving order in respect of their debt, it, therefore, follows that the jurisdiction of the court under the Debtors Act, 1869, must be exercised by refusing relief to the petitioning creditors in respect of the same debt. I also agree with JENKINS, L.J., that the question whether the £12 12s. ought or ought not wholly or in part to be deducted from the amount of the debt now owing for any purpose is a matter for the discretion of the judge when the present summons comes to be re-heard. I think the appeal must be allowed.

Appeal allowed.

Solicitors: *Hewitt, Woollacott & Chown* (for the creditors); *Isadore Goldman & Son* (for the debtor).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

LONDON & COUNTRY COMMERCIAL PROPERTY INVESTMENTS, LTD. v. ATTORNEY-GENERAL.

[CHANCERY DIVISION (Upjohn, J.), January 16, 20, 21, 22, 23, 1953.]

Money—Borrowing—Treasury control—Issue of shares and debenture stock in consideration of sale of land—Borrowing (Control and Guarantees) Act, 1946 (c. 58), s. 4 (2) (a)—Control of Borrowing Order, 1947 (S.R. & O., 1947, No. 945), art. 2 (1).

L., Ltd., agreed to sell to a property company, and the property company agreed to purchase, freehold and leasehold properties described in the schedule to the agreement. The consideration for the sale was the issue by the property company to L., Ltd., of (a) 400,000 ordinary shares of £1 each in the capital of the property company credited as fully paid up, and (b) £750,000 debenture stock of the property company to be constituted and secured by a trust deed. The trust deed provided that as and when the stock or any part thereof ought to be redeemed or satisfied in accordance with the conditions indorsed on the stock certificates as set out in the schedule thereto, or on such earlier date as the security thereby constituted should become enforceable as thereafter provided, the property company would pay to the trustees the principal amount of the stock which ought to be redeemed or satisfied, together with such premium thereon as might be payable in accordance with the said conditions, and would in the meantime pay to the trustees interest on the stock for the time being outstanding at the rate of five per cent. per annum half-yearly. Further, by the trust deed the property company mortgaged to the trustees the properties the subject of the transaction as security for the service of the stock, and granted a floating charge over the undertaking, the property, and the assets for the time being of the property company.

HELD: the transaction was not the "borrowing of money" within the Borrowing (Control and Guarantees) Act, 1946, s. 4 (2) (a), or within the Control of Borrowing Order, 1947, art. 2 (1), because it was not a transaction which had a cash consideration that was allowed to remain unpaid.

FOR THE BORROWING (CONTROL AND GUARANTEES) ACT, 1946, s. 4 (2), see HALSBURY'S STATUTES, Second Edn., Vol. 16, p. 555. FOR THE CONTROL OF BORROWING ORDER, 1947, art. 2, see BUTTERWORTH'S COMMERCIAL CONTROLS, Vol. 2, p. 52.

Cases referred to:

- (1) *Dyke v. Elliott. The Gauntlet*, (1872), L.R. 4 P.C. 184; 41 L.J. Adm. 65; 26 L.T. 45; 42 Digest 730, 1526.
- (2) *Tuck & Sons v. Priestler*, (1887), 19 Q.B.D. 629; 56 L.J.Q.B. 553; 52 J.P. 213; 42 Digest 729, 1516.

(3) *St. Aubyn (L. M.) v. A.-G.* (No. 2), [1951] 2 All E.R. 473; [1952] A.C. 15; 2nd Digest Supp.

ADJOURNED SUMMONS under R.S.C., Ord. 54A, r. 1A, to determine whether, on the true construction of the Borrowing (Control and Guarantees) Act, 1946, and the Control of Borrowing Order, 1947, made thereunder, the plaintiff company, London & Country Commercial Property Investments, Ltd., was entitled, without the consent of the Treasury, to issue 400,000 ordinary shares of £1 each and £750,000 debenture stock by way of consideration for the acquisition by the company of certain freehold and leasehold properties without contravening any provision of the said order within the meaning of para. 1 of the schedule to the Act.

London, Q.C., and *K. B. Suenson-Taylor* for the plaintiffs.

Denys B. Buckley for the Attorney-General.

UPJOHN, J.: This is a summons under R.S.C., Ord. 54A, seeking the construction of the Borrowing (Control and Guarantees) Act, 1946, and the Control of Borrowing Order, 1947, which was made under the powers conferred on the Treasury by the Act. The Act and the order provide that certain financial transactions can only be carried out with Treasury approval and the question I have to consider is whether a proposed transaction does require Treasury approval on the true construction of the Act and the order. If a transaction where Treasury approval is required is carried out without such approval, then serious penalties are imposed by the Act. Large fines may be imposed and on indictment imprisonment up to a maximum of two years may be inflicted on the offender, but it is expressly provided that the legal rights of the parties under any prohibited transaction are not to be affected. I, therefore, had serious doubts whether this court ought to exercise the powers which it undoubtedly has under Ord. 54A of making a declaration as to the rights of the parties, for that is a matter which must ultimately be tested in the criminal courts. However, counsel for the Attorney-General says that in the view of the Attorney-General this is a point of some general importance and he has no objection to my determining the matter. In those circumstances, although the parties must recognise that my decision will not be binding on any criminal court, I think it right to entertain this application.

The proposed transaction is quite simple. There are necessarily a number of blanks in the proposed agreement, but I think the right course is for me to treat it as though it was an actual agreement and consider whether, on the footing that it is an actual agreement, it infringes the provisions of the Act and the order. The agreement, then, is made between Littlewoods Mail Order Stores, Ltd., defined in the agreement as Littlewoods, and I shall so refer to them, of the first part; the plaintiff company, defined therein as the property company, and I shall refer to the plaintiff company as the property company, of the second part; the Alliance Assurance Co., Ltd., referred to as the trustee company, of the third part; and the companies whose names, with the addresses of their registered offices, are set forth in the first and second columns respectively of sched. I, called the purchasing companies, of the several other parts. I do not think I need read any part of the recital. The operative parts are as follows:

"1. Littlewoods hereby agree to sell and the property company hereby agrees to purchase for the consideration mentioned in cl. 2 hereof"

certain freehold and leasehold properties which were described in sched. II to the agreement. Clause 2 is the vital paragraph:

"The consideration for the said sale shall be the issue by the property company to Littlewoods or its nominee or nominees of (a) 400,000 ordinary shares of £1 each in the capital of the property company credited as fully

paid up and (b) £750,000 debenture stock of the property company referred to in cl. 3 hereof to be created and issued as fully paid by the property company."

Clause 3 is in these terms:

"The property company will create £750,000 debenture stock to be called the said £750,000 five per cent. first debenture stock 1962/80 (and hereinafter called 'the stock') and shall constitute and secure the stock by a trust deed in the form of the draft trust deed expressed to be made between the property company of the one part and the trustee company of the other part a copy of which is attached hereto."

Clause 5 and cl. 6 complete the story of the proposed transaction but are not, I think, strictly relevant to the matters I have to consider. Clause 5 provides that on completion of the transaction the property company will let and Littlewoods will take leases of all the properties for ninety-nine years from, I suppose, the date of completion. Clause 6 is to the effect that Littlewoods agrees with the persons mentioned in sched. I to sell the stock to those persons at par on the completion of the sale. Clause 7 deals with completion of the transaction:

"The sale and purchase hereby agreed to be made of the said properties the sale of the stock and all other transactions hereby provided for shall be completed and effected on or before the [blank] day of [blank] 1952 at the office of [blank] when the consideration aforesaid consisting of shares and debenture stock of the property company shall be satisfied and when Littlewoods and all other necessary parties (if any) shall at the expense of the property company execute and do all such assurances and things as may be reasonably required by the property company for vesting the said properties in it."

That, then, is the transaction. It is, I repeat, quite simple, providing for the purchase by the property company of certain real and leasehold properties in consideration of an issue of debenture stock and of shares which are to be issued as fully paid. I must, however, turn to the debenture trust deed for, as counsel for the Attorney-General has rightly submitted, it is referred to, and, indeed, attached to the agreement, and, therefore, must be read as one with the agreement, to see what is the true nature of the transaction between the parties. The parties to the trust deed are the property company and the Alliance Assurance Co., Ltd., to whom I shall refer as the trustees. Clause 1 of the trust deed contains a number of definitions and cl. 2 provides:

"As and when the stock or any part thereof ought to be redeemed or satisfied in accordance with the conditions indorsed on the stock certificates as set out in sched. I hereto or on such earlier date as the security hereby constituted becomes enforceable as hereinafter provided the company will pay to the trustees the principal amount of the stock which ought to be redeemed or satisfied together with such premium thereon (if any) as may be payable in accordance with the said conditions and will in the meantime and until all the stock shall have been redeemed or satisfied pay to the trustees interest on the stock for the time being outstanding at the rate of five per cent. per annum half-yearly . . ."

In cl. 3 it is provided:

"The stock may be issued to such persons at such times and on such terms and either at par or at a premium or a discount as the company may think fit."

Clause 4 provides for the issue of stock certificates which were to be in the form set out in sched. I. By cl. 6 the property company mortgaged the properties the subject-matter of the transaction to the trustees as security for the service

of the stock. In cl. 7 the property company further granted a floating charge over the undertaking, the property and assets for the time being of the property company. Clause 10 provided for the security to become enforceable in certain events, i.e., on default in making payment of the moneys due on liquidation, and on other events, the clause in fact being in what may be said to be, I think, common form. There are the usual provisions for the trustees to realise the property when the security becomes enforceable and to hold the proceeds of realisation on trust after payment of costs, and so forth, for the holders of the debenture stock.

The form of the certificate and the conditions indorsed thereon are set out in the trust deed. The conditions are, briefly, that the stock is to be redeemed with accrued interest (which was five per cent. per annum) in 1980, but there is to be provided a sinking fund of one per cent. of the stock outstanding at any moment, and that sinking fund is to be used each year either to purchase the stock at or under par in the market or to redeem the stock by annual drawings. There is a power by which at any time on or after Jan. 1, 1962, the company could redeem the stock at 101 per cent. That is a familiar form of debenture stock. I should add that it is plain that the stock is to be a negotiable instrument and a marketable instrument in the ordinary sense of the term.

That is the transaction which, it is said, infringes the provisions of the Borrowing (Control and Guarantees) Act, 1946, and the order made thereunder. I must, therefore, turn to the Act and consider its terms. Its title is:

“An Act to provide for the regulation of the borrowing and raising of money, the issue of securities, and the circulation of offers of securities for subscription, sale or exchange, to enable the Treasury to guarantee loans in certain circumstances, and for purposes connected with the matters aforesaid.”

Section 1 (1) provides:

“The Treasury may make orders for regulating, subject to such exemptions as may be specified in the orders, all or any of the following transactions, that is to say: (a) the borrowing of money in Great Britain where the aggregate of the amount of money borrowed under the transaction and of any other amounts so borrowed by the same person in the previous twelve months (including any period before the passing of this Act) exceeds £10,000; (b) the raising of money in Great Britain by the issue, whether in Great Britain or elsewhere, by any body corporate, of any shares in that body corporate; (c) the issue for any purposes—(i) by any body corporate of any shares in or debentures or other securities of that body corporate, if either the body corporate is incorporated under the law of England or Scotland or the shares, debentures or other securities are or are to be registered in England or Scotland: or (ii) by any government, other than His Majesty’s government in the United Kingdom, of any securities of that government which are or are to be registered in England or Scotland . . .”

Sub-section (3) provides:

“The provisions of the schedule to this Act (which relate to enforcement and penalties) shall have effect in relation to orders made under this section but the rights of the persons concerned in any transaction shall not be affected by the fact that the transaction was in contravention of any such orders.”

Section 4 is the important section in this case. It is a definition section and provides so far as relevant:

“(1) In this Act, unless the context otherwise requires, the following expressions have the meanings hereby assigned to them, that is to say

... 'security' includes shares, bonds, notes, debentures, debenture stock and units under a unit trust scheme; 'share' includes stock and any perpetual debenture or perpetual debenture stock . . . (2) Any reference in this Act to the borrowing of money—(a) includes a reference to the making of any arrangement by which a sum which would otherwise be payable at any date is payable at a later date, and includes in particular the making of any arrangement by which the whole or any part of the price of any property is allowed to remain unpaid either for a fixed period or indefinitely, but (b) does not include a reference to the acceptance by a person carrying on a banking undertaking of moneys to be placed to the credit of a current or deposit account."

Sub-section (2) is the vital provision. I must deal briefly with the schedule which contains the provisions as to enforcement and penalties. Paragraph 1 provides:

"Any person who contravenes any provision of any order made under this Act shall be liable—(a) on summary conviction to imprisonment for not more than three months or to a fine not exceeding £500 or to both such imprisonment and such fine."

Paragraph 3 provides that no proceedings for an offence under the Act are to be instituted in England except with the consent of the Director of Public Prosecutions. Sub-paragraph (4) of para. 3 is important and is in these terms:

"Where an offence under this Act has been committed by a body corporate (other than a local authority), every person who at the time of the commission of the offence was a director, general manager, secretary or other similar officer of the body corporate, or was purporting to act in any such capacity, shall be deemed to be guilty of that offence, unless he proves that the offence was committed without his consent or connivance and that he exercised all such diligence to prevent the commission of the offence as he ought to have exercised having regard to the nature of his functions in that capacity and to all the circumstances."

Under the powers conferred under that Act the Treasury made the Control of Borrowing Order, 1947, which came into operation on June 16, 1947. Part I is headed "General extent of control", and art. 1 provides:

"Borrowing in Great Britain. (1) Subject to the exemptions contained in Part II of this order, a person shall not, without the consent of the Treasury, borrow money in Great Britain where the aggregate of the amount of money borrowed and of any other amounts borrowed in Great Britain by that person in the previous twelve months (including any period before the coming into force of this order) exceeds £10,000."

Article 2 (1) provides:

"In this order references to the borrowing of money include:—(a) references to the making of any arrangement by which any money borrowed or any money due under a security (other than money representing interest or dividends), which would otherwise be payable at any date, is payable at a later date except where the money is payable by instalments and the arrangement is for the postponement of the payment of any instalment, other than the last instalment, to a date not later than that fixed for the payment of the last instalment; and (b) references to the making of any arrangement by which the price of any property except—(i) the price of goods sold by a person in the ordinary course of his business, and (ii) the price of any undertaking under a sale thereof to a private company, is allowed to remain unpaid either for a fixed period or indefinitely but charged on the property, but do not include references to the making of any other arrangement by which a sum which would

otherwise be payable at any date is payable at a later date; and references to loans shall be construed accordingly."

There are definitions in art. 8 (5) which I must read:

A "In this article, the expression 'the amount involved' means—(a) in relation to the borrowing of money, the amount of money to be borrowed . . . (d) in relation to an arrangement for the postponement of payment of any money, the amount the payment of which is to be postponed."

B The correspondence, to which I need not refer in any detail, makes it quite clear that the whole of the Treasury case on this matter depends on bringing the transaction within the extended definition of the borrowing of money contained in s. 4 (2) of the Act and in art. 2 (1) of the order made thereunder. It is not suggested that the issue of securities infringes any part of the order. There was in the Act ample power given which would enable the Treasury in express terms to have prohibited the issue of securities on a transaction such as this. It is equally clear, and, indeed, it is not disputed, that in art. 2 (1) of the order there is no prohibition of the issue of securities in this particular transaction. Section 4 (2) of the Act and art. 2 (1) of the order are substantially in identical terms, but there are two differences. In C the Act there is a reference in s. 4 (2) (a) to "the whole or any part of the price of any property". In the order in art. 2 (1) (b) the reference is to "the price of any property" without any qualifying words. The only other difference is that, although the definition in s. 4 (2) (a) of the Act is in general terms and relates to any arrangement by which a sum which would be payable at any date is payable at a later date, art. 2 (1) (b) of the order relates only to any arrangement whereby the sum allowed to remain unpaid is charged on the property. D In construing these provisions I must have in mind the Interpretation Act, 1889, s. 31, which provides that in an order made under powers conferred by an Act, the same words must have the same meanings unless a contrary intention appears.

E The first question I have to consider is what are the principles of construction which I must adopt in construing this Act and this order. I have to bear in mind that this is a penal statute. Indeed, I suppose that it represents the high-watermark of the Parliamentary invasion of the traditional rights of the subjects of this realm. Not only does it impose on offenders substantial penalties—no objection could be taken to that—but what is so serious from the point of view of the subject is that where a body corporate has been found to be an F offender, then directors, general managers, secretaries, or other similar officers of the body corporate, including persons who are purporting to act in those capacities, are deemed to be guilty unless they prove the offence was committed without their consent or connivance, thereby reversing the usual and traditional view of this country that a man is innocent until he is proved guilty. Not G only that, but proof that he is innocent will not avail him, because he has to go further and show that he exercised all such diligence to prevent the commission of the offence as he ought to have exercised, having regard to the nature of his functions in that capacity, and to all the circumstances. However, that is what Parliament has thought fit to enact, and, of course, I abide by it. Nevertheless, it is what counsel for the property company described as a highly H penal statute.

In those circumstances, what are the proper canons of construction? I do not propose to refer to the authorities at any length. I think the proper approach to the construction of such a statute as this is that I must construe it as I would any other instrument, i.e., I must look at all the surrounding circumstances, I must look at the mischief intended to be remedied, I must, above all, give effect to the words that have been used in the section. That is plain from the Privy Council case of *Dyke v. Elliott. The Gauntlet* (1), and, particularly,

from the language of JAMES, L.J. (L.R. 4 P.C. 191) who delivered the judgment of the Board. If, in construing the relevant sections of the Act and of the order, there appears any reasonable doubt or ambiguity, then, as it is a penal statute, I must apply the principles laid down succinctly by LORD ESHER, M.R., in *Tuck & Sons v. Priester* (2). LORD ESHER, M.R., says (19 Q.B.D. 638):

"But then comes the question whether the plaintiffs are also entitled to recover penalties under s. 6 [of the Fine Arts Copyright Act, 1862.] We must be very careful in construing that section, because it imposes a penalty. If there is a reasonable interpretation which will avoid the penalty in any particular case we must adopt that construction. If there are two reasonable constructions we must give the more lenient one. That is the settled rule for the construction of penal sections."

There is another principle that I must have in mind, and that is that a man is entitled so to order his affairs as to avoid the provisions of the order. This is a genuine transaction. There is nothing colourable about it. The whole question I have to determine is whether, on the true construction of the Act and the order and on the true interpretation of the acts and deeds of the parties, that transaction falls fairly and squarely within the provisions of the Act and the order. In *St. Aubyn (L. M.) v. A.-G. (No. 2)* (3), LORD SIMONDS was dealing with a taxing Act, but his remarks apply, in my respectful view, a fortiori to a penal statute when he says ([1951] 2 All E. R. 485):

"The question is not at what transaction the section is according to some alleged general purpose aimed, but what transaction its language according to its natural meaning fairly and squarely hits."

I have to see whether, construing the Act and the order and giving the words their natural meaning, the Act and the order fairly and squarely hit this transaction. The case has rightly been elaborately argued before me, and I am indebted to counsel for their careful submissions and for their painstaking researches into the many authorities that have been cited to me. In a matter of this sort naturally there has been much reference to hypothetical examples of analogous transactions. I think, however, that it is undesirable for me to go outside the particular transaction which I have to consider. I do not propose to review the arguments because, after all, the case depends on a very few words in the Act and in the order.

I turn once more to the Act, and, in particular, to s. 4 (2):

"Any reference in this Act to the borrowing of money—(a) includes a reference to the making of any arrangement by which a sum which would otherwise be payable at any date is payable at a later date . . ."

It seems to me that what the Act is trying to hit is this. In order to repay one's existing creditors, one may borrow money, but another way of dealing with the matter is to persuade one's existing creditors to permit one to repay them at a later date. No borrowing in the ordinary sense occurs if the latter course is followed, but the Act plainly hits that sort of arrangement. Section 4 (2) continues " . . . and includes in particular"—those words are important, because, while I find it unnecessary to decide whether they show that what follows falls within and is a particular example of what has gone before, at all events they do show that the Act is now going to deal with a case closely analogous to that which has gone before—

"the making of any arrangement by which the whole or any part of the price of any property is allowed to remain unpaid . . ."

It is conceded by counsel for the Attorney-General that the reference to price is appropriate in an Act of this sort only to a money consideration, using money in the strict sense of cash; it is not appropriate to describe some consideration other than cash. What do I have to find in order that the Act should

cover the transaction? I have to find a cash consideration being paid for a property, i.e., a contract of sale and purchase for cash. I have to find an arrangement by which that cash is to remain unpaid. I do not think I need refer in any detail to the order, because with the exceptions I have just mentioned the words are exactly the same. I look then at the transaction. Is this a transaction which has a cash consideration which is allowed to remain unpaid?

- With all respect to the arguments of counsel for the Attorney-General, I should have thought that this was plainly described in legal language as a transaction for a consideration which consisted in the issue of debentures. The Act plainly draws a distinction between the issue of securities and the borrowing of money. The order makes the difference even plainer, as appears from the various cross-headings. One can only make this a transaction for a cash consideration which is allowed to remain unpaid by saying that, looking at the transaction as a whole, one finds that, on its true interpretation, a sum of cash is to be paid on the terms of the debenture trust deed in the future, and that what really is happening is that there is a consideration of £750,000 payable in cash which is to be allowed to remain unpaid until 1980 or such earlier time as the security is redeemed under those provisions which I have already read. That seems to me to be a most strange and unnatural interpretation of the transaction.
- There is, in fact, no cash consideration here at all. No money is being allowed to remain unpaid. This is quite a different transaction. This is a transaction in consideration of the issue of a series of debenture stock secured by a debenture trust deed. Under that trust deed, of course, moneys become payable from time to time in accordance with the provisions of the trust deed to the holders from time to time of the stock certificates. How that can be said to be allowing money to remain unpaid when one is dealing with provisions which in essence are merely extending the meaning of the word "borrowing", I do not understand. It would have been easy for the Treasury, by making appropriate orders, to have dealt with this type of transaction. It has not thought fit to do so, and, in my judgment, it can only bring this transaction within the provisions which I have dealt with by giving to this transaction a most strange and unnatural construction.
- It follows, therefore, if the Treasury is wrong in that view, that this transaction does not infringe the Control of Borrowing Order, 1947. At the same time, I think, having regard to the facts to which I have already referred, that this is really a question for the criminal courts. My declaration ought to be very narrow. I, therefore, propose to declare that the arrangement proposed is not a transaction whereby the price of any property is allowed to remain unpaid within the meaning of art. 2 (1) (b) of the Control of Borrowing Order, 1947.

Order accordingly.

Solicitors: *Linklaters & Paines* (for the plaintiffs); *Treasury Solicitor*.

[*Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.*]

PRACTICE NOTE.

KANGOL INDUSTRIES, LTD. v. ALFRED BRAY & SONS, LTD.

[CHANCERY DIVISION (Danckwerts, J.), November 11, 1952.]

Design—Practice motion—Undertaking to deliver up machines and drawings—Enforcement.

MOTION.

The plaintiffs claimed (i) an injunction to restrain the defendants from disclosing or making any use of (a) any information received from the plaintiffs relating to the construction of knitting machines, and (b) any improvements made by the defendants relating to such knitting machines, and (ii) an order that the defendants should deliver up to the plaintiffs all knitting machines similar to those made by the defendants for the plaintiffs, and all parts, drawings, jigs and patterns relating thereto which were in their possession, power, or control. On July 29, 1952, the plaintiffs moved the court for an interlocutory injunction, but the defendants offered an undertaking in the terms of claim (i) in the writ, and also undertook to deliver up on or before Aug. 5, 1952, to the plaintiffs the articles claimed in claim (ii). The plaintiffs undertook to lodge £365 in court and to take no further step in the action which was pending between the parties. The undertakings were embodied in the order made on the motion. The plaintiffs now moved the court for an order that “(i) the defendants do within seven days after the date of this order make and file a full and sufficient affidavit by their proper officer stating whether they have or have had in their possession or power any and (if any) what drawings or copies thereof relating to any knitting machines made, or similar to those made, by the defendants for the plaintiffs and accounting for the same, and (ii) the defendants do within seven days after filing such affidavit deposit at [a bank] in the joint names of the solicitors for the plaintiffs and the defendants any such drawings or copies not already so deposited which are in their possession or power.”

Shelley, Q.C., and Aldous for the plaintiffs.

Raymond Jennings, Q.C., and Van Oss, for the defendants, objected that the court had no jurisdiction to order delivery up on oath on an interlocutory application. They also pointed out that the plaintiffs had undertaken to take no further step in the action.

DANCKWERTS, J., made the order asked for by the notice of motion. He said that, having regard to the correspondence, which showed that, either through foolishness or lack of appreciation of the seriousness of the situation, or a quibbling kind of dishonesty, the defendants had failed to make an effort to comply with the undertaking promptly. He was not surprised that the plaintiffs had lost faith in the defendants' intention to fulfil their undertaking. While it might be true that, if on the original motion relief had been resisted, the plaintiffs could not have obtained an order on interlocutory application for delivery up of the drawings and patterns, the order had been made by consent. The defendants had given an undertaking that they would hand over the drawings and patterns, and so it was too late to take an objection of that nature. The court was entitled to require that some statement should be made by the defendants to the effect that they had complied with their undertaking. The application did not constitute a further step in the action. The costs would be the plaintiffs' in any event. [After discussion the time for filing the affidavit was extended to fourteen days.]

Solicitors: *H. B. Supperstone & Co.* (for the plaintiffs); *Field, Roscoe & Co.* (for the defendants).

R.D.H.O.

STRUTT v. PANTER.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Jenkins and Morris, L.J.J.),
January 26, 1953.]

Rent Restriction—Statutory tenant—Previous order against tenant's mother for possession of other premises on condition that landlord provided alternative accommodation—Death of mother while in occupation of alternative accommodation—Claim by daughter to protection as statutory tenant—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (c. 17), s. 12 (1) (g).

On Feb. 7, 1950, an order for possession of a dwelling-house to which the Rent Restrictions Acts applied was made against the widow of a tenant, she having become a statutory tenant on her husband's death by virtue of s. 12 (1) (g) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920. It was a term of the order that the landlord should "let" to the widow alternative accommodation at a comparable rent. The landlord complied with that condition, and the widow went into possession of the alternative accommodation. On Dec. 17, 1951, the widow died and her daughter who had resided with her, remained in possession of the alternative accommodation. On a claim against the daughter for possession of that accommodation,

HELD: the effect of the order of Feb. 7, 1950, was to create in the mother a new contract of tenancy of the alternative accommodation, and, therefore, the daughter was entitled to remain in possession by virtue of s. 12 (1) (g) of the Act of 1920.

Observations by SIR RAYMOND EVERSLED, M.R., on the terms of an order for possession on condition that the landlord provides suitable alternative accommodation.

FOR THE INCREASE OF RENT AND MORTGAGE INTEREST (RESTRICTIONS) ACT, 1920, s. 12 (1) (g) and s. 15 (1), see HALSBURY'S STATUTES, Second Edn., Vol. 13, p. 999, and p. 1017, respectively.

APPEAL by the landlord from an order of His Honour JUDGE HODGSON made at Kingston-upon-Thames County Court on Nov. 21, 1952, dismissing the landlord's action for possession of a dwelling-house.

S. Terrell for the landlord.

Lubbock for the tenant.

SIR RAYMOND EVERSLED, M.R.: The tenant claims to be entitled to the possession of a house, No. 59 Station Road, Chertsey, by virtue of s. 12 (1) (g) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920. She is in occupation of the house in the following circumstances. On Feb. 7, 1950, in an action brought by the landlord against the tenant's mother, Mrs. Beard, for possession of another house, No. 48 Station Road, Chertsey, JUDGE KONSTAM made an order for possession of that house on the terms, by way of satisfying s. 3 (1) (b) of the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, that the landlord would let—and, so far as we can tell, those were the vital words—No. 59 Station Road to Mrs. Beard at a comparable rent, 10s. 11d. a week. That was done. At the time of the order Mrs. Beard was the statutory tenant of 48 Station Road, having survived her husband, the previous tenant, and taken advantage of s. 12 (1) (g) of the Act of 1920. If, therefore, Mrs. Beard had remained at 48 Station Road and had died there—in fact, she died at 59 Station Road on Dec. 17, 1951—the present tenant could not have invoked that same provision in order to preserve for herself a right of continued occupation. If, however, the effect of the order was to create in Mrs. Beard a new contract of tenancy of 59 Station Road, then the fact that she had herself succeeded to the tenancy of 48 Station Road under s. 12 (1) (g) ceases to have any further relevance, and the present tenant is now entitled, by

virtue of s. 12 (1) (g), to remain in possession of 59 Station Road after her mother's death. I would add that the intention of JUDGE KONSTAM was that everything would remain as nearly as possible exactly as it was on Feb. 7, 1950, with the mere substitution for 48 Station Road of No. 59, so that Mrs. Beard's statutory tenancy of No. 48 would, so to speak, be translated to No. 59.

I agree with JUDGE HODGSON that that is not a possible consequence. As I understand the position, a statutory tenancy can only come into existence, to use the language of s. 15 (1) of the Act of 1920, by the circumstance that a contractual tenant retains possession of the subject-matter of the tenancy after the contract has been determined. Therefore, it seems to me impossible to create a statutory tenancy when no previous contractual relationship of landlord and tenant in respect of the premises has ever existed. If that is right, it seems to me that other consequences follow. I have no doubt that, in their notable efforts to give effect to the rent restriction legislation, county court judges are from time to time faced with the need to order alternative accommodation for a tenant as a condition of making an order for possession, and, when doing so, try to put the tenant as nearly as may be in the same position as he or she was before the order for possession took effect, but, in my judgment, a court cannot create a tenancy, as it were, out of the void, and, if an order of this kind is made, it is, perhaps, desirable that further consideration should be given to the precise intent behind it. Thus, if what happened on the order of Feb. 7, 1950, taking effect was to bring into operation a contractual tenancy at 10s. 11d. a week of 59 Station Road, and nothing more was said, it may well have been—though I do not so decide—that on the very next day the landlord could have served a notice to quit as a preliminary to increasing the rent to the recoverable limit of 13s. 10d. If that is to be prevented, it may be that orders of this kind should contain an undertaking on the part of the landlord, that, so long as the tenant remains in occupation and complies with all the terms of the newly created tenancy, he (the landlord) will not serve a notice determining the contractual tenancy with a view to increasing the rent without the leave of the court or on such terms as the county court judge may think proper. In making orders of this kind, no doubt, county court judges will also consider the possible effect, so far as succession under s. 12 (1) (g) of the Act of 1920 is concerned—though it does not, perhaps, happen very often—that the person against whom the order is being sought is himself or herself a “successor” under s. 12.

Those observations are, however, by the way. The present appeal raises only the limited question whether the learned judge was right in holding, as he did, that no order for possession could now be made on these proceedings against the tenant. In my judgment, the learned judge was right in that conclusion, and I think the appeal ought to be dismissed.

JENKINS, L.J.: I agree.

MORRIS, L.J.: I agree.

Appeal dismissed.

Solicitors: *Kingsford, Dorman & Co.*, agents for *Dawe & Co.*, Kingston-on-Thames (for the landlord); *McNamara Ryan & Co.*, Chertsey (for the tenant).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

SMITH v. CHESTERFIELD & DISTRICT CO-OPERATIVE SOCIETY, LTD.

[COURT OF APPEAL (Lord Goddard, C.J., Jenkins and Morris, L.J.J.), January 28, 29, 1953.]

Factory—Dangerous machinery—Rolling machine in bakery—Guard leaving space for operator's hand to go underneath it—Operator putting hand through in breach of instructions—Factories Act, 1937 (c. 67), s. 14 (1).

A

A machine which rolled out puff pastry at a bakery was provided with a guard to protect the operator from coming into contact with the rollers. The guard came down to within three inches of the bed of the machine. Disregarding instructions which had been given to her, the plaintiff, while operating the machine, put her hand under the guard to press against the rollers pieces of dough which had escaped them, her hand came in contact with the rollers, and she was injured. In an action by the plaintiff against the defendants, her employers, for damages for negligence and/or breach of their statutory duty securely to fence the machine as they were required by s. 14 (1) of the Factories Act, 1937, OLIVER, J., held that, as the plaintiff had deliberately put her hand underneath the guard, that was equivalent to breaking or taking away the guard, and, therefore, the defendants were not liable. On appeal,

B

C

D

E

HELD: that, while the question whether a machine was securely fenced was one which fell to be decided on the facts of the particular case under consideration, it must also be decided according to the right principle of law, and the ground on which OLIVER, J., had come to his decision placed too limited a duty on the defendants under s. 14 (1); the conduct of the plaintiff, unreasonable as it was, was reasonably foreseeable by the defendants, and, as the guard which was provided was such that the plaintiff could put her hand beneath it and so come into contact with the rollers, the rollers of the machine were not securely fenced within the meaning of s. 14 (1); and, therefore, the defendants were in breach of their duty under that sub-section.

Observations of LORD NORMAND in *Lyon v. Don Brothers, Buist & Co., Ltd.* (1944 S.C. (J.) 5), and dictum of DU PARCQ, J., in *Walker v. Bletchley Flettons, Ltd.* ([1937] 1 All E.R. 175), applied.

F

FOR THE FACTORIES ACT, 1937, s. 14 (1), see HALSBURY'S STATUTES, Second Edn., Vol. 9, p. 1009.

Cases referred to:

G

- (1) *Burns v. Joseph Terry & Sons, Ltd.*, [1950] 2 All E.R. 987; [1951] 1 K.B. 454; 114 J.P. 613; 2nd Digest Supp.
- (2) *Lyon v. Don Brothers, Buist & Co., Ltd.*, 1944 S.C. (J.) 1; 2nd Digest Supp.
- (3) *Walker v. Bletchley Flettons, Ltd.*, [1937] 1 All E.R. 170; Digest Supp.
- (4) *Stimson v. Standard Telephones & Cables, Ltd.*, [1939] 4 All E.R. 225; 161 L.T. 387; *sub nom. Stimpson v. Standard Telephones & Cables, Ltd.*, [1940] 1 K.B. 342; 109 L.J.K.B. 315; 32 B.W.C.C. 253; 2nd Digest Supp.

H

APPEAL by the plaintiff against an order of OLIVER, J., dated July 19, 1952, dismissing an action for damages for negligence and breach of statutory duty.

The plaintiff was employed by the defendants on a machine which rolled out puff pastry at their bakery. The machine was provided with a guard which came down to within three inches of the bed of the machine, leaving enough space for the operator to put her hand underneath it. In order to roll small pieces of dough which had been left behind after layers of dough had passed through the machine, the plaintiff, in contravention of instructions given to

her by the defendants, put her hand under the guard to push the dough against the rollers and her fingers came into contact with the rollers and were injured.

OLIVER, J., held that the guard was a sufficient protection against anything except a deliberate act and that, therefore, the machinery was "securely fenced" within the meaning of s. 14 (1) of the Factories Act, 1937, and the defendants were not in breach of their statutory duty under that sub-section.

Hylton-Foster, Q.C., and R. W. Sykes for the plaintiff.

Beresford, Q.C., and Seuffert for the defendants.

LORD GODDARD, C.J.: This is an appeal from an order of OLIVER, J., in an action in which the plaintiff claimed damages for injury to her hand caused by an alleged breach of statutory duty on the part of the defendants. The plaintiff was employed at a bakery, on a rolling machine which rolled puff pastry. The pastry is made by placing a layer of margarine on a layer of dough, folding the layer of dough over and putting it through the machine, repeating this operation several times, until a slab of material about three inches thick is made. The plaintiff's duty is to manipulate the dough by rolling it or beating it with a hand roller, and then, as it is very heavy, putting it through the mechanical roller. The mechanical roller comprises a fixed bottom roller and a top roller which will move slightly up and down, according, I suppose, to the thickness of the dough which is being put through. When dough is going through the machine small pieces are left which have not been drawn in by the rollers and rolled out. It is the plaintiff's duty to stop the machine, collect these small pieces of dough, put them again into a lump, roll them with a hand roller, and then add them to the dough when it goes through the machine again, in the reverse direction to that in which it went through in the first instance. The rollers have a guard over them which comes down, leaving a space of over three inches between the bottom of the guard and the bed of the machine. The object of the guard is to prevent the operator's fingers coming into contact with the rollers. The operators who work these machines are given special directions and training, and they are forbidden from time to time to put small pieces of dough which have escaped the rollers back into the machine for rolling. They are told to roll them with a rolling pin, because, if small pieces have to be pushed tight against the rollers when they are working, there is a danger that the fingers may come into contact with the rollers. A careless or thoughtless operator can put her hand under the guard and come in contact with the rollers, and that is what happened to the plaintiff. The plaintiff collected the bits of dough, and, because it was rather heavy work to roll them out by hand, she put them back, and contrary to her instructions put her hand under the guard to push the dough up against the rollers while the machine was working. As a result her fingers were cut and she was injured.

It has been said that the provisions of the Factories Acts regarding fencing are not meant only to prevent accidents to careful workmen. It is recognised that people in factories are not always careful, but, on the contrary, they are often thoughtless and sometimes they do things deliberately which they ought not to do and which involve themselves in injury. Fencing is intended to protect the careless and the ignorant as well as the careful and the well-instructed. In *Burns v. Joseph Terry & Sons, Ltd.* (1) SOMERVELL, L.J. ([1950] 2 All E.R. 990) cited a passage from the Lord President's opinion in *Lyon v. Don Brothers, Buist & Co., Ltd.* (2) in which LORD NORMAND said (1944 S.C. (J.) 5):

"It can be appositely said that the standard to be observed is a fence which will prevent accidents from occurring in circumstances which may be reasonably anticipated, but the circumstances which may be reasonably anticipated include a great deal more than the staid, prudent, well-regulated conduct of men diligently attentive to their work, and the

occupiers of factories are bound to reckon on the possibility of conduct very different from that. They are bound to take into account the possibility of negligent, ill-advised or indolent conduct on the part of their employees, and even of frivolous conduct, especially where young workers are employed. If the fencing is to secure operatives against injury which may reasonably be anticipated in that sense, then I am of opinion that there was a contravention of the section of the Act."

A The guard in the present case was provided to prevent operatives from touching or getting their fingers up against the rollers, but a girl could put her hand under it and steps might have been taken to prevent that happening. Counsel for the defendants called our attention to the proviso to s. 14 (1) of the Factories Act, 1937, which I think is against the defendants' case. Section 14 (1) requires all dangerous parts of machinery to be "securely fenced"—not merely "fenced"—and as with some machinery a permanent fence is impracticable, the proviso provides that:

B "in so far as the safety of a dangerous part of any machinery cannot by reason of the nature of the operation be secured by means of a fixed guard, the requirements of this sub-section shall be deemed to have been complied with if a device is provided which automatically prevents the operator from coming into contact with that part."

C If this guard had come down when the dough was no longer there and touched the bed of the machine so as to prevent a person's hands going through, it would have been a sufficient guard, and if an operative deliberately picked up such a guard and put her hand through the machine very different considerations would apply.

D We are asked to say that there are here findings of fact by the learned judge with which we should not interfere. He held that, because the plaintiff deliberately put her hand underneath this guard, i.e., through the space which was left between the guard and the bed of the machine, that was equivalent to breaking or taking away the guard, and that, therefore, the employers were not liable. With all respect to the learned judge, I do not agree with that view. It was possible for an operator, without breaking the guard, to get her hand in contact with the rollers. Therefore, it seems to me that it is impossible to say that the dangerous part of the machine, the moving rollers, was "securely fenced".

E For this reason I think that there was a breach of statutory duty on the part of the defendants. The plaintiff, however, was guilty of contributory negligence, because she did a deliberate act against which she had been warned and which she ought to have known was highly dangerous. That the danger was foreseeable by the employers is clear, both because the guard was provided to prevent it and because the employees were instructed about it. The guard was not adequate, but the plaintiff was guilty of folly in doing what she did, in direct disobedience of orders. Therefore, she cannot recover the whole of the damages, and the court has come to the conclusion that she should be given forty per cent. of whatever sum may be awarded. We have no information or evidence before us on which we can assess the damages, and so, in default of agreement, the case will be sent to the registrar of the Leeds County Court to assess the damages.

H JENKINS, L.J.: I agree. Counsel for the defendants argued that whether this machine was "securely fenced" or not in accordance with the requirements of s. 14 (1) of the Factories Act, 1937, was a question of fact on which the learned judge had reached his conclusion after hearing and seeing the witnesses, and so this court ought not to interfere with it. Whether any particular machine is "securely fenced" in accordance with the statutory duty must be judged with reference to the facts of each particular case. That is a truism,

but the question must also be judged by reference to the right principle of law, and, to my mind, the learned judge was in error when he said:

"But on those facts how can she succeed in an action under the Factories Acts? I do not think that she can. The essence of the provisions of s. 14 (1) of the Factories Act, 1937, from what I know of the cases and from what has been cited to me, seems to be that there should be a fencing against accident and not a fencing against deliberation."

The learned judge, having laid down that principle for his guidance, came to the conclusion that the plaintiff's deliberate act was tantamount to a breaking of the fence and involved no breach of statutory duty on the part of the defendants, inasmuch as the fence provided was a sufficient protection against anything except a deliberate act amounting to a breaking of the fence.

To my mind, this statement of the principle of law by which the learned judge was guided puts far too narrowly the duty of an employer under s. 14 (1). It is plain from the passage from the opinion of LORD NORMAND in *Lyon v. Don Brothers, Buist & Co., Ltd.* (2) (1944 S.C. (J.) 5), cited in *Burns v. Joseph Terry & Sons, Ltd.* (1) in the judgment of SOMERVELL, L.J. ([1950] 2 All E.R. 990), that the security to be provided by means of the fencing extends not merely to protection against accidental occurrences, but also to protection against "negligent, ill-advised or indolent conduct"; and it extends further, in my judgment, to conduct such as that of the plaintiff in the present case. The test, as was said by DU PARCQ, J., in *Walker v. Bletchley Flettons, Ltd.* (3) is this ([1937] 1 All E.R. 175):

"In considering whether machinery is dangerous you must not assume that everybody will always be careful . . . a part of machinery is dangerous if it is a possible cause of injury to anybody acting in a way in which a human being may be reasonably expected to act in circumstances which may be reasonably expected to occur."

This applies in considering whether machinery is "dangerously fenced". I may add this comment from REDGRAVE'S FACTORIES, TRUCK & SHOPS ACTS, 18th ed., p. 32:

"This, which is the test now most commonly applied, is, it is submitted, the correct one. In spite of the first sentence of the test, the same learned judge had in *Stimson v. Standard Telephones & Cables, Ltd.* (4) to complain that the test had in some quarters been misunderstood. The behaviour of human beings that has to be regarded is such behaviour as is reasonably foreseeable which is not necessarily confined to such behaviour as is reasonable behaviour."

In the present case it seems to me not open to doubt that the action of the plaintiff, unreasonable as it may have been, was behaviour on her part which was reasonably foreseeable by the defendants. That seems to me to be demonstrated by the fact that Mr. Naylor, the defendants' bakery manager, when asked what instructions were given to the staff concerning the machine and the use of the guard, said:

"We have always given the staff instructions that, when they put the paste through and it comes that they have small pieces to finish off, they must not use the machine for the small ends; they must use a rolling pin, because it is awkward practice to put small pieces through the machine, and also dangerous."

It appears clear, therefore, that this procedure of putting small pieces through the machine was one which the employers had in mind and against which they thought it necessary to caution their employees. It was, therefore, a foreseeable act of anyone working the machine. The guard was so constructed as to leave room between the table and the lower member of the guard sufficient

for a person minded to follow this forbidden procedure to thrust her hand through, with a view to putting the small pieces between the rollers, and thus to get the hand caught in the nip. Accordingly, I agree with my Lord that this appeal should be allowed. On the question of contributory negligence and damages, I have nothing to add to what he has said.

MORRIS, L.J.: I am in full agreement with the judgments which have been delivered.

Appeal allowed.

Solicitors: *George A. Herbert*, agent for *Willey Hargrave & Co.*, Leeds (for the plaintiff); *Fred Hollis*, agent for *C. W. Nelson & Co.*, Leeds (for the defendants).

[Reported by F. A. AMIES, ESQ., Barrister-at-Law.]

BORYS v. CANADIAN PACIFIC RAILWAY CO. AND ANOTHER.

[PRIVY COUNCIL (Lord Porter, Lord Tucker, Lord Asquith of Bishopstone, Lord Cohen and the Chief Justice of Canada (the Rt. Hon. T. Rinfret)), July 10, 14, 15, 16, 17, 21, 22, 23, 1952, January 12, 1953.]

Mine—Minerals—Reservation—Right to work implied in reservation—Meaning of “petroleum”—Vernacular, not scientific, meaning to be sought—Right of occupier of land to natural gas within the land.

The appellant owned an estate in fee simple of property in Alberta. The property had been acquired by his predecessor in 1906 from the first respondents and he was registered as owner in 1947. In the original conveyance the first respondents reserved to themselves all coal, petroleum and valuable stone, and in 1949, in reliance on this reservation, they leased to the second respondents all petroleum that might be found within, on, or under the land, together with the exclusive right to work, win, and carry it away, for a period of ten years, subject to the right of renewal. There was, under the appellant's property and the lands adjoining it, a large reservoir of petroleum which was found in a bed of porous rock underlying the land. This bed contained at the bottom water, then the petroleum, and on top a layer of gas. The porous rock and the other substances were held in a container which was impervious and shut them off from the surrounding land which lay outside it, but within the container they could move from place to place, and, therefore, any withdrawal of water, petroleum, or gas from one portion would normally result in the filling of the vacant space by one of those three substances. The second respondents entered on the appellant's land and proceeded to bore for oil. The appellant sought a declaration that he was the owner of the natural gas within his lands, whether it was found in solution in the petroleum or in a free state, and an injunction restraining the respondents from using, removing, wasting, interfering with, or otherwise disposing in any manner of this natural gas. Both respondents claimed that the free gas contained in the same chamber as the petroleum was part of the petroleum.

HELD: (i) a reservation by a landowner of mines and minerals was meaningless unless it was accompanied by a right to work and to recover the substance reserved, and, although the reservation in the conveyance of 1906 did not contain a clause giving a right to work, the absence of such a clause did not abrogate or limit the respondents' powers, for such a reservation necessarily implied the existence of power to recover the substance reserved and the right to work it: *Rowbotham v. Wilson* (1860)

(8 H.L. Cas. 348), and observation of LORD HATHERLEY in *Ramsay v. Blair* (1876) (1 App. Cas. 704), applied.

(ii) in ascertaining the meaning of the word "petroleum", the vernacular meaning (i.e., the meaning applied by landowners, business men, and engineers, as opposed to scientists) should be sought: observations of LORD HALSBURY, L.C., in *Glasgow Corpn. v. Farie* (1888) (13 App. Cas. 669), applied; and, applying that test, "petroleum", when in a container below ground, included gas in solution in the liquid as it existed in the earth;

(iii) the respondents were under no obligation to conserve the free gas within the appellant's land with the consequent denial of their right to recover the petroleum in the usual way, because the respondents had a direct grant of the petroleum, whereas the appellant had merely such residual rights as remained in him subject to the grant to the respondents, and, therefore, there was no obligation on the respondents to take steps to prevent the egress of the gas or to refrain from connecting the orifice with the oil bed.

(iv) therefore, the appellant was not entitled to the declaration and injunction which he sought.

AS TO THE RIGHT TO WORK MINES AND QUARRIES UNDER LEASE, see HALSBURY, Hailsham Edn., Vol. 22, p. 599, para. 1303; and FOR CASES, see DIGEST, Vol. 34, pp. 620, 621, Nos. 181-185.

Cases referred to:

- (1) *Glasgow Corpn. v. Farie*, (1888), 13 App. Cas. 657; 58 L.J.P.C. 33; 60 L.T. 274; 34 Digest 604, 12.
- (2) *Rowbotham v. Wilson*, (1860), 8 H.L. Cas. 348; 30 L.J.Q.B. 49; 2 L.T. 642; 24 J.P. 579; 11 E.R. 463; 34 Digest 613, 121.
- (3) *Ramsay v. Blair*, (1876), 1 App. Cas. 701; 34 Digest 605, 19.
- (4) *Hamilton (Duke) v. Graham*, (1871), L.R. 2 Sc. & Div. 166; 34 Digest 614, 134.
- (5) *Trinidad Asphalt Co. v. Ambard*, [1899] A.C. 594; 68 L.J.P.C. 114; 81 L.T. 132; 34 Digest 651, 481.
- (6) *Barnard-Argue-Roth-Stearns Oil & Gas Co., Ltd. v. Farquharson*, [1912] A.C. 864; 82 L.J.P.C. 30; 107 L.T. 332; 34 Digest 608, 55.

CONSOLIDATED APPEALS from a judgment of the Appellate Division of the Supreme Court of Alberta, dated Feb. 6, 1952.

The appellant owned an estate in fee simple in section 19, township 50, range 25 west of the fourth meridian, in the province of Alberta. On Sept. 2, 1900, the first respondents, the Canadian Pacific Railway Co., were registered as owners of the property in question, and on Dec. 27, 1906, they transferred it to one Simon Borys, but his title did not appear to have been registered till Nov. 19, 1920. By a series of subsequent transactions the land was transferred to the appellant who was registered as owner of the estate on Dec. 18, 1947. In the original conveyance the first respondents reserved to themselves all coal, petroleum, and valuable stone, and, on Sept. 21, 1949, in reliance on this reservation, they leased to the second respondents, Imperial Oil, Ltd., all petroleum that might be found within, on, or under the land, together with the exclusive right to work, win, and carry away the same for a period of ten years, subject to the right of renewal. That lease in terms granted a right which was not specifically reserved in the original conveyance, i.e., the right to work the petroleum. There was, in fact, a large reservoir of petroleum under the appellant's property and the lands adjoining it. The petroleum, in so far as was material to the present case, was found in a bed of porous rock underlying the appellant's land and the surrounding property, which contained at the bottom water, then petroleum, and on top a layer of gas. The porous rock and the other substances were held in a container which was impervious and shut them off from such of the surrounding land as lay outside it, but

within the container itself they could move from place to place, and, therefore, any withdrawal of water, petroleum, or gas from one portion of the container normally resulted in the filling of the vacant space by one of those three substances. As the bed stretched beyond the appellant's land, any withdrawal might cause the gap to be filled from those portions which lay outside the appellant's boundaries. On the other hand, the withdrawal of any of the contents might result in a partial filling of the space by the original substances under decreased pressure, or partially in both ways. The substances were fugacious and not stable within the container, though they could not escape from it. If one of the three substances was withdrawn from a portion of the property which did not belong to the appellant, but lay within the same container, and any oil or gas situated in his property thereby filtered from it to the surrounding lands, admittedly he had no remedy. So, also, if any substance was withdrawn from his property, thereby causing fugacious matter to enter his land, the surrounding owners had no remedy against him. The only safeguard was to be the first to get to work, in which case those who made the recovery became owners of the material which they withdrew from any well situated on their property or from which they had authority to draw.

The dispute which arose between the parties was as to what was included under the reservation of petroleum, to what extent the respondents were empowered to work it in default of a reservation of a right to do so, and how far they could interfere with the appellant's right in things not reserved in the grant to him. The particular substance of which the appellant claimed to be owner, and to interference with which he objected, was the gas contained in a cap situated on top of the petroleum (which may be called "free gas") and also any gas which was in solution in the petroleum under his land or might be withdrawn from under his land. The problem arose because the material in the container was subjected to high pressure and a high temperature, with the result that what would be gas at a normal surface temperature and at such a pressure as would be met with at ground level became dissolved in the petroleum and was found in solution with it in liquid form. Petroleum, not gas, was reserved, and the appellant claimed that all gas on his premises belonged to him, whether it were found in solution in the petroleum or in a free state. The second respondents, who claimed that the reservation of petroleum included the gas in the cap as well as all gas in solution in it, and included the right to work it, obtained a permit from the State on Nov. 28, 1949, giving them the right (on providing security sufficient, in the opinion of the board of arbitration set up under the Right of Entry Arbitration Act, 1947, to protect the rights and privileges of the appellant) to enter on and use such portions of his property as might be required for the purpose of drilling for petroleum, subject to compensation. They then entered on the land and proceeded to bore for oil, but before they reached the container the appellant, maintaining that their working would remove his gas, whether free or in solution, applied for, and obtained, an interim injunction inhibiting them from penetrating into the chamber. At the same time he brought an action claiming (a) a declaration that he was the owner of the natural gas within his lands; (b) an interlocutory and permanent injunction restraining the respondents from using, removing, wasting, interfering with, or otherwise disposing in any manner of that natural gas; (c) alternatively, damages. Howson, C.J., found that (i) petroleum and natural gas were two separate substances; (ii) the appellant was the owner of all such gas, whether free or in solution; and (iii) the second respondents' workings would interfere with his rights, and he granted the appellant a permanent injunction. The respondents appealed to the Supreme Court of Alberta, who agreed that petroleum and natural gas were two different substances, but held that (i) gas in solution in strata in liquid form in the petroleum was part of the petroleum, and was, therefore, one of the products

reserved under the lease; (ii) the reservation of the substance included a right to work it; (iii) all petroleum reserved was the property of the respondents and all gas not included in the reservation was the property of the appellant; and (iv) the respondents were entitled to extract all of the substances belonging to them from the earth, even if their action caused interference with, and wastage of, the gas belonging to the appellant, so long as in the operation modern methods were adopted and reasonably used, and the provisions of any relevant statutes and regulations were observed.

G. H. Steer, Q.C., and *H. W. Riley, Q.C.* (both of the Canadian Bar) for the appellant.

Cross, Q.C., *S. J. Helman, Q.C.* (of the Canadian Bar), *Gahan, Q.C.*, and *J. G. Le Quesne*, for the first respondents.

H. G. Nolan, Q.C., *J. W. Hamilton, Q.C.* and *J. F. Barrett* (all of the Canadian Bar) for the second respondents.

Jan 12. **LORD PORTER** read the following judgment of the Board. This is an appeal by Michael Borys from a judgment of the Appellate Division of the Supreme Court of Alberta which partly reversed and partly affirmed a judgment of the Chief Justice. In the court of first instance Mr. Borys was plaintiff, and the two respondents were defendants, who not only resisted the claim but also counterclaimed against him and now cross-appeal against portions of the judgment of the Appellate Division.

[HIS LORDSHIP stated the facts as set out above and continued:] When petroleum is sold as a marketable substance no difficulty arises as to the material which is dealt with. The substance by that time has reached the open air and is no longer affected by the pressure and temperature to which it is subjected while underground. Petroleum, says the appellant, is that well-known commodity which is bought and sold under that designation and does not include gas whether in solution or retained in the cap above it. Gas not found in the same container as petroleum may, say the respondents, be conceded to be gas and not to be included in the reservation, but the gas in solution is part of the petroleum and so is the gas which is enclosed with it in the same container. Both substances, as they point out, are hydrocarbons and contain the same elements. A great deal of evidence tending to either conclusion was given on the hearing of the case, but both courts in Canada, after analysing the evidence, have come to the conclusion that petroleum and gas, though each is a combination of the same elements, are separate substances. In their Lordships' view there was evidence to justify this conclusion, and there are, therefore, concurrent findings of fact which the Board would not be justified in disturbing. The substance which is found in the form of gas in situ is, therefore, not the subject of reservation and remains the property of the appellant. Gas, however, which exists in solution in the petroleum is a different matter, and must be separately dealt with.

When endeavouring to ascertain the meaning which is to be attributed to "petroleum" in the original reservation, it becomes necessary to decide who are the persons whose use of the word is to determine the sense in which it is employed in the relevant document, inasmuch as the chemist and laboratory expert may attribute to it a meaning different from that which the lay mind would adopt. As has been said, the chemical contents of the petroleum and the natural gas found in the field are the same, and, regarded scientifically, the substances are, therefore, the same. But a scientific similarity of substance does not establish that the materials are themselves rightly to be described by the same name. The proper approach, says the appellant, is to ascertain the meaning of the word in the mouths of those non-scientific persons who are concerned with its use, such as landowners, business men and engineers, and to be guided by them as to the true construction of the reservation. The

vernacular, not the scientific, meaning is, he maintains, the true one, and in support of this contention he calls attention to the observations of LORD HALSBURY, L.C., in *Glasgow Corp'n. v. Farie* (1) when he says of mines and minerals (13 App. Cas. 669) that, in construing the expression, it has to be determined what these words mean in the vernacular of the mining world, the commercial world, and landowners at the time when the grant is made. This method of interpretation has been repeated and accepted more than once, and their Lordships agree that, where it can be ascertained that a particular vernacular meaning is attributed to words in circumstances similar to those in which the expression to be construed is found, the vernacular meaning must prevail over the scientific. But the distinction is not a rigid one to be applied without regard to the circumstances in which the word is used. It was said by LORD WATSON in the same case (*ibid.*, 675):

“ ‘Mines’ and ‘minerals’ are not definite terms: they are susceptible of limitation or expansion, according to the intention with which they are used.”

In their Lordships’ view, the same observations are true of the meaning of petroleum. It may vary according to the circumstances in which it is used.

Inasmuch as the respondents claim all the material in liquid form, including gas in solution, and also all gas associated with petrol in the same container, much of the evidence was directed to a distinction between petroleum and gas. But this is a different problem from an inquiry whether gas in solution is included in a reservation of petroleum. No light on this matter is thrown by the recognition going back as far as 1906 of petroleum and gas as different substances. The question is not whether there are two separate substances, but what is included in each. Except, possibly, one witness, a Dr. Nauss, no witness dealt specifically with this topic, and with that one exception those who may be thought to do so inferentially do not seem to have directed their minds to a consideration of what is included in a reservation of petroleum in the earth, but merely to have dealt with its meaning when recovered from the mine and put into condition for sale above ground. To discriminate between two substances found in solution, one from the other, is difficult enough in any case, but when changes of temperature and pressure can alter the respective relative quantities of one and the other, the difficulty is enhanced. In the ground there is a distinction, one is then liquid and the other gaseous, and the liquid may naturally be called petroleum and the gaseous gas. Any other distinction must depend on a purely conventional assumption that liquid at a particular temperature and pressure corresponding more or less to that found on the surface of the earth is petroleum and the rest of the substance is gas. This is a purely chemical formula and in no way elucidates the meaning which the word bears on the lips of landowners, business men, or engineers, and except as a convenient conventional formula has no logical basis. The difficulty of distinguishing between what is gas and what is petroleum is most easily seen when the ratio of what is fluid in the untapped container to what is gaseous is compared with the ratio of one to the other when the substance is stabilised on the surface. But the difficulty goes deeper because, as the oil is extracted from the reservoir, the ratio almost inevitably changes, the gas increasing as the pressure and temperature are reduced. If, then, a question arose as to the right of the appellant to tap and recover his gas, a difficult problem might arise as to how much of the substance belonged to each party. The solution might be that what emerged as liquid was petroleum and what emerged in gaseous form was gas. But the appellant has not tapped the gas and the question is what substance can the respondents withdraw and to what extent they can make use of the gas whether free or in solution. The answer, say the respondents, is to be found in a wide interpretation of the word “petroleum”, which, it is maintained, includes all kinds of hydrocarbons whether in liquid or gaseous

form. On the other hand, the appellant contends that gas is gas whether in solution with oil in a liquid form or in a gaseous state. The test is what is liquid and what is gas at the conventional figure of sixty degrees F., and 4.65 pressure, i.e., its state at what is a mean temperature and a mean pressure on the surface. The learned Chief Justice took the latter view, the Court of Appeal adopted a compromise, viz., the condition of the substance as it emerges from time to time from the reservoir.

This conclusion, says the appellant, is wrong because it depends on the scientific constitution of the material, and neglects the vernacular meaning. If non-scientific people had ever had to consider what was included in a reservation of petroleum in a grant of land and the answer had been categorical, this view might well prevail. But, as their Lordships have indicated, there is no evidence of such an approach to the problem, or, indeed, of any consideration of it. The ordinary man, when asked: "What is petroleum?", is only concerned with the substance which he can buy or sell after it is recovered and can be delivered as an article of commerce. Their Lordships cannot find any clear evidence as to what the uninstructed mind would define as petroleum underground either in 1906, when the grant to Simon Borys was first made, or, indeed, at any later date.

One may illustrate the attitude of the layman by quoting the evidence of Mr. Harvie, the Deputy Minister of Lands and Forests for Alberta, who had been entrusted with the task of drafting regulations in respect of mines and minerals. His first statement as to this matter was that, from the year 1919, and, indeed, possibly from 1905, his understanding was that petroleum was oil, and natural gas was a separate entity, but later on, when asked: "What about gas in the ground that is dissolved in solution?", he explained that he was not a technician and that in his evidence he was not dealing with gas in the ground at all. Mr. Droppo, who had been engaged in the petroleum business for many years, gave evidence to the like effect. Similarly, when Mr. O'Connor, another of the appellant's witnesses, says that petroleum is a liquid or crude oil produced from the earth, he throws no light on the question at issue. In their Lordships' opinion, none of the further non-scientific witnesses called on the appellant's behalf assist his case on this point. On the other hand, Dr. A. W. Nauss, who is a geologist and has had wide experience in oil, explains that in the case of the petroleum in the Leduc field (which is the field under consideration), each barrel of oil recovered from the ground contains one hundred cubic feet of gas in solution in the oil, and continues:

"When we say 'a gas' we mean those substances which are a gas at atmospheric pressure and at room temperature . . . Gas in solution is the gas which is dissolved in the oil,"

but when it was suggested that it had then ceased to be gas, he replied:

"It ceases to look like gas, yes. I would not say it ceases to be gas."

Dr. Nauss, however, is expressing the opinion of the expert, whereas, as the appellant insists and their Lordships agree, it is in the vernacular use that the true solution is to be found. The chemist may make a distinction between different contents of the liquid substance and resolve it into its constituent parts, but such treatment is purely scientific and in no sense based on the view of the ordinary man. The finding of the learned trial judge—that gas in solution is not included in a reservation of petroleum in the earth, depends on Dr. Nauss' evidence and not on vernacular.

In these circumstances their Lordships, with such assistance as is to be obtained from the facts as given in evidence, must form their own opinion purely as a matter of construction as to the meaning which the word "petroleum" bears when the substance referred to is in situ in a container below ground. In this matter they agree with the observations of the majority

in the Supreme Court of Alberta as expressed by PARLEE, J., in his judgment, when he says:

A "The trial judge found that petroleum and natural gas were, by common usage, two different substances, and that conclusion ought not to be disturbed. I am, however, with respect, unable to agree with him that the reservation 'petroleum' did not include gas in solution in the liquid as it exists in the earth. What was reserved to the railway company was petroleum in the earth and not a substance when it reached the surface. It is true that by change of pressure and temperature, gas is released from solution when the liquid is brought to the surface but such a change ought not to affect the original ownership. In my opinion, all the petroleum reserved, including all hydrocarbons in solution or contained in the liquid in the ground, is the property of the [respondents] who are entitled to do as they like with it, subject, of course, to the observance of all relevant statutory provisions and regulations."

B

C In reaching this conclusion their Lordships have not taken into consideration the view or belief of either Simon Borys or the Canadian Pacific Railway in 1906 or thereafter as to what was included in the term petroleum. Probably they had none, and, in any case, it has to be remembered that what has to be sought is the vernacular meaning of the word "petroleum" and not what opinion was held by the parties to the grant, but, indeed, their Lordships would observe that they find it difficult to believe that either landowners, business men or engineers, or, indeed, the staff of the Canadian Pacific Railway or Simon Borys, would at any time have differentiated between the oil and the gas in solution. They would, in the view of the Board, have included in petroleum all the liquid substance in the mine, and this view in no way conflicts with the testimony of the appellant's lay witnesses.

D

E But, even if it be conceded that petroleum means a substance formed from a hydrocarbon admixture in its liquid form when in position in its container under ground, the difficulty still arises as to the method by which it is to be recovered and the means by which it is to be brought to the surface. Three elements are normally made use of for this purpose and are perhaps well illustrated by a consideration of the conditions subsisting in the premises now under consideration. In the container in question are to be found three layers, (i) on top, the gas cap, (ii) the oil with gas in solution, and (iii) water. The petroleum is recovered by ensuring that the orifice into the container is neither at too high nor at too low a level. The object is (i) to take advantage of the pressure of the gas cap to push the oil upwards; (ii) to assist the oil to mount by the help of the gas in solution; and (iii) to make use of the upward surge of the underlying water to push up the intervening petroleum. Each plays its part in the recovery of the liquid oil. Perhaps the most important element is the uprising of the water as the pressure above is released, but all three are essential if the greatest recovery of oil is to be obtained. The result, however, of tapping the reservoir in this way is to obtain with the oil the gas in solution to turn it into gas on the surface and to appropriate it. A further result is that some of the gas in the gas cap emerges with the petroleum and the gas-owner is thereby deprived of some of the unreserved property.

F

G

H Whatever might be the consequence of a reservation of petroleum together with a right to work it, the grant in the present case contains no such right, and, says the appellant, gives no right in the respondents to interfere with the gas in the cap or to deprive him of his property in it. In their Lordships' opinion, the absence of a clause giving a right to work does not abrogate or limit the powers of the respondents. Inherently the reservation of a substance, which is of no advantage unless a right to work it is added, makes the reservation useless unless that right follows the grant. The true view is that such a reservation necessarily implies the existence of power to recover it and of the

right of working. *Rowbotham v. Wilson* (2) states the proposition in plain terms in a case where no right to work was given, and, though a right to work is to be found in *Ramsay v. Blair* (3), LORD HATHERLEY states (1 App. Cas. 704):

"In the case of the *Duke of Hamilton v. Graham* (4) it was clearly pointed out what the exact right of a proprietor was in respect of a property excepted from a demise; and as to which therefore all the original rights of the demising proprietor remained, together with all the incidents to that property necessary to its working and enjoyment, that which the owner has reserved to himself being as much his as other parts of his land of which he has made no demise whatever."

So far as their Lordships know, the general proposition has never been controverted except in the case of interference with the surface of land which has been granted to another. In such a case there is, in general, no right to let down the surface. In the present case, however, there is no suggestion that the withdrawal of the petroleum or gas will interfere with the surface in any way. But the contention that such a right gives no permission to interfere with the property of others or in the present instance to let the free gas escape requires further consideration and depends on the legal position of the owner of land in which fugacious matter is found. The appellant maintained that the gas was his at any rate while in situ and that the true comparison was with the right of support. The respondents, he said, had no more right to pierce the container and allow the gas to escape than the respondents had in *Trinidad Asphalt Co. v. Ambard* (5), to withdraw the support which their land afforded to the pitch which formed the main ingredient of the appellant's land. It was not suggested on behalf of the respondents in the present case that there existed any circumstances which might empower them to let down or interfere with the surface of the land except the right to enter on the appellant's land, to sink a shaft, and to recover the petroleum, nor was such a right denied by the appellant. The dispute centred round the contention raised on behalf of the appellant that he must not be deprived of the benefit of his gas, a loss which would follow and be the result of opening the container and allowing the oil to escape. To this contention the respondents reply that a distinction has to be drawn between a right to support and a right to property. A long series of decisions, they say, affirms that percolating water may be withdrawn from under the land of an owner by pumping operations on other land adjoining his and such operations give no redress to the person whose water is tapped, and gas is even more fugacious than water and must be treated on the same principles. This proposition is not denied, but does not conclude the matter. The respondents' contention is not that they are entitled to withdraw gas from their own land and to continue to withdraw gas from the same orifice though such gas may have flowed or percolated from under property which is not theirs. Their claim is to use gas which is in situ under the appellant's land or which percolates under it as a result of the normal method of recovering the petroleum by using the gas to assist in drawing it to the surface.

A good deal of authority in the American and Canadian courts has been quoted showing the diverse view entertained in different countries and in the various states in the U.S.A. Some maintain that gases, oils and waters, being fugacious elements, do not belong to the owner of the soil in which they are found, not even when in situ: like wild animals they are only the subject of ownership when reduced into possession. The other view is that, so long as they remain in situ, they belong to the owner of the soil, but are subject, if one may use the expression, to defeasance in case they move elsewhere before the owner of the soil reduces them into possession. For the purpose of their decision their Lordships are prepared to assume that the gas whilst in situ is the property of the appellant even though it has not been reduced into possession, but the question is not whose property the gas is, but what

means the respondents may use to recover their petroleum. That the method which they are permitted to adopt under the judgment of the Appeal Court is the ordinary way of working today is of some assistance to their argument despite the fact that in 1906 the tendency was to regard gas as a danger and a nuisance rather than a help. But the main strength of the respondents' case is that they have a direct grant of the petroleum, whereas the appellant has merely such residual rights as remain in him subject to the grant to the respondents. In such circumstances their Lordships are not prepared to hold that the respondents are under an obligation to conserve the appellant's gas with the consequent denial of their right to recover the petroleum in the usual way. Even if it be conceded that the respective rights of the two parties are to work for and recover each his own property (i.e., in the case of the respondents, the petroleum, and in the case of the appellant, the gas), it does not follow that neither can act without the consent of the other and that only by mutual agreement can they work at all. It may well be that the appellant can recover his own substance by any usual and customary method, but cannot prevent the respondents from following a similar course. It is not, however, necessary to come to any conclusion on this matter, since the claim is concerned only with the respondents' right to work and method of working and does not involve any decision as to how the appellant may deal with the gas. As has been said, no question arises as to a right of support either of the surface or of a lower layer. Their Lordships, accordingly, refrain from analysing the many cases on subsidence which were quoted to them. The issue is rather as to the right of fortuitous abstraction of gas, leaving the surface as it was. Such a question, in their Lordships' view, gives rise to no consideration of the right of support, but only involves the right of taking from an orifice, bored under express power given in that behalf, fugacious material which makes its way to the surface as a result of natural effluxion. They agree with the Appellate Division that there is no obligation on the respondents to take steps to prevent its egress or to refrain from connecting the orifice with the oil bed.

Such a conclusion confirms the judgment appealed from, subject to one consideration, viz.: Are the rights of the respondents in any way destroyed or curtailed by the fact that the reservation is a reservation only and does not in terms give a right to work? It was suggested on the appellant's behalf that *Barnard-Argue-Roth-Stearns Oil & Gas Co., Ltd. v. Farquharson* (6) was an authority for the proposition, not only that petroleum and gas are different substances, but that, in working the reserved petroleum, the respondents must take care to preserve the appellant's gas. In that case the actual reservation was of springs of oil, and their Lordships are not prepared to decide that "springs of oil" and "petroleum" bear the same meaning, but for the purpose of dealing with the argument will assume that they do. Nevertheless, though it is true that a distinction is drawn between oil and gas, that distinction was between the liquid substance and the gas as found in the earth. As LORD ATKINSON said in delivering the judgment of the Board ([1912] A.C. 869):

"It is clearly established by the evidence that this gas is not volatilized rock oil, nor is rock oil condensed natural gas. The gas is not an exhalation of the oil, *nor is it held in solution by the oil to any considerable extent.** The gas and the oil are in their chemical composition no doubt both hydrocarbons, but they are distinct and different products, and it therefore could not be contended successfully, their Lordships think, that the words 'springs of oil' cover this natural gas, simply because both are found, in some cases, to impregnate the same subterranean porous stratum, and that when this stratum is tapped by a pipe or boring leading to the surface the gas in its escape to the upper air helps to bring up to the surface with it some of the oil."

* The italics are their Lordships'.

And it is clear from the judgment as a whole that the question of the respective right to the gas in solution was not a serious element affecting the ultimate decision. If it had been, a different result might have followed. The judgment goes on (*ibid.*, 870):

"In some instances a stratum almost entirely impregnated with gas is found separated by a stratum impervious to both gas and oil from a stratum almost entirely impregnated with oil. Both the impregnated strata are then tapped by pipes so arranged that the gas performs the same function as in the other case, bringing, or helping to bring, the oil to the surface; but in both cases, when the pressure under which the gas is pent up in the earth is relieved, a pump has to be used to pump up the oil."

From those observations it appears that in some instances the appellant tapped oil sealed in a different container and used it to assist in bringing up the oil. In such a case it may well be said that the oil owners are not recovering their oil in the normal way, but drawing Mr. Farquharson's oil from a separate receptacle. The result of merely using the gas in the same container in a normal working of their oil is dealt with at the end of the judgment, where it is said (*ibid.*, 871):

"The company are clearly entitled to search and work for oil in these springs of oil, and to win and carry it away from them, provided they do so in a reasonable manner, and do as little injury as is practicable. While the point does not arise in this appeal for decision, their Lordships think that the company would not be responsible for any inconvenience or loss which might be caused to the respondent or to the owners of the estate of the grantee in the conduct of their operations in the manner mentioned":

a statement which accords with the decision of the Appellate Court in Alberta, and in their Lordships' opinion expresses the true view.

In the circumstances of this case the absence of a clause giving a right to work does not, as their Lordships have intimated, affect the respondents' position. A reservation by a landowner of the mines and minerals, or, indeed, in specific terms, of petroleum, is meaningless unless it is accompanied by the right to work and to recover the substance reserved. No question arises as to the right of tenant for life or remainderman. There has been an out-and-out reservation and an out-and-out transfer of the subject of the reservation. Under these conditions, in their Lordships' view, the reservation must imply a right to work.

They are, therefore, of opinion that the judgment of the Appellate Division is right in all respects and will humbly advise Her Majesty to dismiss the appeals of both parties. There will be no costs of the appeals.

Appeals dismissed.

Solicitors: *Charles Russell & Co.* (for the appellant); *Blake & Redden* (for the first respondents); *Laurence Jones & Co.* (for the second respondents).

[Reported by G. A. KIDNER, ESQ., Barrister-at-Law.]

REEVES v. DEANE-FREEMAN.

[COURT OF APPEAL (Somervell, Birkett and Romer, L.J.J.), January 30, February 2, 1953.]

Public Authority—Limitation of action—Soldier on duty—Member of Canadian forces—Visiting Forces (British Commonwealth) Act, 1933 (c. 6), s. 2 (3) (b)—Limitation Act, 1939 (c. 21), s. 21 (1).

A As the result of a collision on Nov. 14, 1946, between the plaintiff, who was riding a motor bicycle, and a lorry belonging to the Canadian army and driven by the defendant, who was a private soldier in the Canadian army, in the course of his duty, the plaintiff, on Dec. 2, 1949, issued a writ in an action for damages for personal injuries against the defendant.

B HELD: an act done by a soldier in Her Majesty's army in the course of duty was done in pursuance of a public duty within s. 21 (1) of the Limitation Act, 1939; by s. 2 (3) (b) of the Visiting Forces (British Commonwealth) Act, 1933, members of the Canadian army were put in the same position in relation to this matter as members of the home forces; and, therefore, the action could not be maintained, it not having been commenced before the expiration of one year from the date on which the cause of action accrued.

C *Greenwell v. Howell* ([1900] 1 Q.B. 535), applied.

Decision of LORD GODDARD, C.J. ([1952] 2 All E.R. 506), affirmed.

FOR THE LIMITATION ACT, 1939, s. 21 (1), see HALSBURY'S STATUTES, Second Edn., Vol. 13, p. 1180; and FOR THE VISITING FORCES (BRITISH COMMONWEALTH) ACT, 1933, s. 2 (3), see *ibid.*, Vol. 22, p. 676.

D Cases referred to:

- (1) *Merlihan v. Pope (A. C.), Ltd. (Pagnello, Third Party)*, [1945] 2 All E.R. 449; [1946] K.B. 166; 115 L.J.K.B. 90; 173 L.T. 257; 109 J.P. 231; 2nd Digest Supp.
- (2) *Hordern-Richmond, Ltd. v. Duncan*, [1947] 1 All E.R. 427; [1947] K.B. 545; [1947] L.J.R. 1024; 176 L.T. 332; 2nd Digest Supp.
- E (3) *Wilson v. 1st Edinburgh City Royal Garrison Artillery Volunteers*, (1904), 7 F. (Ct. of Sess.) 168; 38 Digest 125, n.
- (4) *The Danube II*, [1921] P. 183; 90 L.J.P. 314; 125 L.T. 156; 38 Digest 103, 741.
- (5) *Bradford Corpn. v. Myers*, [1916] 1 A.C. 242; 85 L.J.K.B. 146; 114 L.T. 83; 80 J.P. 121; 38 Digest 110, 784.
- F (6) *Greenwell v. Howell*, [1900] 1 Q.B. 535; 69 L.J.Q.B. 461; 82 L.T. 183; 38 Digest 105, 751.
- (7) *Griffiths v. Smith*, [1941] 1 All E.R. 66; [1941] A.C. 170; 110 L.J.K.B. 156; 164 L.T. 386; 105 J.P. 63; 2nd Digest Supp.
- (8) *Edwards v. Metropolitan Water Board*, [1922] 1 K.B. 291; 91 L.J.K.B. 210; 126 L.T. 300; 86 J.P. 33; 38 Digest 111, 795.
- G (9) *Fielden v. Morley Corpn.*, [1899] 1 Ch. 1; 67 L.J.Ch. 611; 79 L.T. 231; *affd.* H.L., [1900] A.C. 133; 69 L.J.Ch. 314; 82 L.T. 29; 64 J.P. 484; 38 Digest 120, 864.
- (10) *The Johannesburg*, [1907] P. 65; 76 L.J.P. 67; 96 L.T. 464; 38 Digest 103, 738.
- H (11) *Williams v. Mersey Docks & Harbour Board*, [1905] 1 K.B. 804; 74 L.J.K.B. 481; 92 L.T. 444; 69 J.P. 196; 36 Digest 131, 870.

APPEAL by the plaintiff from an order of LORD GODDARD, C.J., dated July 23, 1952, and reported [1952] 2 All E.R. 506.

On Nov. 14, 1946, a collision occurred between the plaintiff, who was riding a motor bicycle, and a lorry belonging to the Canadian army and driven by the defendant, a private soldier in the Canadian army, in the course of his duty.

On Dec. 2, 1949, the plaintiff issued a writ claiming damages for personal injury suffered by him which, he alleged, had been caused by the negligence of the defendant in the driving of the lorry. The defendant denied negligence, alleged that the matters complained of were caused by the negligence of the plaintiff, and in para. 4 of his defence pleaded:

"Further the defendant was driving the said lorry in the course of his duties as a member of His Majesty's Canadian armed forces, and he will contend that the plaintiff's cause of action against him (if any, which is denied) is barred by the provisions of the Limitation Act, 1939, s. 21."

On Mar. 11, 1952, PARKER, J., in chambers ordered that the issues of law raised by that paragraph be set down and disposed of before the trial of the action. At the trial of the issue LORD GODDARD, C.J., held that, as the defendant was driving the lorry in pursuance of a public duty, he then being a soldier in His Majesty's army, he was protected by the provisions of the Limitation Act, 1939, s. 21 (1), the provisions of s. 2 (3) (b) of the Visiting Forces (British Commonwealth) Act, 1933, putting members of British Commonwealth forces while in this country in the same position as members of home forces.

Vester for the plaintiff.

P. M. O'Connor for the defendant.

SOMERVELL, L.J., stated the facts and continued: The Limitation Act, 1939, did not repeal the provisions of the Public Authorities Protection Act, 1893, s. 1, with which the cases to be cited dealt, but s. 21 of the later Act provided:

"(1) No action shall be brought against any person for any act done in pursuance, or execution, or intended execution of any Act of Parliament, or of any public duty or authority, or in respect of any neglect or default in the execution of any such Act, duty or authority, unless it is commenced before the expiration of one year from the date on which the cause of action accrued: Provided that where the act, neglect or default is a continuing one, no cause of action in respect thereof shall be deemed to have accrued, for the purposes of this sub-section, until the act, neglect or default has ceased. (2) The foregoing provisions of this section shall not apply to any action to which the Public Authorities Protection Act, 1893, does not apply, or to any criminal proceedings. (3) The enactments specified in the schedule to the said Act shall, so far as they relate to the limitation of actions, prosecutions or other proceedings in England and are not repealed by the said Act, be repealed."

The learned Lord Chief Justice said early in his judgment:

"The points which arise in the case and which have been argued before me are whether a soldier on duty is entitled to the protection of the section as being a public authority engaged in a public duty, and, secondly, whether the Act in any case affords protection to a member of the Canadian forces even on the assumption that it would to a member of the British forces."

Counsel for the plaintiff, in arguing the appeal, dealt with the first question first, and I will do the same. The learned Lord Chief Justice referred to *Merlihan v. A. C. Pope, Ltd.* (*Pagnello, Third Party*) (1), and *Hordern-Richmond, Ltd. v. Duncan* (2), in which the Act had been applied in favour, in the first case, of a member of the Canadian armed forces, and, in the second place, in favour of a sergeant in the British army. In neither of those cases was the point which was argued before the learned Lord Chief Justice raised. He then proceeded to refer to a Scottish case, *Wilson v. 1st Edinburgh City Royal Garrison Artillery Volunteers* (3), which was an action for damages against a regiment of volunteers and the officer commanding the regiment, as representing the regiment and also as an individual, by the father of a child who

was killed on the public street by an ammunition waggon, the horses of which had bolted. The pursuer averred that the accident had been caused by the fault of the commanding officer in not seeing that quiet horses were used, that competent drivers were employed, that the waggons were driven according to military regulations, and that a competent commissioned officer was present to superintend the parade. The action was not raised within six months after the date of the accident, and it was held that the action against the commanding officer as an individual was excluded by the statute on the ground that the fault averred against him was neglect of duty in his public capacity as commanding officer.

That case was referred to with approval in *The Danube II* (4) where there had been a collision in the Thames Estuary between a ship which was on a voyage to Middlesbrough in ballast and a battle practice target which was being towed from Portsmouth to Scapa Flow. The defendant, who was a lieutenant in the Royal Naval Reserve in charge of the tug, pleaded that he was acting in pursuance or execution, or intended execution, of a public duty or authority, and that, as the action had not been begun within six months after the act, neglect or default complained of, he was protected by the Act. It was held by this court that the Public Authorities Protection Act, 1893, applied to servants of the Crown acting within the scope of their public duties, and the Act was not impliedly repealed as regards actions in respect of damage by collision at sea by the Maritime Conventions Act, 1911, s. 8, and, therefore, the defendant was protected. LORD STERNDALÉ, M.R., said ([1921] P. 187):

" . . . it seems to me that a man who, under the orders of the Crown—in this case the Admiralty which is a department of the Crown—is taking a battle target to Scapa Flow for the purposes of the fleet, is undoubtedly engaged in a public duty. Perhaps no member of the public could complain if he did not take it; but certainly he was doing what was for the benefit of the public, and under the authority of the Crown; and it can, I think, hardly be denied that the Crown is a public authority. I think, therefore, that the Act applies to this case, and that none of the cases to which we have been referred in any way militate against that view. The same view has been held in cases not binding upon us, by LAWRENCE, J., and DARLING, J., and it also seems to me to be involved in the decision in *Wilson v. 1st Edinburgh City Royal Garrison Artillery Volunteers* (3). In my opinion, therefore, the first point fails."

SCRUTTON, L.J., put it in this way (*ibid.*, 188):

" . . . I share the difficulty that the House of Lords felt in *Bradford Corpn. v. Myers* (5), in knowing exactly what the limit is in the Public Authorities Protection Act between those acts which are protected by the measure of limitation and those acts which are not. But on the best consideration I can give to the matter it appears to me that the Admiralty were under a public duty to make provision for public defence; that in carrying out the particular measure of sending a battle target to Scapa Flow by tug, they were carrying out that public duty; and that the neglect of the servant in charge of the tug was a 'neglect in the execution of any such duty' within the words of the Act. The particular action, therefore, is *prima facie* within the Public Authorities Protection Act."

Those are both cases in which the defendant was an individual, and not, as in many of these cases, a body like some local authority. In *Greenwell v. Howell* (6), a decision of this court, the plaintiff, a landowner, was denying that a road over his land was a public highway and was threatening proceedings against any person using it. Two officials of the county council were directed by the council, acting under the provisions of the Local Government Act, 1894, s. 26, to use the road for the purpose of formally testing the right, which they did.

The landowner brought an action of trespass against them, but at the trial it was found that the road was a public highway, and judgment was given for the defendants. It was held that the acts in respect of which the action was brought having been done by the defendants in pursuance, or execution, or intended execution, of the Local Government Act, 1894, s. 26, the case came within the Public Authorities Protection Act, 1893, s. 1 (b), and, therefore, the defendants were entitled to costs to be taxed as between solicitor and client under that provision. A. L. SMITH, L.J., said ([1900] 1 Q.B. 539):

"I think that, having regard to these provisions, the acts done by the defendants in pursuance of the orders given by the county council were clearly acts done in pursuance or execution or intended execution of an Act of Parliament."

Counsel for the plaintiff submitted that in certain House of Lords cases there is doubt thrown on that case. I do not accept that submission. The first case to which he referred was *Bradford Corpn. v. Myers* (5). The problem there being dealt with seems to me to have been quite a different one. In that case the defendants, who were a municipal corporation, were authorised by Act of Parliament to carry on the undertaking of a gas company, and they did so. They contracted to sell and deliver a ton of coke to the plaintiff, and by the negligence of their agent the coke was shot through the plaintiff's shop window. More than six months later the plaintiff commenced an action of negligence against the defendants who pleaded s. 1 (a) of the Public Authorities Protection Act, 1893. It was held that the act complained of was not an act done in the direct execution of a statute, or in the discharge of a public duty or the exercise of a public authority, and that the Act of 1893 afforded no defence to the action. There have been other cases where that principle has been applied. The principle is summed up concisely, though the line may be difficult to draw, by VISCOUNT MAUGHAM in *Griffiths v. Smith* (7), where he says ([1941] 1 All E.R. 76):

"My Lords, since the decision of this House in *Bradford Corpn. v. Myers* (5), and the tacit or express approval of the cases to which I have referred, it has been impossible to doubt (if it was doubtful before) that it is not essential that a public authority seeking to rely on the Act of 1893 must show that the particular act or default in question was done or committed in discharge, or attempted discharge, of a positive duty imposed on the public authority. It is sufficient to establish that the act was in substance done in the course of exercising for the benefit of the public an authority or a power conferred on the public authority not being a mere incidental power, such as a power to carry on a trade."

It is not enough to show that it is simply *intra vires*. Having considered that case and the other cases to which we were referred, I can find nothing in them intended to throw any doubt on the principle laid down in *Greenwell v. Howell* (6), that the servants of a public body, acting in the execution of duties which would be within the Act, are not outside its protection. Indeed, there are sentences which, I think, point the other way.

The learned Lord Chief Justice clearly had the principle of the *Bradford* case (5) in mind. He says ([1952] 2 All E.R. 508):

"It was for this reason that, before deciding, I required an admission, not only that the defendant was on duty, but also as to the nature of the duty, for I can conceive that, if, let us say, the commanding officer of a battalion or depot had to attend some social function, such as a regimental sports meeting or a special church service, for which it might be proper for him to use an army car, it might be that the driver would not be acting in pursuance of a public duty, and, if an accident took place on the journey, he might not be protected by the section. The evidence showed that on

the day in question the defendant was on a journey from the army garage to Waterloo station for duty in connection with the railway transport officer and that his journey had been authorised by the officer commanding the transport company. It seems to me, therefore, clear, that this was a journey which he was required by his military duty to undertake and that the duty was in connection with army service . . .”

A Counsel for the plaintiff submitted that we should not regard that evidence and we should reverse the judgment on that point. I do not take that view. I would have said myself, agreeing fully with the learned Lord Chief Justice, that the proper inference from that report was that at the time of this accident the defendant was carrying out his military duties.

B The next point taken by counsel for the plaintiff was that a private soldier driving a lorry cannot be a public authority. That, of course, would involve what seems to me an impossible distinction. No doubt, in *Greenwell's* case (6) the two defendants were doing a positive act of walking along a highway. But, on the other hand, in *The Danube II* (4) the claim was based on an allegation of negligence in navigation. In that case, as I have said, the commander of the tug was a naval officer, but one can imagine some boat being sent, whether pulling a target or not, on what would equally be a naval duty where the person in charge might be a warrant officer, or, indeed, a rating. I cannot see how one could apply the principle as laid down by SCRUTTON, L.J., to one case and not to the other.

C The plaintiff's next point was that a soldier driving a lorry on a highway as in this case should be regarded as not engaged in the execution of his duties, but that the accident in the present case should be regarded as caused by a breach of a private right. I find great difficulty about that. In the ordinary case the plaintiff is complaining of a breach of his private rights, but once one comes to the conclusion, to which I have come, that the neglect occurred in the carrying out of a duty, I do not think that that submission avails the plaintiff. Once one finds that the claim is based on some act or neglect in carrying out duties, it seems to me, having regard to the cases which I have cited, that the Act applies. On that point, therefore, I agree with the learned Lord Chief Justice, and for the same reasons as he gave.

D As to the second point, the question whether the Act does not apply because the defendant was a Canadian soldier, the learned Lord Chief Justice decided in the defendant's favour, having regard to s. 2 (3) of the Visiting Forces (British Commonwealth) Act, 1933. Counsel for the plaintiff, in his approach to the construction of that section, submitted that, apart from that Act and having regard to the position of the Canadian forces, the duty could not be one within the Limitation Act, 1939. We have not to decide that point, but counsel for the defendant submitted that, if visiting forces are here—whether Dominion, or, as in war, foreign, forces—prima facie, at any rate, it would be proper to regard them when carrying out military duties as fulfilling a duty within the Act of 1939. As I have said, one has not got to decide the point, and if it was argued difficult questions might well arise. The only relevance, I think, is this. If there is any ambiguity in the Act which we have to construe, is it the type of protection which one might well expect to be applied by Parliament to visiting forces? I think it is, but I also think the words of the Act of 1933 are plain, and, therefore, the question as to the position apart from it does not arise. The relevant words are to be found in s. 2 (3) and I will read paras. (a) and (b), though the part in question is para. (b):

H “Subject as hereinafter provided, any enactment (whether contained in the Naval Discipline Act, the Army Act, the Air Force Act or any other statute) which—(a) exempts, or provides for the exemption of, any vessel, vehicle, aircraft, machine or apparatus of, or employed for the purposes of, the home forces or any of them from the operation of any enactment;

or (b) in virtue of a connection with the home forces or any of them, confers a privilege or immunity on any person . . . shall, with any necessary modifications, apply in relation to a visiting force as it would apply in relation to a home force of a like nature to the visiting force."

Having regard to the general intention of that sub-section to be gathered from its terms and the generality of the words used, I think the learned Lord Chief Justice was right in saying that the Limitation Act, 1939, fell to be applied to a visiting force as it would apply to a home force of a like nature to the visiting force. In those circumstances, I think that point also fails, and I would dismiss the appeal.

BIRKETT, L.J.: I am of the same opinion. I agree with the judgment which has been delivered and also with that of the learned Lord Chief Justice. The words of s. 21 (1) of the Act of 1939 are very wide, as, indeed, were the terms of the Public Authorities Protection Act, 1893, s. 1 (a):

"No action shall be brought against any person for any act done in pursuance, or execution, or intended execution of any Act of Parliament, or of any public duty or authority, or in respect of any neglect or default in the execution of any such Act, duty or authority, unless it is commenced before the expiration of one year from the date on which the cause of action accrued . . ."

I observe that in *Edwards v. Metropolitan Water Board* (8), to which a casual reference was made in the course of the argument, SCRUTTON, L.J., having cited the words of the Public Authorities Protection Act, which are substantially those of s. 21 (1) of the Limitation Act, said ([1922] 1 K.B. 303):

"As the legislature was codifying and replacing a large number of clauses in slightly different language, no doubt it used very wide words. Five years after the Act was passed LINDLEY, M.R., foresaw the difficulties that would arise. 'It is not necessary', he said in *Fiedlen v. Morley Corpn.* (9) ([1899] 1 Ch. 4), 'to consider what cases, if any, do not fall within the Act, although apparently within the words. I add that by way of precaution, because some day there will probably be a great discussion as to what acts or defaults do or do not come within it . . .'"

That forecast has been amply fulfilled. SCRUTTON, L.J., in the same judgment pointed out that in *Bradford Corpn. v. Myers* (5), there was the true fulfilment of the words of the Master of the Rolls. He quoted (*ibid.*, 304) these words of LORD HALDANE ([1916] 1 A.C. 250) which I want to apply to the present case:

"It is often obvious from the words he has employed that the draftsman has had instructions which have been too vague and insufficient to admit of the expression of a comprehensive principle with exactness, or at all. In such a case the court can only take the particular facts in the case before it, and decide as best it can whether they come within the words, or whether they fall altogether outside them."

There are two other passages I wish to quote ([1922] 1 K.B. 304):

"There are two statements in that case [*Bradford Corpn. v. Myers* (5)] which seem to lay down a principle. LORD BUCKMASTER said ([1916] 1 A.C. 247): 'It is because the act is one which is either an act in the direct execution of a statute, or in the discharge of a public duty, or the exercise of a public authority'."

The other passage (*ibid.*) contains a point of principle from LORD HALDANE ([1916] 1 A.C. 251):

"I do not think that they'—i.e., the words of the Act—'can be properly extended so as to embrace an act which is not done in direct

pursuance of the provisions of the statute or in the direct execution of the duty or authority . . .”

SCRUTTON, L.J., went on to say (*ibid.*):

“The word ‘direct’ is not in the statute.”

A I have quoted that because I think the learned Lord Chief Justice here was concerned to see that the precise facts that he had to decide where the words of the section were so wide were clearly before him without ambiguity. My Lord has already read at length the passage in which the Lord Chief Justice dealt with the matter, but I quote these words which he said ([1952] 2 All E.R. 508):

B “The evidence showed that on the day in question the defendant was on a journey from the army garage to Waterloo station for duty in connection with the railway transport officer and that his journey had been authorised by the officer commanding the transport company. It seems to me, therefore, clear, that this was a journey which he was required by his military duty to undertake and that the duty was in connection with army service . . .”

C So the Lord Chief Justice was dealing with it as a case in which the defendant was clearly carrying out his military duty and he was careful to exclude by an ascertainment of the real facts anything which might suggest that this was a duty outside his recognised military duties. I think it is on that footing that this court has to deal with this matter. When it is argued by counsel for the plaintiff that somehow this case must be looked at, not as that of a Canadian soldier performing his military duty, but as a simple case in which he is doing a private wrong to some private person, I think that is clearly excluded by the words of the section.

D With regard to the argument based on the fact that the defendant was a Canadian soldier, I think the Visiting Forces (British Commonwealth) Act, 1933, particularly in s. 2 (3), completely covers that point:

E “Subject as hereinafter provided any enactment . . . or any other statute which . . . (b) in virtue of a connection with the home forces or any of them, confers a privilege or immunity on any person . . . shall . . . apply in relation to a visiting force as it would apply in relation to a home force of a like nature to the visiting force.”

F That, I think, must mean what the learned Lord Chief Justice said it meant. In ordinary common English it is that, if you find in any statute something which gives a privilege or an immunity to a United Kingdom soldier, that is to apply with equal force to a soldier who is a member of the Canadian army visiting the United Kingdom. I cannot think that it can mean anything else.

G I think the point taken on that matter by counsel for the plaintiff also fails. For these reasons I agree with the judgment which has just been delivered by my Lord.

H ROMER, L.J.: I also agree. It is plain that a public authority can only act through its servants or its agents, whether it be in navigating a ship or driving a lorry or challenging a right of way. Therefore, the admission of counsel for the plaintiff that certain officials of a public authority can properly be regarded as entitled to the benefit of the Public Authorities Protection Act was obviously well founded, but, as I understood him, he sought to draw a distinction between responsible or senior officials, on the one hand, and employees or representatives of a more subordinate character, on the other. I cannot see that there is any warrant for that distinction. It was not drawn in *Greenwell v. Howell* (6), nor is it to be found in the observations of the Court

of Appeal in *The Danube II* (4). In *Griffiths v. Smith* (7), to which my Lord has referred, VISCOUNT MAUGHAM said ([1941] 1 All E.R. 77):

"That persons in a somewhat similar position to that of the managers in the present case have been treated as a public authority has been decided in numerous cases. The following are examples: river commissioners and harbour boards acting without profit (*The Johannesburg* (10) and *Williams v. Mersey Docks & Harbour Board* (11)), all kinds of sanitary, water and tramway authorities, and the officers and servants of such authorities, e.g., medical officers of health, or persons in a like position . . ."

It seems to me that, as LORD MAUGHAM's language was in perfectly general terms, it may be regarded as an authoritative recognition by him of what I should have thought was clear, namely, that, provided that a representative of a public authority is told to perform an act of public duty, then, if the other elements are present which are requisite to attract the operation of the Act, it will be attracted whatever be the position of the representative in question. Indeed, if one is to draw the kind of distinction which counsel for the plaintiff invited us to draw, it seems to me it would be a task of an impossible kind to classify officials who do qualify for protection as distinct from those who do not.

I would add one word on the point whether the defendant is disqualified from having protection because he is in the Canadian, and not in the British, army. It is not necessary to decide it because I quite agree with what has been said on the interpretation of the Visiting Forces (British Commonwealth) Act, 1933, s. 2 (3). The point might give rise to questions of fact whether a member of one or other of the Dominion forces did qualify for protection or not, depending on the circumstances and the reasons why his unit was stationed in this country. Matters of that kind might have to be considered, and I agree that that question, which was not argued elaborately before us, should be left open. I agree that the appeal fails.

Appeal dismissed.

Solicitors: *Preston, Lane-Claypon & O'Kelly* (for the plaintiff); *L. Bingham & Co.* (for the defendant).

[Reported by MISS PHILIPPA PRICE, Barrister-at-Law.]

STEPHENSON BROTHERS, LTD. v. COMMISSIONERS OF
CUSTOMS AND EXCISE. KING AND JARRETT, LTD. v.
COMMISSIONERS OF CUSTOMS AND EXCISE.

[CHANCERY DIVISION (Roxburgh, J.), January 27, 28, 1953.]

*Purchase Tax—Chargeable goods—"Pictures"—Pictorial coupons—Use in
trader's gift book advertisement scheme—Finance Act, 1948 (c. 49), s. 20 (1),
sched. VIII, Part I, Group 25.*

By an agreement, dated Oct. 27, 1950, the manufacturers of household
polishes and furniture creams were granted a licence to use and reproduce
on stamps certain characters from a motion picture, entitled "Cinderella",
for distribution to persons purchasing their goods, and they undertook
to supply a book containing scenes from the film to purchasers in exchange
for sets of the stamps. In 1951 some ten million stamps, each depicting one
or other of the "Cinderella" characters, were printed for the manufacturers
by K. and J., Ltd., and another five million were printed by the manu-
facturers themselves. The stamps were numbered in series from one to
twelve on the side on which the character was depicted, and on the reverse
side of each stamp were printed instructions concerning the exchange of
the stamps for the book containing scenes of the film which would be
supplied by the manufacturers to the holders of sets of stamps numbered
one to twelve. The stamps were then inserted in descriptive folders and
attached to goods which the manufacturers sold to retailers for re-sale to
the public. No additional charge was made for the stamps. On the
question whether the stamps were chargeable goods for the purposes of
purchase tax, within the meaning of the Finance Act, 1948, s. 20 (1),

HELD: as purchase tax became exigible at the time when an article
was delivered to the retailer, the nature of the article and its liability to
tax fell to be determined at that time; applying that test, the stamps were
pictorial coupons, but in the circumstances the pictorial element was so
important that, notwithstanding that they were coupons, they were
pictures within Group 25 of sched. VIII, Part I, to the Act of 1948; and,
therefore, they were chargeable goods for the purposes of purchase tax,
within s. 20 (1) of the Act.

FOR THE FINANCE ACT, 1948, s. 20, and sched. VIII, Part I, Group 25, see
HALSBURY'S STATUTES, Second Edn., Vol. 21, pp. 1372, 1390.

ACTIONS for, inter alia, declarations that stamps printed by or for Stephenson
Brothers, Ltd., the plaintiffs in the first action, were not chargeable goods for
the purposes of purchase tax, within the meaning of the Finance Act, 1948,
s. 20 (1).

The stamps, which were affixed to goods manufactured by Stephenson
Brothers, Ltd. (referred to hereinafter as Stephensons) and sold by them
wholesale, depicted characters from the film "Cinderella". On the face of
each stamp was a number, in the series one to twelve, and on the reverse side
were instructions for exchanging a set of twelve stamps for a book to be
supplied by Stephensons. The first action was brought by Stephensons in
respect of (a) five million stamps printed by themselves and (b) a hundred
thousand stamps purchased by them from King and Jarrett, Ltd., printers.
The second action was brought by King and Jarrett, Ltd., in respect of ten
million stamps printed by them for Stephensons on the instructions of another
company.

J. W. P. Clements for the plaintiffs.

J. P. Ashworth for the Commissioners of Customs and Excise.

ROXBURGH, J.: Stephenson Brothers, Ltd. (referred to hereinafter
as Stephensons), are manufacturers of furniture cream and floor polish. Walt

Disney Mickey Mouse, Ltd., deal with the copyright, among other things, of cartoons by Walt Disney, whether they be of Mickey Mouse or of other similar characters. By a licence, dated Oct. 27, 1950, made between Walt Disney Mickey Mouse, Ltd., as licensor, and Stephensons, as licensee, it is recited:

"Whereas (1) The licensor by virtue of certain agreements between it and Walt Disney Productions an American corporation claims authority to license within the territory hereinafter defined the use and exploitation of the fanciful character or characters specified in cl. 1 of the schedule hereto as personified and represented by Walt Disney for motion picture purposes (which character or characters are hereinafter for convenience referred to as 'the fanciful character' and this collective description shall where the context requires and admits be deemed to relate severally to each fanciful character to which this licence relates) in connection with the manufacture and marketing of certain classes of commodities and merchandise. (2) The licensee realising the great value of the publicity and goodwill connected with the fanciful character and the name 'Walt Disney' and that it has established an identity for itself and for the products bearing its name and/or design in the mind of the purchasing public is desirous of obtaining authority within the territory hereinafter defined to reproduce and/or associate the name of the fanciful character together with the name 'Walt Disney' and/or the name of the licensor in connection with certain merchandise of the licensee as hereinafter defined and the licensor has agreed to permit such use upon the terms hereinafter contained."

By cl. 1 of the licence it is agreed that

"For the term specified in cl. 2 of the schedule hereto [from Oct. 1, 1950, to Sept. 30, 1952] the licensor authorises the licensee to use and reproduce the fanciful character and the name 'Walt Disney' and/or the name of the licensor on upon and/or in connection with the sale of certain articles of merchandise as defined in cl. 3 of the schedule hereto (which merchandise is hereinafter for the purpose of this licence referred to as 'licensed articles') and the licensor has or will supply to the licensee all necessary typical representations of the fanciful character."

By cl. 1 of the schedule, "the fanciful character" includes various fanciful characters from the Walt Disney full-length motion picture production "Cinderella", the names of which are "Cinderella", "The Prince", "The King", "The Duke", "Fairy Godmother", "Stepmother", "Drizella", "Anastasia", "Bruno", "Lucifer", "Gus", "Jaq" and "Lackey". By cl. 3 of the schedule, the licensed articles are:

"Furniture cream and floor polish manufactured by the licensee affixed to which in a manner to be approved by the licensor are printed representations of the fanciful characters in four colour half tones in the form of poster stamps of a size one and five-eighths inches deep by one and three-sixteenths inches wide."

The consideration for the licence was a substantial lump sum payment.

Clause 28 of the licence is relevant:

"The licensee further undertakes that premium material shall be supplied by the licensee to purchasers of licensed articles in exchange for licensed stamps in a manner to be approved by the licensor and that such premium material shall consist exclusively of a stereoscopic eye-piece and a 'Magic Mirror Picture Book' containing six scenes from the Disney film 'Cinderella' which book shall be published and printed (by one of the licensees of the licensor to be selected in agreement with the licensee in a form and upon terms to be approved by the licensor) in such manner

that when viewed through a stereoscopic eye-piece such scenes will appear in stereoscopic relief."

A That licence contains the genesis of the scheme which Stephensons put into operation. There are two actions before me. One is by Stephensons and the other is by King and Jarrett, Ltd., but the point in both is precisely the same, though an argument is available in one of the cases which is not available in the other. The point is whether or not the poster stamps envisaged by the licence, and, in fact, produced, are liable to purchase tax. It is common ground that, if they are liable, it is because they fall into Group 25 of the Finance Act, 1948, sched. VIII, Part I (as amended). Group 25 now stands as follows:

B " Pictures, prints, engravings, photographs, figures, busts, reliefs, vases, and similar articles, of a kind produced in quantity for general sale other than articles comprised in para. (d) or (i) of Group 11 or in para. (c) or (d) of Group 34."

C It has not so stood at all material times, but I have carefully considered, with the assistance of counsel and those instructing them, the various changes which have been made in that group and the various dates at which those changes have been made, and I have come to the conclusion that the changes do not and should not influence my decision, and it is, therefore, quite sufficient to take the group as it now stands.

D The point is a short one, but this is a case which is very near the line, and I do not regret the considerable time which it has taken to hear, because to the very end I have thought it difficult. What happened was this. Having got the licence, Stephensons proceeded to get poster stamps printed. They did not always adopt the same method, and, as there is a point of distinction, I must describe the three methods which they adopted. As regards an order for ten million such stamps, in or about January, 1951, King and Jarrett, Ltd. (referred to hereinafter as Kings), the plaintiffs in the second action, received an order from Barney, Ltd. to print ten million stamps and deliver them to Stephensons. The blocks were supplied by Barneys to Kings. After some discussion which took place at the first hearing, the statement of claim has been amended, and there is no dispute now that, as regards those ten million stamps, there was a sale of the stamps by Kings to Barneys, and at that time, as between Kings and Barneys, they were nothing but pieces of paper containing pictorial representations of the fanciful character. It is true that they had on them certain other material, to which I shall shortly refer, but, as between Kings and Barneys, that other material was of no consequence whatever. In October, 1951, Stephensons ordered a hundred thousand stamps direct from Kings. In that case Barneys dropped out, but it is conceded that that transaction stands on the same footing as the transaction between Kings and Barneys. Then there was a third method which raises an additional point.

G In September, 1951, five million of these stamps were printed by Stephensons.

The stamps, apart from bearing printed cartoons of the nature described in the licence, bear prominently on the face a number. The numbers run from one to twelve. On the back of each stamp is written:

H " Wonderful book for you. Collect a set of these stamps numbered 1 to 12. Send to Stephenson Brothers, Ltd., Bradford, with 1s. P.O. to cover post and packing, any time before Dec. 31, 1952, for wonderful ' Magic Wand ' Book, value 7s. 6d."

That is the book referred to in cl. 28 of the licence agreement. It was, undoubtedly, an integral part of the whole scheme from its inception that these cartoons should be used in connection with a coupon scheme which, in the result, redounded to the benefit both of the licensor and the licensee, because

the book is connected with copyright characters. The printed matter at the back of each stamp then goes on to say:

"Stamps come with Stephenson's Non-Smear Polish, Stephenson's Perfumed Wax Polish and Stephenson's Furniture Cream. Use all three products and get your set quicker."

One of these stamps was put inside a small folder, which was attached to each licensed article by a piece of transparent tape. On the folder were the words: "Your Cinderella stamps are here". The licensed articles were supplied by Stephenson's to retailers who sold them to the public generally. A

I shall deal first with a question which concerns only the transaction in which Stephenson's printed their own poster stamps. This question is whether these stamps are "goods" within the meaning of the Sale of Goods Act, 1893, s. 62 (1). By s. 41 (1) of the Finance (No. 2) Act, 1940, the definition of "goods" in s. 62 (1) of the Act of 1893 is incorporated into the Act of 1940, which imposed the purchase tax. By s. 62 (1) of the Act of 1893, "'Goods' include all chattels personal other than things in action . . ." B

Seeing that one became entitled to a book, valued at 7s. 6d., if one produced a set of twelve stamps in the manner directed on them, I had at one time thought that they might be choses in action, but, on further consideration, I think that that is not really a possible view for the following reasons. First, I think it cannot be put higher than that each stamp contains an offer of a contract and no more. The stamp cannot, I think, constitute a contract, i.e., a contract in writing or a memorandum of a contract in writing, and, therefore, in my judgment, it cannot be regarded as a chose in action. Secondly, each stamp is sold separately. (It is conceded that they are sold—I do not have to determine that point.) One of them per se is nothing at all except an offer of a contract. Even if one accepts the offer, one does not reach a further stage until one has got twelve in a set. It is not an easy thing to achieve. Mathematicians in court have calculated the chances, in other words, how many boxes on the average one would have to buy to get a set. I am quite unable to embark on such abstruse calculations, but I am satisfied that one would have to get a good many, certainly more than twelve—I think it would be a very remarkable coincidence if one got twelve straight off. Therefore, I do not think that they are choses in action. C

I now come to the main point, which is the more difficult point. Are these poster stamps "Pictures . . . of a kind produced in quantity for general sale", within the meaning of the words in which Group 25 is described in sched. VIII, Part I, to the Finance Act, 1948. It is quite clear that they are not exclusively pictures. They operate as something more. But I do not think that that is in any way fatal to the Crown's case. If there is a dual purpose article, it would not cease to be a picture, within the definition of Group 25, because it was sold for some other purpose. On the other hand, I am satisfied that not every pictorial representation on a document or other article is necessarily a picture within this definition. Therefore, the question is a very nice and narrow one. It seems to me, first, that the nature of the article has to be tested at the moment when it is delivered to the retailer. That is the moment at which the purchase tax becomes exigible, and, obviously, it must be then that liability to tax falls to be determined, and, therefore, it is then that it has to be decided whether the article falls into some, and, if so, which, group. But it is also, I think, true to say that one has to look forward and consider the article, not in relation to the middleman, as counsel for the taxpayers suggested, but in the hands of the ultimate consumer. That, I think, is indicated by the words "for general sale", which I construe as meaning "for sale to the public generally". Looking at the language of sched. VIII, Part I, to the Act of 1948, in which Group 25 is described, I think that what one has to do is, first, to consider, at the time when the goods are being delivered to the retailer, what D
E
F
G
H

A the article is, and, having made up one's mind what it is, one then has to consider whether it is of a kind produced in quantity for sale to the public generally. I do not think in this case that any difficulty arises on those latter words, because this kind of thing is very common and has been so for many years. It is not seriously contested before me that these articles, whatever they are (that is the real difficulty), are not "of a kind produced in quantity for general sale". In fact, Stephensons alone produced or caused to be produced several million.

B The real question is: What is the article at the time when it is delivered to the retailer? It is always dangerous to try to put glosses on the words of an Act of Parliament, and I am not going to try to do that. It is enough to say that I think one has to look at the substance of the question. Here is an article. It has various features. Taking it as a whole, what is it? As I have said, the fact that it contains a pictorial representation is not, in my judgment, decisive. There still is the question: Is it properly to be described as a picture? Counsel for the taxpayers contended that, though there was a pictorial representation, the number on the article, which lacked artistic attraction, clearly showed that the article was not a picture. He further contended that the words at the back of the article made it plain that it was a coupon. In my judgment, however, it is a pictorial coupon, and a pictorial coupon may, or may not, be a picture. It must, I think, depend on the facts of each particular case. Imagine a coupon which contained all the information printed on these and, in addition, had some very inferior pictorial representation of, say, a lion or a cat stamped or printed on it. It would be a pictorial coupon. D I am by no means sure that it would be a picture. But this case is quite different. Walt Disney cartoons are universally known, and beloved by many, and Stephensons themselves have told me what importance they attach to these cartoons as cartoons. That is also clear from para. 2 of the recital to the licence. That is not evidence against them, because evidence is not admissible on this matter, but I rely on it merely to confirm the view which I take, namely, that these are quite definitely dual purpose stamps, and that one of their purposes is to entertain by these cartoons. That, of course, is the normal purpose of a cartoon, and, normally, a cartoon is a picture within Group 25 of sched. VIII, Part I, to the Act of 1948. To that extent the articles are for the normal purpose for which cartoons are reproduced, and are, in my judgment, pictures. On the other hand, they are plainly coupons. Therefore, in my judgment, they are pictorial coupons, but the pictorial element is so important in the particular circumstances of this case that they are, in my judgment, pictures, and none the less so because, at the same time, they are coupons. F Therefore, in my judgment, both these actions must fail.

Judgment for Crown.

G Solicitors: *Ward, Bowie & Co.*, agents for *A. V. Hammond & Co.*, Bradford (for the plaintiffs); *M. G. Whittome*, Solicitor of Customs and Excise (for the commissioners).

[Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.]

BROWN v. ALLWEATHER MECHANICAL GROUTING CO., LTD.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Lynskey and Pearson, JJ.), February 5, 1953.]

Street Traffic—Licence—Unlicensed vehicle—User attracting higher rate of duty—Not a summary offence—Liability to excise penalty—Vehicles (Excise) Act, 1949 (c. 89), s. 13 (2).

Where a person uses on a road a vehicle licensed as a goods vehicle for a purpose in respect of which a higher rate of duty should have been paid, contrary to the Vehicles (Excise) Act, 1949; s. 13 (2), he does not commit an offence punishable on summary conviction, but merely renders himself liable to an excise penalty recoverable on complaint laid before justices, and, therefore, no person can be convicted under the Summary Jurisdiction Act, 1848, s. 5, of aiding and abetting the commission by him of a summary offence.

AS TO RECOVERY OF PENALTIES, see HALSBURY, Hailsham Edn., Vol. 9, p. 666, para. 1125; and FOR CASES, see DIGEST, Vol. 14, pp. 30, 31, Nos. 11-28.

FOR THE VEHICLES (EXCISE) ACT, 1949, s. 13 (2), see HALSBURY'S STATUTES, Second Edn., Vol. 21, p. 1444.

Case referred to:

(1) *A.-G. v. Bradlaugh*, (1885), 14 Q.B.D. 667; 54 L.J.Q.B. 205; 52 L.T. 589; 49 J.P. 500; 14 Digest 30, 14.

CASE STATED by Oxfordshire justices.

At a court of summary jurisdiction sitting at Woodstock, the appellant, Norman George Brown, an inspector of the Oxfordshire Constabulary, preferred an information against the respondents, Allweather Mechanical Grouting Co., Ltd., charging that they on June 18, 1952, did unlawfully aid, abet, counsel and procure one Joseph Cassidy in the commission of a summary offence, that is to say, in contravention of the Vehicles (Excise) Act, 1949, s. 13 (2), while there was then in force a certain licence taken out for a mechanically propelled goods vehicle at a certain rate, he did unlawfully use such vehicle on a road for a purpose which brought it within a class or description of vehicle to which a higher rate of duty was chargeable, such higher rate not having been paid before the vehicle was so used, contrary to the Summary Jurisdiction Act, 1848, s. 5.

It was contended on behalf of the respondents as an objection preliminary to the hearing that the Vehicles (Excise) Act, 1949, did not create an offence which was punishable on summary conviction; that the respondents could not, therefore, be convicted of aiding and abetting such offence, contrary to the Summary Jurisdiction Act, 1848, s. 5; and that, if there had been a breach of the regulations whereby the local licensing authority had been deprived of a certain amount of revenue, the appropriate remedy was by way of an excise penalty against the party liable.

The justices dismissed the information and the appellant appealed.

J. P. Ashworth for the appellant.

Roland Brown for the respondents.

LORD GODDARD, C.J.: This is a Case stated by justices for the county of Oxford, before whom the respondents were charged that they

"did unlawfully aid, abet, counsel and procure one Cassidy in the commission of a summary offence, that is to say, in contravention of s. 13 (2) of the Vehicles (Excise) Act, 1949, while there was then in force a certain licence taken out for a mechanically propelled vehicle, namely, a goods vehicle, at a certain rate he did unlawfully use such vehicle on a certain public road called the Woodstock to Chipping Norton road for a

purpose which brought it within a class or description of vehicle to which a higher rate of duty was chargeable, such higher rate not having been paid before the vehicle was so used, contrary to s. 5 of the Summary Jurisdiction Act, 1848."

A Counsel for the respondents has taken a point of great importance, and the court is indebted to him for doing so as this point appears not to have occurred to anybody before because there have been plenty of proceedings under the section in question in circumstances I will mention in a moment. His point was that the Vehicles (Excise) Act, 1949, s. 13 (2), did not create an offence punishable on summary conviction, and it follows that, if that is so, s. 5 of the Summary Jurisdiction Act, 1848, which provides for the punishment of aiders and abettors of summary offences, has no application. Concisely stated, B the argument of counsel for the respondents was that the sanction provided by the Act for using a vehicle which has one class of licence attached to it for a purpose which would require a different class of licence is a monetary penalty which can be recovered in various forms of proceedings, but the Act does not create an offence in the sense that it is punishable as a criminal offence, although a penalty may be recovered in what would generally be called penal proceedings. C It is true that, if the word "penalty", as distinct from the word "fine", is used in a section, the general rule is that the penalty must be sought and recovered as a debt in a civil court, whereas a fine is a penalty imposed by a criminal court, and a fine always goes to the Crown.

D In the present case there was alleged to have been an offence against s. 13 (2) of the Vehicles (Excise) Act, 1949. It is observable that this is an excise Act, and, therefore, the Excise Management Act, 1827, applies to proceedings under it. Under the Act of 1949 a person using a motor vehicle for a purpose for which it is not licensed and which would attract a higher rate of licence, is made liable to an excise penalty of £20 or an excise penalty of an amount equal to three times the difference between the duty actually paid on the licence and the amount of duty at the higher rate. There are no words in s. 13 (2) which E refer to summary conviction or summary trial, or to fines, or anything to indicate that a criminal offence is created. In s. 15 of the Act, which refers to using vehicles without a licence at all, a similar penalty is imposed, that is, an excise penalty of £20 or an excise penalty "equal to three times the amount of the duty chargeable". Section 15 (2) provides:

F "Proceedings for a penalty under the last foregoing sub-section may be brought at any time within a period of twelve months from the date on which the offence was committed."

There, the word "offence" is used. A further provision in sub-s. (3) (a) obliges the owner of the vehicle to give such information as he may be required

G "... by or on behalf of a chief officer of police or a county council ... as to the identity of the driver and of any person using the vehicle and, if he fails to do so, shall be guilty of an offence under this sub-section, unless he shows to the satisfaction of the court that he did not know and could not with reasonable diligence have ascertained who was driving or using the vehicle; and (b) any other person shall, if required as aforesaid, give any information which it is in his power to give . . ."

H In sub-s. (4) it is provided:

"A person guilty of an offence under the last foregoing sub-section shall be liable on summary conviction to a fine not exceeding £20."

Therefore, if a person fails to give the information when he is asked for it, that is made by the statute an offence and the word "fine" is used, not "penalty". We are not considering s. 15 in the present case, but counsel for the appellant rightly drew our attention to s. 15 (1) because the subject-matter is very much

the same as that of s. 13 (2). The penalty, also, is similar. It is true that it is provided in s. 15 (2) that "proceedings . . . may be brought at any time within a period of twelve months from the date on which the offence was committed". In other words, the Act is imposing an express term of limitation of twelve months. Years ago, under the old statutes, a debt created by a statute was regarded as a specialty debt, and for the present purpose a special period of limitation is provided. I do not think the mere fact that the word "offence" is used there shows that it is to be regarded as a criminal offence. A failure to do something prescribed by a statute may be described as an offence although Parliament imposes in respect of it, not a criminal sanction, but a mere pecuniary sanction which is recoverable as a civil debt. Justices, as is well known, have in many cases power to order the recovery of sums of money. If one turns to s. 65 of the Excise Management Act, 1827, one finds that excise penalties may be recovered before justices of the peace, but there is no indication in the section that the justices are able to imprison or to impose a fine. It simply gives them power to inquire into the matter and give judgment for penalties. Of course, if the penalties are not paid, there may be proceedings under the Debtors Act or other Acts—possibly, under the Summary Jurisdiction Acts—and there may be a committal to prison, but that is not a punishment for the offence itself. It is a punishment for not paying the penalty, or a means of endeavouring to compel a defendant to pay a penalty, which is a different matter.

Passages in the judgment of the Master of the Rolls in *A.-G. v. Bradlaugh* (1), to which counsel for the respondents has directed our attention, support his argument. SIR WILLIAM BRETT, M.R., pointed out (14 Q.B.D. 687) that where a penalty is imposed for doing a particular act, the penalty is the only sanction, and the imposition of the penalty, if it is the only consequence, does not make the prohibited act a crime. It was far more common in earlier days than it is nowadays to prohibit certain acts and to impose as the sanction a penalty which often could be recovered by a common informer. There were many Acts on the statute book till the Common Informers Act, 1951, was passed to abolish that particular form of public nuisance, which provided for the recovery of penalties. A well known class of case was created by the Sunday Observance Act, 1780, under which, if a person promoted a public entertainment or amusement on a Sunday, in certain circumstances he was liable to a penalty for which he could be sued, but no one ever said that that was a criminal act. Whether it would be desirable to make these penalties criminal acts, or not, I do not know, nor need I discuss the matter, but, in my opinion, an excise penalty is something quite different from a fine. It is recoverable before justices, and it ought to be recovered by way of complaint. I would add this. Many people who see this case may think that they have been wrongly ordered to pay, but this is not a case in which this court will encourage anybody to apply for a free pardon on the ground that he was convicted of something of which he was not guilty. It may be he has been ordered to pay in a proceeding begun by information when it ought to have been begun by complaint. That is the only objection, and, if he has done the prohibited act, he has incurred the penalty which has been imposed. In my opinion, the justices came to a right decision in point of law, and, therefore, this appeal fails.

LYNSKEY, J.: I agree.

PEARSON, J.: I agree.

Appeal dismissed.

Solicitors: *Treasury Solicitor* (for the appellant); *Cripps, Harries, Hall & Co.* (for the respondents).

[*Reported by* MICHAEL MALONEY, Esq., *Barrister-at-Law.*]

COOPER v. RAILWAY EXECUTIVE (SOUTHERN REGION).

[HAMPSHIRE AUTUMN ASSIZES (Devlin, J.), December 12, 1952.]

Railway—Fence—Quality of fence required—Railways Clauses Consolidation Act, 1845 (c. 20), s. 68.

On Oct. 10, 1950, the plaintiff, a farmer whose land was divided by a railway line owned and operated by the defendants, rounded up his herd of cattle and divided it, keeping the calves in the farm buildings on the north side of the railway line, and putting the remainder of the herd in a field on the south side of and adjoining the line where the bellowing of the calves could be heard by the dams. This division excited the herd, and in the early morning of Oct. 11, twelve of the herd in the field broke through the defendants' fence and got on the railway line with the result that a passing train killed three beasts, being itself derailed by the collision. On a claim by the plaintiff for damages for breach by the defendants of their duty under s. 68 of the Railways Clauses Consolidation Act, 1845,

HELD: the quality of the fence which the defendants were required to maintain under the section was such as to prevent cattle from straying in normal circumstances and not such as to prevent cattle from breaking through by the use of exceptional force or under unusual conditions; in the circumstances, the fence maintained by the defendants was strong enough for all normal purposes; and, therefore, they were not in breach of their statutory duty.

Dictum of BRAMWELL, B., in *Child v. Hearn* (1874) (L.R. 9 Exch. 181), applied.

Dictum of MARTIN, B., in *Bessant v. Great Western Ry. Co.* (1860) (8 C.B.N.S. 370), considered.

AS TO THE DUTY OF RAILWAYS TO MAKE AND MAINTAIN FENCES, see HALSBURY, Hailsham Edn., Vol. 27, p. 61, para. 117; and FOR CASES, see DIGEST, Vol. 38, pp. 286-292, Nos. 215-237.

FOR THE RAILWAYS CLAUSES CONSOLIDATION ACT, 1845, s. 68, see HALSBURY'S STATUTES, Second Edn., Vol. 19, p. 628.

Cases referred to:

(1) *Child v. Hearn*, (1874), L.R. 9 Exch. 176; 43 L.J.Ex. 100; 38 Digest 288, 220.

(2) *Bessant v. Great Western Ry. Co.*, (1860), 8 C.B.N.S. 368; 141 E.R. 1208; 38 Digest 286, 216.

ACTION by the plaintiff for damages for breach of statutory duty by the defendants in that they failed to erect and maintain a proper fence under s. 68 of the Railways Clauses Consolidation Act, 1845. The defendants counter-claimed for damages for trespass.

The plaintiff was a farmer whose land was divided by a railway line owned and operated by the defendants. Communication between the two parts of the plaintiff's land was obtained by an occupation crossing and a cattle creep, which was a tunnel underneath the railway, and on the south side of the line there was a fence which ran from the gate leading to the occupation crossing to the gate leading to the cattle creep. This fence was the ordinary railway fence consisting of concrete posts let into the ground several feet apart, with chain link fencing on three runner wires and three or four straining wires. The plaintiff owned a herd of Aberdeen Angus cattle, one hundred and eighty in number, which normally remained in a field on the south side of the railway line and beyond the field actually adjoining the line, the beasts being brought into the farm buildings on the north side only occasionally for grading, selecting suitable animals for market, or castrating bull calves. On Oct. 10, 1951, the herd was rounded up and brought in for grading and the castrating of the bull calves, an operation

which was normally completed in one day. On this occasion the cattle were graded first, and then the bull calves needing castration were separated and kept in the buildings overnight while the rest of the herd was put in the field on the south side of, and adjoining, the railway line. This division of the herd caused a considerable amount of excitement and agitation among the beasts, and the bellowing of the calves in the farm buildings could be heard by the dams on the other side of the railway line. During the early hours of Oct. 11 some beasts had been able to lift the chain link fencing between the two gates and get underneath it, and twelve of them found their way on to the railway line with the result that at 4.45 a.m. three of them were killed by a train which was derailed by the collision.

A. Lyell for the plaintiff.

Fay for the defendants.

DEVLIN, J.: Under the Railways Clauses Consolidation Act, 1845, s. 68, a railway company—whose duties and obligations are now, of course, taken over by the defendants—is under an obligation to

“ . . . make and . . . maintain . . . sufficient posts, rails . . . or other fences, for separating the land taken for the use of the railway from the adjoining lands not taken, and protecting such lands from trespass, or the cattle of the owners or occupiers thereof from straying thereout . . . ”

The defendants, therefore, are under a duty to fence so as to keep cattle off the railway. The plaintiff contends that the defendants failed to erect and maintain a proper fence, and, accordingly, he sues for breach of this statutory duty. If the fence was defective, there can be no doubt that the claim succeeds and the counterclaim fails. If, on the other hand, the fence was not defective, it is agreed that the plaintiff has no answer to an action for trespass. His beasts got on somebody else's land, and under the law of cattle trespass there is a strict liability on the owner of beasts not to let them go on somebody else's land. It is only if he can show that there was a duty on the owner of the land—that is, the defendants—to keep a proper fence and that they failed to do so that he can resist the counterclaim in trespass. It is conceded, if he has no answer to a claim for cattle trespass, that the damages which flow from it and are recoverable by the defendants are in respect of the damage they have sustained as a direct consequence of the derailment. Thus, the only question I have to determine is whether or not the fence which was erected at this place was a proper fence within the meaning of the statute. *Prima facie*, of course, if cattle get on a railway line, the presumption, in the absence of some satisfactory explanation, is that the fence which was supposed to have kept them off could not have been doing its duty. It is, therefore, necessary before I consider the condition of the fence itself to go a little into the history of the matter so as to see how it came about that cattle were on the railway line in the early morning of Oct. 11, 1951.

[His LORDSHIP stated the facts and continued:] The chain link fencing—and this is a point on which the plaintiff relies—was secured to the runner wires, and the runner wires in turn were secured to the posts, on the north, or railway, side of those posts. Had they been secured on the south side—that is to say, the field side—the beasts pushing against the chain link would have pushed it into the posts. As it was, they pushed it away from the posts. The runner wires which held the chain link in position were secured by “U” pins, that is, a pin with a little circle through which the wire runs and two long tails which go into a hole in the post and are bent to keep the pin in position. Some of those pins had been pulled out of the centre post by the cattle pushing against it, and in that way they had been able to lift the chain link.

I have to consider whether the fence as so constructed fulfilled all the obligations of the defendants under the statute. I am satisfied that it was as strong as any ordinary farm fence could be to offer protection against the ordinary behaviour of cattle. Indeed, it was a great deal stronger, being made of concrete posts and strong chain link fencing. The two criticisms that have been made about it are these. There is, first, that, on the assumption that the fence was well enough constructed, nevertheless it was improperly designed because the chain link was attached to the wrong side of the middle posts, though not to that of the corner post. Had it been on the right side, it was said, this would not have happened. I am satisfied from the evidence I have heard that, secured as it was by these "U" pins, the chain link fencing was secured quite strongly enough to resist all what I may call the ordinary activities of cattle—any sort of pushing and rubbing against it, which, undoubtedly, occurs when sheep or cattle are brought up against a fence. It is, no doubt, true that, if the chain link fencing had been on the other side of the posts, it might have prevented the extraordinary—one might also say violent; at any rate forcible—behaviour of the cattle on this occasion which resulted in their getting through. But I am satisfied that, if the right test is that the fence must be strong enough to prevail against the ordinary forcible behaviour of cattle in ordinary circumstances, this fence was good enough for the purpose. The fact that it might have been better is not proper ground of complaint against the defendants. They are, in my judgment, obliged, not to provide the strongest possible fence, but only to provide a fence which is proper in normal circumstances. The other criticism is as to the condition of the fence. According to the evidence of the defendants' employees, who saw it shortly before Oct. 10, the fence was in good condition, and I accept that evidence. Accordingly, I find that the fence was as strong as any ordinary farm fence—not merely a fence dividing fields, but a fence dividing fields from a place on which it is highly undesirable that cattle should go—could reasonably be expected to be, and I am satisfied that cattle behaving in a normal way would not have got through it, but only cattle using exceptional force or under unusual conditions.

It is contended for the plaintiff that that finding is not enough to absolve the defendants from blame. It is said that the operation which had taken place that day was not in any way an improper operation or contrary to the rules of good husbandry, that a proper agricultural use was, therefore, being made of the field, and that there is a duty on the defendants to make a fence strong enough to resist the consequences of any proper agricultural operation that may be conducted on the land which adjoins the railway. That involves a consideration of the true construction of the Act. The section creates, of course, an absolute obligation in the sense that the defendants are absolutely bound to maintain a fence, and it is no answer to say that some accident or act of a trespasser has made the fence defective. But the question is: What is the quality of the fence which the defendants are absolutely bound to maintain? One finds in s 68 of the Act that it is to be such a fence as will protect "... the cattle of the owners or occupiers thereof from straying thereout . . ." It is important not to ignore those words "from straying thereout", because those are the words which give a clue to the sort of fence which the defendants shall be obliged to maintain. It is protection against straying, and all the cases which have been cited to me have been cases in which the cattle have, in the ordinary sense of the word, strayed through a gap in the fence or something of that sort. It is not necessary for me to define exactly what is meant by "straying", but I do not think it could be taken to include cattle breaking through the fence by the use of exceptional force because they are subjected to some peculiar inducement or temptation to try to get through it. It may well be, of course,

that constant rubbing will so weaken a fence that a cow or beast acting quite normally will ultimately break it down and stray across, but here was a fence which was in good and proper condition, but was broken through in the way which has been related. I do not think in those circumstances that cattle can be said to be breaking through a protection against straying.

I do not propose to cite more than two of the cases to which I have been referred. For this purpose the matter seems to be summed up in *Child v. Hearn* (1). I need not do more than read a short passage from the judgment of BRAMWELL, B. He says (L.R. 9 Exch. 181):

"Now the fence was not sufficient to prevent the defendant's pigs from trespassing, and it would seem to follow that the railway company must be liable for the consequence of the pigs escaping through it. But it does not follow as a consequence that they would be liable for any mischief done by any pig escaping on to the land through a defective fence. Nor do we lay down that there must be a fence so close and strong that no pig could push through it, or so high that no horse or bullock could leap it. One could scarcely tell the limits of such a requirement, for the strength of swine is such that they would break through almost any fence, if there were a sufficient inducement on the other side. But the company are bound to put up such a fence that a pig not of a peculiarly wandering disposition, nor under any excessive temptation, will not get through it."

That I respectfully follow as laying down the right test of the construction of the Act, and it is the test I seek to apply.

The plaintiff relied on *Bessant v. Great Western Ry. Co.* (2). In that case a farmer folded sheep and lambs adjoining the railway. He made three of the sides of the fold with hurdles in the ordinary way and used the railway "fence", which in fact consisted only of a quickset hedge, as the fourth side. The defendants, according to the evidence stated in the report, called several competent persons who had inspected the hedge, and they stated that it was amply sufficient for all ordinary purposes, but they all said it was not a proper fence to rely on for the folding of sheep. The sheep got through a gap in the quickset hedge, and it was held that the matter was properly left to the jury at large and they were entitled to take the view that the operation of folding was a normal farming operation and a normal use of the land which the railway company must foresee, and that they must provide a fence that was strong enough to prevent sheep or cattle from straying out of the land adjoining the railway. I do not think that the case itself decides any more than that it was proper to direct the jury that the railway company were bound by the Act to provide a fence of that quality. That direction could not reasonably be disputed though it may not be one which would be very illuminating for a jury. The case came on a rule to the full court and SIR WILLIAM EBLE, C.J., said the general direction in those terms was a proper one. There are some dicta in the case which may go a little further. In the present case the plaintiff relies, in particular, on the direction of MARTIN, B., in the court below, which was approved in the full court. He said (8 C.B.N.S. 370):

"... the broad question is, whether or not the fence was a sufficient fence,—was it such a fence as the company were bound by the Act to make?"

He went on (*ibid.*):

"It strikes me, that, if the use to which the adjoining land is put is such (being an ordinary use) as to render a stronger fence necessary, it would be the duty of the company to provide it; and to place hurdles along it if necessary."

I think those words are merely used by the learned baron by way of illustration and they must be read in relation to the facts of the case—in particular, to the

A fact that they were dealing with sheep folding rather than the ordinary use of the land and with a fence which was no more than an ordinary quickset hedge with a gap in it. I do not think that they meant that, whenever it is shown that the land is being used for a purpose for which a farmer may properly use it, the railway company is bound to guard against anything arising therefrom. Were it so, the burden on the railway company would be intolerable because they cannot be expected to find out exactly to what use the farmer is going to put his land on any particular day and then to strengthen a fence, which is strong enough for all normal purposes, to meet that particular use. Counsel for the plaintiff, feeling the difficulty of forcing the argument as far as that, said that the obligation would exist, at any rate, if the defendants knew of the particular use, and he says that they were told of the "round-up" of the cattle on this day. But the Act does not say anything about knowledge; it does not impose any duty on the farmer to tell the defendants of the use he is going to make of the land or for the defendants to find out. It imposes a duty to provide and maintain a fence, and the only question is: What is the quality of the fence which has to be maintained? That does not depend, I think, on the particular use which is going to be made of a particular field on a particular day. I shall on that ground, therefore, reject that argument.

C I do not strictly find it necessary for my purposes to inquire whether the use which was being made of the land on this occasion was in conformity with good husbandry—a matter which has been debated in the course of the case. I do not find that it was an improper thing to do, in the sense that it was necessarily a wrong and careless way of carrying on a farming operation, but I think I ought to express my view on the facts on this point in case it might be material hereafter. I think a prudent farmer who did not want to run the risk of his cattle escaping would not have conducted the operation in the way in which it was conducted on this day. To that extent it was carelessly done—if that is the right word to use. That is to say, if he had owed a duty to anybody else in the matter to conduct the operation in a prudent way, I do not think he would have fulfilled it by the way in which he conducted this operation. The view of Professor McCunn, called on behalf of the defendants, is that an ordinary farm fence is not sufficient for confining cattle under the conditions in which this herd was. That, I think, was really accepted by the expert who was called on behalf of the plaintiff, and who said:

F "An ordinary farm fence will not do the job when the herd is separated, but such a separation is comparable with penning cattle for inoculation or other purposes of that sort in a cattle crush or a cattle yard."

G Therefore, he said, if you put dams into an ordinary field the fence should be of extra strong construction such as you want for a cattle crush or a cattle yard, and, in effect, he conceded, I think, that one should not put cattle into the field unless there is an extra strong fence. I follow the argument that on a small farm there may not be such a place. In the ordinary way farms in this country do not have stockades of the sort to which Professor McCunn referred, and it may be on an ordinary farm there is not a yard large enough to hold one hundred and eighty beasts, and to confine the dams, of which there would be twenty or thirty, would mean splitting the herd into three. The answer is that, if the farmer has not those facilities, the importance of conducting the whole operation on one day is emphasised. I am satisfied that the whole operation in this case could have been easily conducted on one day, and that it was not so conducted was for no other reason than that it was not started earlier. Even then I think that the calves could have been castrated on the same day, and, possibly, that would have been done had it not been thought more convenient to do the other work of grading first. A farmer who conducts this operation in that way and who has not got any place in which he can conveniently keep the herd confined overnight is not,

in my view, a prudent farmer. I think a prudent farmer would see that the whole operation was conducted in the normal way in one day.

For these reasons I find there was no breach of the defendants' duty under the Railways Clauses Consolidation Act, 1845, and, accordingly, the consequences follow which I have already indicated. There will be judgment for the defendants on the claim and on the counterclaim.

Judgment for defendants on claim and counterclaim.

Solicitors: *H. M. Gammans*, Portsmouth (for the plaintiff); *M. H. B. Gilmour* (for the defendants).

[*Reported by* CONRAD OLDHAM, Esq., *Barrister-at-Law.*]

PHARMACEUTICAL SOCIETY OF GREAT BRITAIN v. BOOTS CASH CHEMISTS (SOUTHERN), LTD.

[COURT OF APPEAL (Somervell, Birkett and Romer, L.JJ.), February 5, 1953.]

Poison—Sale by retail—Sale by or under supervision of registered pharmacist—Chemist's "self-service" shop—Pharmacist supervising transaction at time of payment—Pharmacy and Poisons Act, 1933 (c. 25), s. 18 (1) (a) (iii).

A chemist's "self-service" shop comprised one room around whose walls were shelves on which were laid out certain drugs and medicines specified in Part I of the Poisons List compiled under s. 17 (1) of the Pharmacy and Poisons Act, 1933. These preparations were wrapped in packages and containers with the prices marked on them. A customer entering the shop took a wire basket, selected any articles he required from the shelves, placed them in the basket, and carried them to a cashier at one of the two exits. The cashier then examined the articles the customer wished to purchase, stated the total price, and accepted payment. At this stage a registered pharmacist, who was authorised by the chemist to prevent the customer from buying any article if he thought fit, supervised the transaction.

HELD: the taking of the articles from the shelves constituted an offer by the customer to buy and not the acceptance of an offer by the chemist to sell; the sale was not completed until the customer's offer to buy had been accepted by the defendants by their acceptance of the purchase price; and, therefore, the transaction took place "under the supervision of a registered pharmacist" as required by the provisions of s. 18 (1) (a) (iii) of the Pharmacy and Poisons Act, 1933.

Decision of LORD GODDARD, C.J. ([1952] 2 All E.R. 456), affirmed.

FOR THE PHARMACY AND POISONS ACT, 1933, s. 18 (1) (a) (iii), see HALSBURY'S STATUTES, Second Edn., Vol. 15, p. 276.

APPEAL by the plaintiffs from a judgment of LORD GODDARD, C.J., on a Special Case, dated July 16, 1952, and reported [1952] 2 All E.R. 456.

The defendants carried on business as retail chemists at their shop premises known as 73, Burnt Oak Broadway, Edgware, which were entered in the register of premises kept under s. 12 (1) of the Pharmacy and Poisons Act, 1933. The shop comprised one room so arranged that customers might serve themselves. The main part of the room contained shelves round the walls and on an "island fixture" in the centre, one part being described by a printed notice as "Chemist's Department". On the shelves in the chemist's department were drugs and proprietary medicines displayed in packages and other containers and marked with the retail prices. One section of the department contained exclusively drugs, including proprietary medicines, which were included in or contained substances specified in Part I of the Poisons List referred to in s. 17 (1) of the Act of 1933. No such drugs were displayed for sale in any other part of the shop. When the shop was open for the sale of goods, there was

present in the room, among other persons, a registered pharmacist in personal control of the chemist's department subject to the directions of a superintendent in accordance with s. 9 (1) (b) of the Act. A customer entering the shop premises would take an empty wire basket at a barrier, select any article he required from among those on the shelves, place them in the basket, and take them to one of the two exits. At each exit there was a cashier who would examine the articles taken and accept payment of the total price. The pharmacist superintended that part of the transaction involving the sale of a drug which took place at the cash desk, and was authorised by the defendants at that stage, if he thought fit, to prevent any customer from removing any drugs from the premises. On Apr. 13, 1951, two customers purchased articles included in Part I of the Poisons List, following the procedure outlined.

A

B

On the question whether each sale was effected by or under the supervision of a registered pharmacist in accordance with s. 18 (1) (a) (iii) of the Pharmacy and Poisons Act, 1933, LORD GODDARD, C.J., held that the sale was effected by the defendants' accepting the customer's offer to buy by accepting payment at the cash desk, and that that sale was conducted under the supervision of a pharmacist, and he gave judgment for the defendants. The plaintiffs appealed.

C

Lloyd-Jones, Q.C., and *T. Dewar* for the plaintiffs.

Baker, Q.C., and *Everington* for the defendants.

SOMERVELL, L.J., stated the facts and continued: One of the duties of the plaintiffs, the Pharmaceutical Society, who were incorporated by Royal Charter, is to take all reasonable steps to enforce the provisions of the Pharmacy and Poisons Act, 1933. The provision of that Act here in question is s. 18 (1) which provides:

D

"Subject to the provisions of this Part of this Act, it shall not be lawful—(a) for a person to sell any poison included in Part I of the Poisons List, unless . . . (iii) the sale is effected by, or under the supervision of, a registered pharmacist."

E

The point which is taken by the plaintiffs is this. It is suggested that the purchase is complete if and when a customer going round the shelves in this shop of the defendants takes an article and puts it in the receptacle which he or she is carrying, and, therefore, when the customer comes to the pay desk, the registered pharmacist, even if he is so minded, has no power to say: "This drug ought not to be sold to this customer."

F

I agree with the Lord Chief Justice in everything he said on the matter, but I will put it shortly in my own words. Whether the plaintiffs' contention is right depends on what are the legal implications of the arrangements in this shop. Is the invitation which is made to the customer to be regarded as an offer which is completed so that both sides are bound when the article is put into the receptacle, or is it to be regarded as a more organised way of doing what is already done in many types of shops—and a bookseller is, perhaps, the best example—namely, enabling customers to have free access to what is in the shop, to look at the different articles, and then, ultimately, having taken the one which they wish to buy, to come to the assistant and say: "I want this"? Generally speaking, the assistant will say: "That is all right", the money passes, and the transaction is completed. I agree entirely with what the Lord Chief Justice says and the reasons he gives for his conclusion that in the case of the ordinary shop, although goods are displayed and it is intended that customers should go and choose what they want, the contract is not completed until the customer has indicated the article which he needs and the shopkeeper or someone on his behalf accepts that offer. Not till then is the contract completed, and, that being the normal position, I can see no

G

H

reason for drawing any different inference from the arrangements which were made in the present case.

The Lord Chief Justice expressed what I consider one of the most formidable difficulties in the way of the plaintiffs' case when he pointed out that, if they were right, once an article has been placed in the receptacle the customer himself is bound and he would have no right, without paying for the first article, to substitute an article which he saw later of the same kind and which he preferred. I can see no reason for implying from this arrangement any position other than that which the Lord Chief Justice found, namely, that it is a convenient method of enabling customers to see what there is for sale, to choose, and, possibly, to put back and substitute, articles which they wish to have, and then go to the cashier and offer to buy what they have chosen. On that conclusion the case fails, because it is admitted that in those circumstances there was supervision in the sense required by the Act and at the appropriate moment of time. For these reasons, in my opinion, the appeal should be dismissed.

BIRKETT, L.J.: I am of the same opinion. The short point of the matter is: At what point of time did the sale in this shop take place? My Lord has explained the system which has been introduced into that shop, and, possibly, other shops since. It is said, on the one hand, that when the customer takes the package from the poison section and puts it into her basket the sale takes place there and then. On the other hand, it is said that the sale does not take place until the customer who has placed that package in her basket comes to the exit. The Lord Chief Justice dealt with the matter in this way, and I would like to adopt his words:

"It seems to me, therefore, applying commonsense to this class of transaction, there is no difference merely because a self-service is advertised. It is no different really from the normal transaction in a shop . . . I am quite satisfied it would be wrong to say the shopkeeper is making an offer to sell every article in the shop to any person who might come in and that he can insist by saying: 'I accept your offer'."

Then he goes on to deal with the illustration of the bookshop and continues:

"Therefore, in my opinion, the mere fact that a customer picks up a bottle of medicine from the shelves in this case does not amount to an acceptance of an offer to sell. It is an offer by the customer to buy. I daresay this case is one of great importance, it is quite a proper case for the Pharmaceutical Society to bring, but I think I am bound to say in this case the sale was made under the supervision of a pharmacist. By using the words: 'The sale is effected by, or under the supervision of, a registered pharmacist', it seems to me the sale might be effected by somebody not a pharmacist. If it be under the supervision of a pharmacist, the pharmacist can say: 'You cannot have that. That contains poison'. In this case I decide, first that there is no sale effected merely by the purchaser taking up the article. There is no sale until the buyer's offer to buy is accepted by the acceptance of the money, and that takes place under the supervision of a pharmacist. And in any case, I think, even if I am wrong in the view I have taken of when the offer is accepted, the sale is by or under the supervision of a pharmacist."

I agree with that and I agree that this appeal ought to be dismissed.

ROMER, L.J.: I also agree. The Lord Chief Justice observed that if, on the footing of the plaintiff society's contention, a person picked up an article, once having picked it up he would never be able to put it back and say he had changed his mind, for the shopkeeper could say that the property had passed and the customer would have to pay. If that were the position in this and similar

shops, and that was known to the general public, I should imagine the popularity of such shops would wane a good deal. I am satisfied that that is not the position, and that the articles, even though they are priced and put in shops like this, do not represent an offer by the shopkeeper which can be accepted merely by the picking up of the article in question. I agree with the reasons on which the Lord Chief Justice arrived at that conclusion, to which BIRKETT, L.J., has just referred, and to those observations I can add nothing of my own.

Appeal dismissed.

Solicitors: *A. C. Castle* (for the plaintiffs); *Masons* (for the defendants).

[*Reported by MISS PHILIPPA PRICE, Barrister-at-Law.*]

B

R. v. SANDERSON.

[COURT OF CRIMINAL APPEAL (Lord Goddard, C.J., Lynskey and Pearson, JJ.), February 9, 1953.]

C

Criminal Law—Evidence—Witness called after summing-up on application of defence.

After the summing-up at a trial at quarter sessions had been completed, an application was made by the defence that a witness, who had arrived when the summing-up was almost completed, should be called. The recorder acceded to the application, and after the witness had given evidence he gave a further direction with reference to that evidence.

D

HELD: while it was not a course which it was desirable should be taken often, the witness having been called for the defence and not the prosecution, there was no objection to what had been done.

R. v. Owen ([1952] 1 All E.R. 1040), distinguished.

Case referred to:

E

(1) *R. v. Owen*, [1952] 1 All E.R. 1040; [1952] 2 Q.B. 362; 116 J.P. 244.

APPLICATION for leave to appeal against conviction and sentence.

The applicant was convicted at the Central Criminal Court of wounding with intent to do grievous bodily harm and was sentenced to three years' imprisonment.

F

No counsel appeared.

PEARSON, J., delivered the following judgment of the court. The application is refused, but there is a peculiar feature in that a witness, Mr. Hall, who was desired to be called as a witness for the defence, did not arrive until a very late stage when the summing-up had been almost completed. After the summing-up, an application was made by the defence that he should be called even at that late stage, and that application was acceded to. The witness was called and the learned recorder delivered what may be called a short supplementary summing-up to the members of the jury with reference to his evidence. In *R. v. Owen* (1) it was held that it was wrong for witnesses to be called by the prosecution after the summing-up, but this case is distinguishable because the leave and liberty in question was extended to the defence. It is not a matter one would wish to happen very often, but, on the particular facts of this case, we think that there is no objection to be taken to what was done here and that the learned recorder was fully justified in the rather unusual course he took.

H

Application refused.

[*Reported by G. A. KIDNER, Esq., Barrister-at-Law.*]

CARNILL *v.* ROWLAND.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Lynskey and Pearson, JJ.),
February 2, 3, 1953.]

Street Traffic—Driving uninsured motor vehicle—Admission of liability by insurer—Reasonable interpretation of policy—Road Traffic Act, 1930 (c. 43), s. 35 (1).

A
A cover note insuring the respondent against third-party risks in relation to the user of a motor cycle combination by him contained the words: "Exclusion and special conditions: sidecar permanently attached". The respondent removed the passenger-carrying sidecar body, but left the chassis and a third wheel attached to the motor cycle and drove the motor cycle in that condition. He was charged before justices with driving an uninsured vehicle, contrary to the Road Traffic Act, 1930, s. 35 (1), and at the hearing a representative of the insurers stated in evidence that, in spite of the removal of the passenger-carrying body, the insurers considered themselves "on risk".

B
C
D
HELD: where a condition in a policy was clear and could only be construed to exclude the liability of the insurers, the court was bound to act on that construction notwithstanding a statement by the insurers that they regarded themselves as being "on risk", but where, as here, the meaning of the words was doubtful and the insurers expressed the view that what was attached to the motor cycle satisfied the conditions of the policy and stated that they would have accepted liability if an accident had occurred, the respondent could not be found guilty of driving an uninsured vehicle, and the justices had rightly dismissed the charge against him.

FOR THE ROAD TRAFFIC ACT, 1930, s. 35 (1), see HALSBURY'S STATUTES, Second Edn., Vol. 24, p. 602.

CASE STATED by Sheffield justices.

E
At a court of summary jurisdiction sitting at Sheffield on Sept. 11, 1952, the appellant, George Alfred Carnill, a superintendent of police, preferred an information against the respondent, Tom Rowland, charging that he unlawfully did use on a road a motor cycle there not being in force in relation to the user of the vehicle such a policy of insurance as complied with the requirements of Part II of the Road Traffic Act, 1930, contrary to s. 35 (1) of the said Act.

F
G
H
It was proved or admitted that the respondent signed a proposal form for the insurance of a motor cycle combination by the Co-operative Insurance Society, Ltd. By the terms of the proposal form the policy was to be restricted to the use of a motor cycle to which a sidecar or box carrier was permanently attached, and the seating capacity of the sidecar was said to be two. On July 14, 1952, a cover note was issued to the respondent bearing the words: "Exclusion and special conditions: sidecar permanently attached". On July 16, 1952, the respondent removed the passenger-carrying sidecar body from the motor cycle combination and on the next day he used and drove the vehicle on a road. At this time the passenger-carrying sidecar body had not been replaced and there was attached to the motor cycle only the sidecar chassis and wheel. The insurance company allowed a reduction of the premium payable on the insurance of a solo motor cycle if a sidecar or box carrier was permanently attached because the vehicle was then more stable on the road, particularly when negotiating a left hand bend. The insurance company considered itself on risk and would have indemnified the respondent if he had been involved in an accident while using the vehicle on the occasion in question and in the condition in which it then was.

It was contended on behalf of the appellant (i) that no policy of insurance against third-party risks was in force when the vehicle was used without a side-

car permanently attached ; (ii) that no sidecar was attached to the vehicle on July 17, 1952 ; (iii) that the meaning of the word "sidecar", as defined in the SHORTER OXFORD DICTIONARY, was "a car for passengers attachable to the side of a motor cycle" ; and (iv) that the test whether the policy of insurance was in force was not whether the insurance company considered itself on risk, but whether it was in law liable to indemnify the user if damage and injury had resulted from the use of the vehicle at a time when no sidecar was permanently attached. It was contended on behalf of the respondent, inter alia, that it was within the contemplation of the respondent and the insurance company at the time the insurance was effected that the vehicle could be used without a body being attached to the sidecar and that the policy was not vitiated in any way by the removal of the body, and that, even if a person was doing an illegal act, it did not preclude the insurance company from indemnifying the insured against the consequence of negligent driving. The justices, being of the opinion that the respondent's use of the vehicle on July 17, 1952, was covered by insurance against third-party risks, dismissed the information.

Paul Wrightson for the appellant.

R. Stock for the respondent.

LORD GODDARD, C.J.: This is a Case stated by justices for the city of Sheffield before whom the respondent was charged with unlawfully using a motor cycle on a road, there not being in force in relation to such user of the vehicle a policy of insurance to comply with the Road Traffic Act, 1930.

The court has often pointed out the inconvenience that arises in these cases where a person is charged with using a car when there is not a policy of insurance in force in relation to it owing to the fact that the cases, which sometimes involve nice questions of insurance law, have to be decided in the absence of one of the parties most interested, namely, the insurance company. For that reason it is to be hoped that use will be made of an arrangement that has been entered into with the approval of the appropriate authorities for consultation between the police and insurance companies as to whether or not the insurance companies are on risk or consider themselves on risk. If a respectable insurance company tells the appropriate authority in a particular instance that they consider themselves on risk, the mischief at which the Road Traffic Act, 1930, is aimed does not arise, for, if an accident had taken place, the company would have indemnified the respondent so that the injured person would recover the money.

On the other hand, the court has to give these decisions in the absence of an insurance company, and if this court gives a decision on the construction of the policy, although that decision may have some persuasive effect, it is in no way binding between the insurance company and the assured. If, for instance, in the present case we decided that the insurance company were not on risk, although they have said they were, that would not debar or bind the respondent, if he met with an accident and chose to bring an action against his insurers, seeking a declaration that they were bound to indemnify him.

In this case the respondent made a proposal to the Co-operative Insurance Society, Ltd., for a policy of insurance, and he was asked the question:

"Do you desire the policy to be restricted to the use of any motor cycle to which a sidecar or box carrier is permanently attached?"

and he answered "Yes". Thereupon a cover note was issued pending the issue of the policy. It contained the words: "Exclusions and special conditions: sidecar permanently attached", and, if the sidecar was not attached, presumably liability would thereby be excluded. These exclusions and conditions are put in for the protection of insurance companies. They may take a smaller premium if their risk is limited, and, if the insurance company do not wish to rely on an exclusion or say that in their view the exclusion does not arise in any particular case, I do not know why we should be acute to find that

they are wrong. If the insurance company insert exceptions or conditions in the policy, on the ordinary principles of construction those conditions have, so far as possible, to be read against the insurance company.

A sidecar was attached to the respondent's cycle, but when the respondent was stopped the body of the sidecar was not in place. The chassis and the wheel only were in place. A representative of the insurance company was called before the justices. The justices evidently accepted him as a truthful witness, and he told the justices that the company considered themselves on risk. That means no more than that for the purposes of the policy of insurance they regarded what was attached to the cycle as a sidecar. The justices came to the conclusion that the charge was not made out because they thought that the respondent was insured, and I see no reason to differ from them. For my part, I put the matter simply on the ground that, the insurance company having said that what was attached to the cycle satisfied the conditions of the policy, there is no reason to say that the respondent was uninsured at the time he was stopped.

LYNSKEY, J.: I agree. It is clear that, if a condition in a policy is so broad that it has only one meaning, and that meaning is to exclude the insurance company from liability when the machine is used either for certain purposes or under certain conditions, the court is bound by that clause and must act on it. But if you have a clause which is open to two constructions, it is for the court to construe that condition in the policy *contra proferentem*, that is, against the insurance company. The question here was whether or not this motor cycle was fitted with a sidecar. What is the meaning of "a sidecar permanently attached" may be a question of doubt. According to the evidence before the justices, the insurance company read the policy as putting them on risk when the cycle was in the condition in which it was found at the time when this offence was alleged to have been committed, namely, fitted with a chassis and a third wheel, but with the body of the sidecar temporarily absent. If that was a construction of the meaning of a sidecar which was impossible on the wording of the policy, one would be able to say that the justices had no right to find as they did, but it seems to me that the meaning of "sidecar permanently attached" is open to two constructions. The insurance company took one and the justices accepted that and also that the insurance company were on risk and the respondent was covered. In those circumstances, I agree that this appeal should be dismissed.

PEARSON, J.: I agree. I only want to say that I should agree with the contention of the appellant, set out in the Case Stated, that the test whether the policy of insurance was in force was not whether the insurance company considered itself on risk, but whether it was in law liable to indemnify the user if damage and injury had resulted from the use of the vehicle at a time when no sidecar was permanently attached. If it was plain that there was no sidecar attached to this vehicle at the material time, the view of the insurance company that they were bound would manifestly be incorrect in law and would have to be disregarded. But here it is arguable one way or the other whether or not there was a sidecar attached at the material time. That being so, and it being a reasonable view that the sidecar had not ceased to be a sidecar merely because a part of it had been removed, I think it was right for the justices to take into account the view expressed by the insurance company as one of the material factors for them to consider. For that reason, I think it is not shown that any error was made by the justices in coming to their decision, and I agree with the proposed judgment. *Appeal dismissed.*

Solicitors: *Sharpe, Pritchard & Co.*, agents for *John Heys*, town clerk, Sheffield (for the appellant); *A. J. A. Hanhart*, agent for *Neal, Scorah, Siddons & Co.*, Sheffield (for the respondent).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

HEATLEY AND ANOTHER v. STEEL CO. OF WALES, LTD.

[COURT OF APPEAL (Lord Goddard, C.J., Jenkins and Morris, L.JJ.), January 29, 1953.]

Negligence—Damages—Fatal accident—Deduction for benefits accruing from death—Deduction from deceased's wages of sum retained for his own use—Deduction in respect of house constituting matrimonial home.

A In assessing damages in an action by a widow, on behalf of herself and her children, under the Fatal Accidents Act, 1846, in respect of the death of her husband who died intestate, the learned judge deducted (i) from the estimated income lost, £5 out of the husband's weekly wages of £10, as expenditure by or for the husband, and (ii) £750 in respect of a house, the lease of which the husband had purchased, which was valued at £1,450, £260 being owed under a mortgage, and which was now available to the plaintiff and her children as a home.

B HELD: (i) the sum deducted for expenditure by or on the husband was too high and, as it must have been made per incuriam, the damages should be amended accordingly.

C (ii) as the widow would require to live with the children in the house exactly as before her husband's death, or, if the lease were sold, in another house, no deduction fell to be made from the damages in respect thereof.

AS TO DAMAGES UNDER THE FATAL ACCIDENTS ACTS, see HALSBURY, Hailsham Edn., Vol. 23, pp. 695-700, paras. 982-987; and FOR CASES, see DIGEST, Vol. 36, pp. 139, 140, Nos. 933-943.

D APPEAL against an order of CROOM-JOHNSON, J., at Swansea Assizes, dated July 11, 1952, awarding £3,250 damages under the Fatal Accidents Act, 1846, and £435 15s. 6d. under the Law Reform (Miscellaneous Provisions) Act, 1934, in an action for damages for negligence and breach of statutory duty.

E In arriving at the damages under the Act of 1846, CROOM-JOHNSON, J., deducted £5, in respect of the husband's estimated weekly expenditure, from the £10 a week wages earned by the husband, representing income lost by the first plaintiff, the widow, and £750 as the value of the lease of a house owned by the husband which accrued to the first plaintiff and her family by his death. The plaintiffs appealed.

Lloyd-Jones, Q.C., and N. G. L. Richards for the plaintiffs.

F *Bickford-Smith* for the defendants.

G LORD GODDARD, C.J.: The deceased man, who died intestate, was forty-three years of age, and had a good working life in front of him. He has left a widow, aged thirty-eight years, the plaintiff, and four children, whose ages vary from eighteen years down to nine, the youngest being said to be a delicate child. At the time of the accident the deceased was earning just under £10 a week, but he would almost immediately have been earning £12 a week had his unhappy death not occurred. He owned the equity of redemption of a house the lease of which he had bought and mortgaged to a building society, paying interest at the rate of £2 4s. 3d. a month. £260 of the principal was outstanding.

H The learned judge took a good deal of trouble over this case, and paid attention to the rule that one must try to find a basic figure, apply a certain number of years' purchase to it, and make an allowance for payment of a lump sum at once in order to find the present value. We should not interfere with the award of a judge merely because we considered it too low unless it were very much too low or we were satisfied that he had applied some wrong principle. That makes two matters in which we disagree with the learned judge a difficult problem. In arriving at the weekly income that is lost to the family, he has deducted £5 a week for £1 spending money for the deceased and

£4 as his keep. With great respect to the learned judge, there was no evidence about this. I do not think that, with a family of six, the feeding and clothing of the husband would be allowed to come to as much as £4 a week out of a total income of £10 a week, especially when he kept only £1 for his own personal expenses. We think that the learned judge has taken much too high a figure and has erred *per incuriam*.

A
B
C
D
A more serious matter on which we differ from the learned judge is with regard to the house which passed on the deceased's death. Under the provisions of s. 46 (1) (i) (b) of the Administration of Estates Act, 1925, the plaintiff and the four children (or such of them as attain the age of twenty-one years or marry) are between them entitled to the whole estate. The plaintiff's interest greatly predominates, as, apart from the personal chattels, which go to her absolutely, she takes £1,000 with interest thereon at five per cent. per annum from the death of the deceased on Mar. 30, 1951, and a life interest in half the ultimate residue. The residue before providing the £1,000 and interest appears to consist of nothing more than the lease, subject to the mortgage, and the equity of redemption is worth not more than £1,200, the value of the house being £1,450 and the outstanding balance of the mortgage £260. What allowance, if any, should be made in the assessment of damages for the beneficial interests thus accruing to the plaintiff, and, in some small degree, also to the children by reason of the death? It is very difficult to see how any substantial sum can be allowed for these interests. The court has to try to ascertain how much the plaintiff and her family have lost by the deceased's death? The plaintiff does not thereby come into some large sum of money of which she never had the handling before. She will simply continue to live in this house and provide a home there for the children until it is sold, and if and when it is sold she will have to get another house. Her two younger children are likely to be living with her for a long time, and her two elder children are still dependent on her.

E
F
G
H
In the circumstances the court cannot see that any sum requires to be deducted for the value of the house. A successful sale of the lease might produce £1,200, but the plaintiff would then have to find another house to provide accommodation for the children and she would be lucky if she could rent one. Therefore, she is in just the same position as before and has not benefited on this account by her husband's death, except, possibly, by some nominal amount. The trifling interests of the children under the intestacy are offset by the need to provide them with a home, and obviously cannot improve the position of themselves and the plaintiff considered collectively. It may be that some value could be shown on paper for the interests in the house which would not have accrued to the plaintiff and the children for many years but for the death of the deceased, but that is hardly a matter which from a practical point of view can be taken into account. In relation to this matter the learned judge deducted £750 from the sum that he was proposing to award the plaintiff on the ground of the pecuniary loss occasioned by her husband's death. He was about to earn £12 a week, a considerable increase of just over £2 a week. The elder children did not contribute to the plaintiff's income. The son was still not keeping himself, since, though he was earning money his tools, lunches, etc., more than offset what he was giving to his mother, and there was some small sum from the elder daughter. But when they became self-supporting the fact that the deceased's wages had gone up to £12 a week would have put the widow in a much more comfortable position.

The number of years' purchase that a judge can reasonably take is entirely an arbitrary matter of speculation, though it may be actuarially possible to calculate the amount by which a basic wage multiplied by a certain number of years' purchase should be reduced to yield its present value. But the court has, in the best way it can, to find a sum of money which it thinks will fairly

compensate the family. One judge may arrive at it in one way, and another judge in another. If this court comes to the conclusion that the judge has taken an unduly high, or an unduly low, figure, it can interfere, but it cannot interfere unless it thinks that the amount was really arrived at on a wrong principle. In our opinion, two deductions made by the learned judge cannot be justified, and for a family of this sort, losing a husband and father in the prime of life, £3,250 is a very low award. £435 was awarded under the Law Reform (Miscellaneous Provisions) Act, 1934, and any sum that may be awarded under the Fatal Accidents Act, 1846, has to be reduced by that amount. This court, giving the best consideration it can to this case, thinks that the fair amount to have awarded was £6,000, less the £435 awarded under the Law Reform (Miscellaneous Provisions) Act, 1934, as to which there is no appeal. The result is that judgment will be entered for the plaintiff for £6,000 in all, £400 of which, plus £35 15s. 6d. for funeral expenses, or £435 15s. 6d. in all, is allocated to the claim under the Law Reform (Miscellaneous Provisions) Act, 1934. As we are increasing the amount awarded in this case by £2,750, it seems only right that the children should also benefit. We think that the elder son, who was given only £50, ought to have £150, because when he has finished his apprenticeship it will be very useful for him to have some money on which to start life, with his tools and other things to pay for. The elder daughter ought to have £200 instead of £100, since she has to be provided for, and if she marries it will be a useful contribution towards setting up house and her trousseau. We do not think there is any reason to increase the amount for the two younger children, because their sums will be paid into court, and they will accumulate. When the boy of nine becomes of age, if he has not had to have anything paid out beforehand, the sum at compound interest will have increased to a fair amount.

JENKINS, L.J.: I agree.

MORRIS, L.J.: I agree.

Appeal allowed.

Solicitors: *Russell Jones & Walker* (for the plaintiffs); *Helder, Roberts & Co.*, agents for *Roger Williams & Son*, Swansea (for the defendants).

[*Reported by F. A. AMIES, Esq., Barrister-at-Law.*]

PEARSON *v.* BOYES.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Lynskey and Pearson, J.J.), February 4, 1953.]

Street Traffic—Licence—Goods vehicle—Utility van towing unladen caravan—Vehicles (Excise) Act, 1949 (c. 89) s. 27 (1).

The respondent was using for towing a caravan on a road a "utility" van which was licensed as a private vehicle. The van was constructed for the conveyance of goods, but at the material time no goods were being carried either in the van or in the caravan. The respondent was charged with using the van as a goods vehicle, i.e., for a purpose which brought it within a class or description of vehicle to which a higher rate of duty was chargeable under the Vehicles (Excise) Act, 1949, such higher rate not having been paid before it was so used, contrary to s. 13 (2) of the Act.

HELD: the van, though constructed as a goods vehicle, was not being so used when towing an unladen caravan, and was, therefore, not liable to be taxed as a goods vehicle.

FOR THE VEHICLES (EXCISE) ACT, 1949, s. 5, see HALSBURY'S STATUTES, Second Edn., Vol. 21, p. 1436.

Case referred to:

(1) *Cook v. Hobbs*, [1911] 1 K.B. 14; 80 L.J.K.B. 110; 103 L.T. 566; 75 J.P. 14; 39 Digest 243, 221.

CASE STATED by Lincolnshire justices.

At a court of summary jurisdiction sitting at Sleaford on Sept. 15, 1952, the appellant, Reginald Arthur Pearson, an assistant solicitor to the Kesteven County Council, preferred an information against the respondent, Donald Craner Boyes, charging that, on July 15, 1952, while there was then in force a licence taken out for a mechanically propelled vehicle at a certain rate under the Vehicles (Excise) Act, 1949, s. 6 and sched. V, he unlawfully used such vehicle on a public road at Welbourn for a purpose which brought it within a class or description of vehicle to which a higher rate of duty was chargeable under the Act, such higher rate not having been paid before the vehicle was so used, contrary to s. 13 (2) of the Act.

It was proved or admitted that the respondent, who was a towing contractor, was the owner of a Bedford utility van which was constructed or adapted for use for the conveyance of goods. On July 15, 1952, he was using the van on Pottergate Road, a public road, for the purpose of towing a caravan. No goods were at the time being carried either in the van or in the caravan. The van was licensed as a private vehicle, duty having been paid at the rate of £10 per annum. If it had been licensed as a goods vehicle, duty would have been chargeable at the rate of £27 10s. per annum, and additional duty at the rate of £10 per annum would have been chargeable in respect of the use of the van for drawing a trailer.

It was contended on behalf of the appellant that, as the van was constructed for the conveyance of goods and was drawing a caravan, it was a "goods vehicle" within the meaning of the Vehicles (Excise) Act, 1949, s. 27 (1). It was contended on behalf of the respondent that the van was not used for the conveyance of goods, and was properly licensed as a private vehicle notwithstanding that it was towing a caravan. The justices dismissed the information and the appellant appealed.

J. P. Ashworth for the appellant.

The respondent did not appear.

LORD GODDARD, C.J.: The vehicle, which was a utility van, and, therefore, could be used for the carriage of goods, was, at the time in question,

towing a caravan, which was unladen. Section 27 (1) of the Vehicles (Excise) Act, 1949, provides:

“ ‘goods vehicle’ means a mechanically propelled vehicle . . . constructed or adapted for use and used for the conveyance of goods or burden of any description, whether in the course of trade or otherwise.”

A The question is: If this vehicle was constructed as a goods vehicle, was it being used for the conveyance of goods or burden of any description?

I should be content to decide this case very much on the same lines as this court decided *Cook v. Hobbs* (1), by saying that, if the Revenue authorities want to tax these vehicles, they should get them taxed in clear words. If you have to hunt about through a large number of sections and consider a large number of cases, it seems to me to show that the Revenue have not succeeded in obtaining the use of clear and precise words showing that a tax is to be imposed, and a subject is only to be taxed if the taxing authority can show that there is no doubt about the fact that he is taxed. Taking the whole scheme of the Act, the words of the different sections, and the expressions used, I think it is dealing with haulage as something quite distinct from carriage. If one of these utility vans was found being used with a trailer which was laden with goods, it seems to me that it would then be used for the conveyance of goods because, although the goods were in the trailer attached to the van, the van would be conveying them from point to point, although, from one point of view, it could be said that it was conveying a caravan. But here the van was towing an empty caravan. The matter is so vague and so debatable that I cannot see that it has been shown that Parliament intended to tax this vehicle in the way suggested. For these reasons, in my opinion, the decision of the justices should be upheld.

LYNSKEY, J.: I agree.

PEARSON, J.: I agree.

Appeal dismissed.

Solicitor: *Treasury Solicitor.*

[Reported by G. A. KIDNER, Esq., Barrister-at-Law.]

NOTE.

MUIR v. JAMES.

[COURT OF APPEAL (Somervell, Birkett and Romer, L.JJ.), January 27, 28, 1953.]

Building Control—Licence for specified work—Authorised expenditure exceeded—Work ordered and executed separately—Execution at same time as licensed work—Defence (General) Regulations, 1939 (S.R. & O., 1939, No. 927), reg. 56A (as amended); sched. VI, Part II.

Case referred to:

- (1) *Dennis & Co., Ltd. v. Munn*, [1949] 1 All E.R. 616; [1949] 2 K.B. 327; [1949] L.J.R. 857; 2nd Digest Supp.

APPEAL by the defendant from an order of His Honour JUDGE SIR GERALD HURST, Q.C., made at Lambeth County Court, dated Dec. 9, 1952, on a claim for work and labour.

The plaintiff was a builder. The defendant was the father of the owner of premises known as 18 Lawrie Park Garden, Sydenham, and he intended to occupy a flat on the premises. A building company for whom the plaintiff worked, undertook the work of converting the premises into flats and building a garage, and for this work licences were required and obtained. The plaintiff's claim was in respect of

" . . . work in connection with cutting back garden beds and excavating over site to form roadway to garage, taking down and re-building part of dwarf burr wall, spreading, levelling and ramming hardcore to roadway, and clearing surplus excavated material, taking out obsolete water main, and repairing leaks in main service pipe."

No licence was issued for this work, to do which the plaintiff alleged he was employed personally.

The defendant contended, inter alia, that the work in respect of which the plaintiff claimed was within the provisions of the Defence (General) Regulations, 1939, reg. 56A, and that, since it was not licensed, the plaintiff could not recover in respect of it. He further contended that the work should be regarded as a part of or so closely connected with the building of the garage as not to be properly treated as covered by the provision as to the value of work that could be done without a licence: see the principle laid down in *Dennis & Co., Ltd. v. Munn* (1).

Syrett for the defendant.

D. G. Wright for the plaintiff.

SOMERVELL, L.J., said that in *Dennis & Co., Ltd. v. Munn* (1) a licence had been given for specified work, but, in doing the work, the builder exceeded the amount authorised by the licence and it was sought to add to the amount of the licence the amount in respect of work which could be done without a licence. The court said that that could not be done, it being held that the allowance of building work permitted without a written licence by virtue of the Control of Building Operations (No. 8) Order, 1947, was only permitted for work severable from specified work for which a written licence had been obtained, i.e., work ordered separately and executed separately. The first point on which the defendant failed before the learned judge was that he failed to establish that this work was within the general controlling words of reg. 56A. Counsel for the defendant relied on the words in Part II of sched. VI to the Defence Regulations, "services for a building" or, possibly, "any other fixed works of construction or civil engineering, including a road". He (his Lordship) did not think that the work in question came within the words

“services for a building”, and he also very much doubted whether it came within the word “road”, as it occurs in Part II. The work was really clearing away obstructions and making something of the character of a garden path sufficiently wide to take a motor car. The court had very incomplete information before it as to the work which was done and he did not propose to base his decision on that part of the case, because he had come to the conclusion that, assuming the work was work within the general words of reg. 56A, the free allowance was available to cover it on the principles as laid down in *Dennis & Co., Ltd. v. Munn* (1). It was clearly ordered separately. It was plainly not within the specification on which the licence was obtained, and, so far as he could gather from the evidence, it was executed separately. Those latter words were taken from the judgment of DENNING, L.J., in *Dennis & Co., Ltd. v. Munn* ([1949] 1 All E.R. 618). It might well be that work fell outside the principles laid down in *Dennis & Co., Ltd. v. Munn* (1) if it was ordered separately and outside the licence specification although it was executed at the same time. That point should be regarded as open. For these reasons he dismissed the appeal.

BIRKETT, L.J., agreed.

ROMER, L.J., also agreed and said that he would like to associate himself with the observations which SOMERVELL, L.J., had made with regard to the case of *Dennis & Co., Ltd. v. Munn* (1).

Appeal dismissed.

Solicitors: *Batchelor, Fry, Coulson & Burder* (for the defendant); *Wilmer Hives & Barren* (for the plaintiff).

P.P.

R. v. MISKIN LOWER JUSTICES. *Ex parte* YOUNG.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Croom-Johnson and Pearson, JJ.), January 20, 21, February 6, 1953.]

Justices—Husband and wife—Maintenance order—Arrears—Committal order suspended on condition that current payments made, with further payments on account of arrears—Payment of arrears, but failure to make current payments—Appropriation of payments—Right to discharge of committal order—Summary Jurisdiction Act, 1879 (c. 49), s. 21 (1)—Summary Jurisdiction (Married Women) Act, 1895 (c. 39), s. 9.

On May 16, 1951, justices made an order under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1949, that the husband should pay to the wife the weekly sum of £2 10s. as maintenance for herself and the child. On Aug. 1, 1951, on a summons by the wife in respect of arrears amounting to £7 12s. 6d., the justices made a committal order against the husband, but suspended it for so long as he paid the weekly sum of £2 10s. provided for in the maintenance order and in addition 2s. per week on account of the arrears. In each of the next two weeks the husband paid £2 only, and on Aug. 18, 1951, the wife applied for a warrant to commit him to prison. The justices issued a warrant for the balance of £3 12s. 6d. on the ground that £4 of the original debt had been paid. Before execution of the warrant the husband paid a further £2 and on arrest he paid £1 12s. 6d., whereupon he was released on the footing that the original debt was paid. On an application by the wife that the warrant might go forward on the ground that the sums paid by the husband should have been credited, as to £7 10s. to the current weekly payments under the maintenance order, and as to 2s. 6d. to the arrears,

HELD: the committal order was, and remained throughout, the sanction

for the non-payment of the original debt, namely, £7 12s. 6d., being the specified sum mentioned in the application for the committal order and proved to the justices to be in arrear; the postponement of the issue of the committal order on condition that the husband regularly paid the amounts of the weekly payments plus some addition on account of the arrears gave him a beneficial option and did not deprive him of the right to secure a discharge of or release from the committal order by payment of the original debt; the husband was entitled to appropriate or have appropriated to the discharge of the original debt the sums paid by him, amounting to £7 12s. 6d., and in the circumstances, although he had not complied with the conditions on which the committal order was suspended, he must be considered to have paid the original debt; and, therefore, the wife's application should be dismissed.

Per curiam: The husband, having failed to keep up the current payments, was liable to further proceedings and a new committal order in respect of the new arrears.

AS TO ENFORCEMENT OF ORDERS IN AFFILIATION AND KINDRED PROCEEDINGS, see HALSBURY, Hailsham Edn., Vol. 2, pp. 594-596, paras. 818, 819, and *ibid.*, Vol. 21, p. 649, para. 1112; and FOR CASES, see DIGEST, Vol. 3, pp. 403, 404, Nos. 367-379.

FOR THE BASTARDY LAWS AMENDMENT ACT, 1872, s. 4, see HALSBURY'S STATUTES, Second Edn., Vol. 2, p. 480; FOR THE SUMMARY JURISDICTION (MARRIED WOMEN) ACT, 1895, s. 9, see *ibid.*, Vol. 11, p. 853; and FOR THE SUMMARY JURISDICTION ACT, 1848, s. 28 and s. 35, THE SUMMARY JURISDICTION ACT, 1879, s. 21 (1) and s. 54, and THE CRIMINAL JUSTICE ADMINISTRATION ACT, 1914, s. 3 (1) and s. 32 (3), see *ibid.*, Vol. 14, pp. 796, 799, 861, 886, 907 and 921, respectively.

Cases referred to:

- (1) *Robson v. Spearman*, (1820), 3 B. & Ald. 493; 106 E.R. 742; 3 Digest 404, 371.
- (2) *Ruther v. Ruther*, [1903] 2 K.B. 270; 72 L.J.K.B. 826; 67 J.P. 359; 27 Digest, Replacement, 724, 6922.
- (3) *Adams v. Adams*, [1914] P. 155; 83 L.J.P. 151; 111 L.T. 414; 27 Digest, Replacement, 730, 6972.

MOTION by the wife, Mrs. Gwladys Elsie Young, for an order of mandamus directed to the justices for the petty sessional division of Miskin Lower in the county of Glamorgan requiring them to exercise the jurisdiction conferred on them by s. 9 of the Summary Jurisdiction (Married Women) Act, 1895, by s. 4 of the Bastardy Laws Amendment Act, 1872, and by s. 8 of the Money Payments (Justices Procedure) Act, 1935, and, in particular, to consider committing the husband, Hubert Wallington Young, to prison for non-payment of arrears under a maintenance order made by the justices in favour of the wife on May 16, 1951.

Pennant and *H. A. P. Fisher* for the wife.

F. E. Jones for the husband.

Cur. adv. vult.

Feb. 6. LORD GODDARD, C.J.: PEARSON, J., will deliver the first judgment.

The following judgments were read.

PEARSON, J.: This case arises out of a maintenance order made by the court of summary jurisdiction for the petty sessional division of Miskin Lower, in the county of Glamorgan, and a suspended committal order made by the same court on the ground of non-payment of arrears under the maintenance order. The motion is on behalf of the wife for an order of mandamus

directed to the justices and requiring them to exercise the discretion conferred on them by s. 9 of the Summary Jurisdiction (Married Women) Act, 1895, and by s. 8 of the Money Payments (Justices Procedure) Act, 1935, and, in particular, to consider committing the husband, against whom the maintenance order was made, to prison for non-payment of arrears under the maintenance order. The grounds of the application are that, the wife having applied orally to the justices to implement the terms of the suspended committal order and to commit the husband to prison, such application was refused by the justices by letter dated Nov. 23, 1952, and that their refusal so to do was wrong.

The maintenance order was made by the justices on May 16, 1951, under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1949, and the material provisions of the order were that (i) the legal custody of a child of the marriage between the parties be committed to the wife; (ii) the husband do pay to the collecting officer on behalf of the wife the weekly sum of £2, together with the additional sum of 10s. for the maintenance of the child, the first of such payments to be made on Wednesday, May 25, 1951, and the subsequent payments on every Wednesday in each succeeding week; and (iii) the husband do pay the sum of £2 12s. 6d. for the costs of the court and of the wife incurred in obtaining the order.

On July 12, 1951, the wife caused to be issued a summons in respect of arrears under the maintenance order amounting to £7 12s. 6d., and on Aug. 1, 1951, the justices made an order committing the husband to prison for one month, such order to be suspended so long as the husband paid the weekly sum of £2 10s. provided for in the maintenance order, and in addition 2s. per week on account of arrears. The sum for non-payment of which the committal order was made was the above-mentioned sum of £7 12s. 6d. In each of the next two weeks the husband paid to the collecting officer the sum of £2 only, so that the condition on which the committal order was suspended was not complied with, but a total of £4 was paid. On Aug. 18, 1951, the wife applied for a warrant to commit the husband. A warrant of commitment was issued for the balance of £3 12s. 6d. on the footing that £4 of the original debt of £7 12s. 6d. had already been paid. While the warrant was in the hands of the police the husband made a further payment of £2, and, on being arrested, he made a further payment of £1 12s. 6d., and he was then released on the footing that by that time he had paid the full amount of the original debt. From Nov. 22, 1951, to Jan. 8, 1952, there was correspondence between the wife's solicitor and the clerk to the justices. The clerk to the justices, in a letter of Jan. 4, 1952, referred to the sums of £4, £2 and £1 12s. 6d. paid by the husband, and said that the husband had paid the amount for which he had been summoned, that the commitment could not be issued again, and that the wife should apply for a further summons for arrears, then amounting to £20 13s. 6d., with a view to the husband again being brought to the court to be dealt with. In reply to that letter the wife's solicitor wrote on Jan. 5, 1952:

"I regret that I cannot agree with your contention. The sum of £4 paid by the defendant by Aug. 18 was in respect of the current order and not the arrears. The arrears were not reduced at all, but, in fact, were increased by the sum of 10s. per week. The warrant, therefore, should have been issued for £7 12s. 6d., the full amount of the arrears, of which the defendant has now paid only the sum of £3 12s. 6d. If your contention was correct a defendant could escape the consequences of the committal entirely by merely paying the current order and could say that any sum paid was on account of arrears. It is my contention that the weekly payments made must be set off first against the current order, and it is only any balance which can be set off against the arrears."

The clerk to the justices wrote on Jan. 8, 1952:

"The legal position as to the appropriation of payments made to the collecting officer after the committal order has been made and suspended so long as certain fixed payments are made is not free from doubt. There has been a great deal of correspondence in the JUSTICE OF THE PEACE AND LOCAL GOVERNMENT REVIEW on this question during the past twelve months. Opinions have been expressed by some of the correspondents that, unless a special direction is given by the sender, a collecting officer is bound to appropriate the whole of such payment to that part of the total amount due which first accrued, namely, the arrears. In your client's case that course was followed, with the result that the total amount of arrears due in respect of the commitment was paid. I, therefore, regret that I can do nothing to assist your client, but suggest that she issue a further summons for the arrears now due under the order, which amount to £20 13s. 6d."

Two questions arise, namely, (i) whether the husband was entitled to secure a discharge of or release from the committal order by paying the original debt of £7 12s. 6d. notwithstanding that he had not complied with the conditions on which the committal order was suspended and further arrears had accrued, and (ii) whether the husband was rightly considered to have paid the original debt by making the payments of £2, £2, £2 and £1 12s. 6d. mentioned above. For the purpose of determining the first question it will be necessary to consider the relevant statutory provisions. Section 9 of the Summary Jurisdiction (Married Women) Act, 1895, provides:

"The payment of any sum of money directed to be paid by any order under this Act may be enforced in the same manner as the payment of money is enforced under an order of affiliation."

The maintenance order in this case was made under that Act as amended or extended by the Married Women (Maintenance) Act, 1920, and the Married Women (Maintenance) Act, 1949. The main provisions for enforcement of the payment of money under an order of affiliation are contained in s. 4 of the Bastardy Laws Amendment Act, 1872, and with later amendments, so far as material, are as follows:

" . . . and if at any time after the expiration of fourteen clear days from the making of such order as aforesaid it be made to appear to any one justice, upon oath or affirmation, that any sum to be paid in pursuance of such order has not been paid, such justice may, by warrant under his hand and seal, cause such putative father to be brought before any two justices, and in case such putative father neglect or refuse to make payment of the sums due from him under such order, or since any commitment for disobedience to such order as hereinafter provided, together with the costs attending such warrant, apprehension, and bringing up of such putative father, such two justices may, by warrant under their hands and seals, direct the sum so appearing to be due, together with such costs, to be recovered by distress and sale of the goods and chattels of such putative father . . . but if upon the return of such warrant, or if by the admission of such putative father, it appear that no sufficient distress can be had, then any such two justices may, if they see fit, by warrant under their hands and seals, cause such putative father to be committed to the common gaol or house of correction . . . there to remain, without bail or mainprize, for any term, not exceeding three calendar months unless such sum and costs, and all reasonable charges attending the said distress, together with the costs and charges attending the commitment and conveying to gaol or to the house of correction, and of the persons employed to convey him thither, be sooner paid and satisfied."

Section 1 of the Affiliation Orders Act, 1914, provides for the appointment of collecting officers and prescribes their duties. Section 54 of the Summary Jurisdiction Act, 1879, provides, so far as material, as follows:

A "This Act shall apply to the levying of sums adjudged to be paid by an order in any matter of bastardy, or by an order which is enforceable as an order of affiliation, and to the imprisonment of a defendant for non-payment of such sums, in like manner as if an order in any such matter or so enforceable were a conviction on information . . . This Act shall be construed as one with the Summary Jurisdiction Act, 1848, so far as is consistent with the tenour of such Acts respectively, and save as aforesaid shall be subject to the exceptions specified in s. 35 of the Summary Jurisdiction Act, 1848."

B Section 35 of the Summary Jurisdiction Act, 1848, provides, so far as material, as follows:

C ". . . nor shall anything in this Act extend or be construed to extend to any complaints, orders, or warrants in matters of bastardy made against the putative father of any bastard child, save and except such of the provisions aforesaid as relate to . . . the levying of sums ordered to be paid, or to the imprisonment of a defendant for non-payment of the same."

Section 28 of the Summary Jurisdiction Act, 1848, provides, so far as material, as follows:

D ". . . and in all cases in which any person shall be imprisoned as aforesaid for non-payment of any penalty or other sum he may pay or cause to be paid to the keeper of the prison in which he shall be so imprisoned the sum in the warrant of commitment mentioned, together with the amount of the costs, charges and expenses (if any) therein also mentioned, and the said keeper shall receive the same, and shall thereupon discharge such person, if he be in his custody for no other matter."

E Section 21 (1) of the Summary Jurisdiction Act, 1879, provides as follows:

F "A court of summary jurisdiction to whom application is made either to issue a warrant of distress for any sum adjudged to be paid by a conviction or order, or to issue a warrant for committing a person to prison for non-payment of a sum of money adjudged to be paid by a conviction, or in the case of a sum not a civil debt by an order, or for default of sufficient distress to satisfy any such sum, may if the court deem it expedient so to do, postpone the issue of such warrant until such time and on such conditions, if any, as to the court may seem just."

G The Criminal Justice Administration Act, 1914, s. 3 (1), as amended by s. 79 of and sched. IX to the Criminal Justice Act, 1948, provides as follows:

H "(1) Where a term of imprisonment is imposed by a court of summary jurisdiction in respect of the non-payment of any sum of money . . . that term shall, on payment of a part of such sum to any person authorised to receive it, be reduced by such number of days as bears to the total number of days in term less one day the proportion most nearly approximating to, without exceeding, the proportion which the part paid bears to the sum in respect of which the imprisonment is imposed. (2) Provision may be made by rules under s. 29 of the Summary Jurisdiction Act, 1879, as to the application of sums paid under this section and for determining the persons authorised to receive such payments and the conditions under which such payments may be made."

The relevant rules are the Summary Jurisdiction Rules, 1915 (S.R. & O., 1915,

No. 200), rr. 18-25, as amended by S.R. & O., 1933, No. 1120. Section 32 (3) of the Criminal Justice Administration Act, 1914, provides as follows:

"Where in any proceedings for the enforcement of an order in any matter of bastardy or of an order enforceable as an order of affiliation the court commits the defendant to prison then, unless the court otherwise directs, no arrears shall accrue under the order during the time that the defendant is in prison."

Moreover, the imprisonment discharges the defendant from liability for the arrears for which he was imprisoned: HALSBURY'S LAWS OF ENGLAND, Hailsham ed., vol. 21, p. 650, note (o); LUSHINGTON'S LAW OF AFFILIATION AND BASTARDY, 6th ed., p. 70, note (h); *Robson v. Spearman* (1). Section 5 of the Summary Jurisdiction Act, 1879, provides a scale of maximum terms of imprisonment for non-payment of money, the maximum terms being proportioned to the amounts unpaid.

In my opinion, it appears from these provisions that (subject to possible additions in respect of costs, which do not in principle affect the present question) (i) the committal order is the sanction for the non-payment of what may conveniently be called "the original debt", being the specific sum which is mentioned in the application for the committal order and proved to the justices to be in arrear; (ii) if there were a distress warrant, it would be for the levying of the amount of the original debt; (iii) a committal order cannot be made if the original debt has already been paid by the time when the application for the committal order is made to the justices; (iv) even after the defendant has been committed to prison, he can secure his release by payment of the original debt, and he can secure a proportionate reduction of the term of imprisonment by payment of part of the original debt; (v) the maximum term of imprisonment depends on the amount of the sum for non-payment of which it is imposed; and (vi) where a committal order is "suspended" on conditions, as in this case, there is only a postponement of the issue of the committal order so long as certain conditions are complied with, and there is no enlargement of the scope of the committal order.

In my opinion, the committal order remains throughout the sanction for non-payment of the original debt, and the postponement of the issue of the committal order on condition that the husband regularly pays the amounts of the weekly payments plus some addition on account of the arrears which constitutes the original debt merely gives to the husband a beneficial option and does not deprive him of the right to secure a discharge of or release from the committal order by payment of the original debt. The option is beneficial to the husband, because, if he exercises the option, no further arrears accrue and he gradually pays off the original debt for which the committal order is the sanction, so that the committal order remains suspended and eventually is discharged or ceases to have effect. If he does not exercise the option and fails to keep up the current payments, he is liable to further proceedings and a new committal order in respect of the new arrears, but the existing committal order retains its original character as the sanction for the original debt and is not converted into a sanction for the growing total of the original debt plus the accumulating new arrears. If the existing committal order, which is for a short term of imprisonment related to the small amount of the original debt, were converted into the sanction for the growing total, he could "work off" by imprisonment for a short term a large amount of old and new arrears for which a longer term of imprisonment would be appropriate. In my opinion, the answer to the first question is that the husband was entitled to secure a discharge of or release from the committal order by paying the original debt of £7 12s. 6d. notwithstanding that he had not complied with the conditions on which the committal order was suspended and further arrears had accrued.

The second question is whether the husband was rightly considered to have paid the original debt of £7 12s. 6d. by making the payments of £2, £2, £2 and £1 12s. 6d. mentioned above. The answer to that question must depend on the facts of the particular case. In this case the husband did make those payments and they did amount to £7 12s. 6d. He would be likely to wish these payments to be utilised in discharge of the original debt so that he would secure his release from the committal order. He was obviously not exercising his option to comply with the conditions of suspension, because he was not paying £2 12s. per week regularly or at all. Nor was he paying regularly or at all the amounts of the current weekly payments due under the maintenance order at the rate of £2 10s. per week. There was no evidence of any express appropriation of any of the sums paid to the current weekly payments, and there are no grounds for implying any such appropriation. So far as appears from the evidence, the first two sums paid were not appropriated, except that by payment to the collecting officer they were appropriated generally to the indebtedness of the husband to his wife under the orders of the court. The third payment probably was, and the last payment, made to avoid arrest, certainly was, appropriated to discharging the balance of the original debt. In those circumstances, I am of opinion that the husband was entitled to appropriate or have appropriated all these sums to the discharge of the original debt and he was rightly considered to have paid the original debt. Accordingly, in my opinion, this application fails and should be dismissed.

CROOM-JOHNSON, J. (read by **PEARSON, J.**): I agree that the husband was entitled to secure a discharge from his liability to be committed to prison by paying the amount of the arrears, £7 12s. 6d., outstanding at the time that the committal order was made. I agree that the justices were empowered by s. 21 of the Summary Jurisdiction Act, 1879, if they thought it expedient so to do, to postpone the issue of the warrant on such conditions, if any, as to them might seem just, but I can find no power in them in so doing to deprive the husband of his right to pay off the arrears and so avoid committal and preserve his liberty, and they did not purport to do so. The question whether the husband was rightly considered to have paid the arrears of £7 12s. 6d. is, in my opinion, a question of fact. The husband was not bound to take advantage of the terms on which the justices suspended the committal order and he was obviously not doing so. I agree with **PEARSON, J.**, whose judgment I have had the advantage of reading in advance, that there was no evidence of any express appropriation by the husband of any of the sums paid to the weekly amounts continuing to accrue under the maintenance order, and I know of no right in the collecting officer to make any such appropriation. On the figures, the last payment of £1 12s. 6d. must have been intended by the husband to discharge the balance of the £7 12s. 6d.; it can refer to nothing else and is not, I think, a mere arithmetical coincidence. On the facts of this case, I have come to the conclusion that the husband was rightly considered to have paid off all the arrears of £7 12s. 6d., and I agree that the application for mandamus should be dismissed.

LORD GODDARD, C.J.: I agree with the judgment of **PEARSON, J.**, and, in view of the importance of this matter, I will shortly state my opinion. At first sight it would seem that, if justices suspend the operation of a committal order on certain terms with which the person affected thereby does not comply, the order ought to take effect and a warrant should issue, but a person can only be committed for arrears, and those must be arrears which had accrued when application for committal is made. If, then, he is ordered to pay off arrears at so much a week and to keep up the payments under the original maintenance order and he pays a sum which wipes out the arrears, if he were then sent to prison it would follow that he was being committed for arrears accruing since

the date of the order. I think, therefore, that the justices were right in refusing to issue a warrant, but could have made a fresh order in respect of the arrears which had accrued since the date of the committal order, and this they offered to do. In my opinion, the matter does not depend on the law relating to appropriation of payments, but solely on the statutory provisions relating to the power to commit and to the husband's right to avoid committal by paying off the arrears. This latter right cannot be taken away. If the justices had powers similar to those conferred by r. 6 of the recent Matrimonial Causes (Judgment Summons) Rules, 1952 (S.I., 1952, No. 2209) the present difficulty and seeming anomaly would not arise, but these rules cannot be applied to orders of courts of summary jurisdiction without legislation.

The proceedings in this case took the form of an application for mandamus, but I have no doubt the matter could be raised by way of Special Case, and I think it would be most desirable if all appeals relating to matters under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1949, were brought to the Probate, Divorce and Admiralty Division. In *Ruther v. Ruther* (2) it was held that a Special Case arising out of an application to commit for arrears lay to this Division and not to the Probate, Divorce and Admiralty Division, but, if I may say so, the reasons given do not appear to be wholly satisfactory, and evidently the Divisional Court of the Probate, Divorce and Admiralty Division which heard *Adams v. Adams* (3) did not regard the decision with favour. If the practice could be changed by rule or by an order of the Lord Chancellor under s. 57 of the Supreme Court of Judicature (Consolidation) Act, 1925, it would, I think, be a desirable alteration. I agree that this application fails and should be dismissed.

Application dismissed.

Solicitors: *Rhys Roberts & Co.*, agents for *Graeme I. Kemp*, Cardiff (for the wife); *Theodore Goddard & Co.*, agents for *Morgan, Bruce & Nicholas*, Pontypridd (for the husband).

[Reported by F. GUTTMAN, ESQ., Barrister-at-Law.]

BRITISH ELECTRICITY AUTHORITY AND ANOTHER v. EXETER CORPORATION.

[CHANCERY DIVISION (Danckwerts, J.), January 28, 29, 1953.]

Electricity—Nationalisation—Undertaking formerly maintained by local authority—Expenses and receipts of undertaking to be paid out of and into general rate fund—Authority directed “to show under a separate heading or division” accounts of their undertakings—Excess revenue of undertaking to be credited to revenue account of undertaking for the next following year—Liability of local authority to account to electricity authority for sum transferred in aid of rates in account for year ending Mar. 31, 1947—Exeter Corporation Act, 1935 (c. cii), s. 108 (1), s. 109 (1), s. 112 (1) (b).

By the Exeter Corporation Act, 1935, s. 108 (1), all the receipts of the corporation's various undertakings were to be paid into the general rate fund, and all expenses in respect of the undertakings were to be paid out of that fund. By s. 109 (1) the corporation were to keep separate accounts in respect of each of their undertakings from which revenue was derived, and were to show “under a separate heading or division on the one side all receipts in respect of the undertaking . . . and on the other side all payments and expenses in respect of the undertaking”. By s. 112 (1) (b) if in any year the moneys received by the corporation on account of the revenue of their electricity undertaking should exceed the aggregate of the moneys paid by the corporation in respect of the

undertaking for various specified purposes, and if the reserve fund of the undertaking amounted to more than one-twentieth of the aggregate capital expenditure, "such amount as the corporation may think fit (not being less in cases where the said excess of receipts over expenses is more than a sum equal to $1\frac{1}{2}$ per centum of the outstanding debt of the undertaking than the difference between the said excess and that sum) shall be credited to the revenue account of the undertaking for the next following year and the charges for electricity supplied by the corporation shall be reduced by such amount or respective amounts as will as nearly as reasonably practicable be equivalent in the aggregate to the amount so deemed to be revenue". In the revenue account of the electricity undertaking for the year ending Mar. 31, 1947, the credit side showed, *inter alia*, a sum of £40,000 as "reserve written back" on account of sums set aside in each of the years 1942-1945 as a contingent reserve against liability for war damage insurance. Among the items on the debit side, as well as a contribution of £830 in aid of rate, representing $1\frac{1}{2}$ per cent. on the amount of the outstanding debt of the undertaking, there was an item of £33,355, which was treated as a transfer in aid of rate. A sum of £37,099, being the credit balance shown in the account, was carried forward to the credit of the revenue account of the undertaking for the following year. On Apr. 1, 1948, under the Electricity Act, 1947, s. 14 and s. 15, the electricity undertaking vested partly in the British Electricity Authority and partly in the South Western Electricity Board, and by s. 14 (2) (iii) and s. 15 (1) all investments and cash held by the corporation immediately before that date wholly or mainly in their capacity as undertakers for the supply of electricity vested in the British Electricity Authority. The authority claimed the sum of £33,355 from the corporation on the ground that the transfer of that sum to the general rate fund was a breach of the corporation's statutory duty, and, by reason of that breach, the amount standing to the credit of the revenue account of the undertaking at Mar. 31, 1948, was wrongfully reduced by that sum. The corporation contended, *inter alia*, that the sum of £40,000 which had been set aside on account of the contingent liability for war damage insurance, should not have been brought into the revenue account, but should have been treated as coming back into the general rate fund.

HELD: (i) the sum of £40,000 set aside for war damage insurance was rightly brought back into the revenue account of the electricity undertaking when it was no longer required for the contingent liability, and it was part of the revenue of the year into which it was brought back.

(ii) under s. 112 (1) (b) of the Act of 1935, the whole of the excess of revenue over expenditure in any given year was to be carried over to the following year and was to be deemed to be revenue of the following year, and the only amount that might be carried to the aid of rates was $1\frac{1}{2}$ per cent. on the outstanding debt of the undertaking, and, therefore, the corporation should have carried the sum of £33,355 over to the electricity undertaking's account for the year ending Mar. 31, 1948, as revenue of that year, and they were accountable for that sum to the electricity authority.

Judgment of LORD GREENE, M.R., in *Allchin v. Coulthard* ([1942] 2 All E.R. 41), considered.

FOR THE ELECTRICITY ACT, 1947, s. 14 and s. 15, see HALSBURY'S STATUTES, Second Edn., Vol. 8, pp. 938-944.

Cases referred to:

(1) *R. v. Minister of Housing & Local Government. Ex p. Hove Corpn.*, (1952), 116 J.P. 498.

- (2) *Allchin v. Coulthard*, [1942] 2 All E.R. 39; [1942] 2 K.B. 228; 111 L.J.K.B. 609; 167 L.T. 18; *affd.* H.L., [1943] 2 All E.R. 352; [1943] A.C. 607; 112 L.J.K.B. 539; 107 J.P. 191; *sub nom.* *Allchin v. South Shields County Borough*, 169 L.T. 238; 25 Tax Cas. 445; 2nd Digest Supp.
- (3) *Birmingham Corpn. v. Inland Revenue Comrs.*, [1930] A.C. 307; 99 L.J.K.B. 299; 142 L.T. 633; 94 J.P. 123; 15 Tax Cas. 172; Digest Supp.
- (4) *Central London Ry. Co. v. Inland Revenue Comrs., London Electric Ry. Co. v. Inland Revenue Comrs., Metropolitan Ry. Co. v. Inland Revenue Comrs.*, [1936] 2 All E.R. 375; [1937] A.C. 77; 105 L.J.K.B. 513; 155 L.T. 66; 20 Tax Cas. 102; Digest Supp.

ACTION by the British Electricity Authority and the South Western Electricity Board for, inter alia, (a) a declaration that, in determining the amount of the assets held by the defendants, Exeter Corporation, immediately before Apr. 1, 1948 (the vesting date for the purposes of the Electricity Act, 1947), there should be included therein a sum of £33,355, being an amount unlawfully transferred by the corporation from their electricity undertaking, and (b) a declaration that, in so far as the corporation had unlawfully done any act in consequence of which the revenues of their electricity undertaking or the assets to be transferred to the plaintiffs, or one or other of them, on Apr. 1, 1948, were less than they otherwise would have been, the corporation were liable to pay the amount of such deficiency either by way of damages or otherwise to the plaintiffs.

The sum of £33,355 was debited from the corporation's revenue account in respect of their electricity undertaking for the year ended Mar. 31, 1947, and treated as a transfer in aid of rate. The plaintiffs contended that, under the Exeter Corporation Act, 1935, s. 112 (1) (b), this sum should have been carried forward to the credit of the revenue account of the undertaking for the following year, and that, as a result of the corporation's action in transferring the sum in aid of rate, in breach of the statutory duty, the revenue account of the undertaking at Mar. 31, 1948, and the assets vesting in the plaintiffs on Apr. 1, 1948, under the Electricity Act, 1947, were reduced by that sum. The corporation contended, inter alia, that, under s. 108 (1) of the Act of 1935, all moneys from time to time received by them on account of the revenue of their electricity undertaking were carried to and formed part of their general rate fund and became merged therein and ceased to be identifiable.

Willis, Q.C., and *Teague* for the plaintiffs.

Sir Andrew Clark, Q.C., and *Denys B. Buckley* for the corporation.

DANCKWERTS, J.: This is an action by the British Electricity Authority and the South Western Electricity Board as plaintiffs. Both those bodies came into being by virtue of the Electricity Act, 1947, which vested certain assets previously belonging to electrical undertakers in new bodies, who came into operation on Apr. 1, 1948, the appointed day for the purposes of the Act. The defendants, Exeter Corporation, were electrical undertakers before the Act came into operation. The action is concerned with the assets which, under the provisions of the Act, the plaintiffs, or one of them, became entitled to take over from the corporation as the previous undertakers. The South Western Electricity Board have only been joined with the British Electricity Authority as plaintiffs because of a possible doubt whether all of the assets under consideration vested in the British Electricity Authority, as certain kinds of assets vest in the board and not in the authority. Nothing, however, turns on that and I need not consider the matter further.

The Electricity Act, 1947, s. 14, which is concerned with the vesting of assets of electricity undertakings provides:

"(1) Subject to the provisions of this Part of this Act all property,

rights, liabilities and obligations which, immediately before such date as may be appointed by order of the Minister (in this Act referred to as 'the vesting date') [Apr. 1, 1948] were property, rights, liabilities and obligations of a body to whom this Part of this Act applies, shall on the vesting date vest by virtue of this Act and without further assurance in such electricity board or boards as may be specified in the following provisions of this section or determined thereunder . . . (2) Subject to the provisions of this section relating to the North of Scotland District—

(a) the property, rights, liabilities and obligations mentioned in sub-s. (1) of this section of the Central Electricity Board, any power station company and any electricity holding company, shall vest in accordance with the said sub-s. (1) in the central authority; (b) the property, rights, liabilities and obligations aforesaid of any authorised undertakers to whom this Part of this Act applies (other than the Central Electricity Board) shall vest as aforesaid in such one of the area boards as may be determined by order of the Minister: Provided that—(i) all generating stations of any such authorised undertakers and all main transmission lines of such undertakers, being lines connecting a generating station directly with another generating station or with any main transmission lines of the Central Electricity Board, and all property and rights held or used by the undertakers wholly or mainly for the purposes of such stations and transmission lines and all liabilities and obligations wholly or mainly incurred by the undertakers for those purposes; (ii) all rights, liabilities and obligations under agreements between any authorised undertakers and any railway undertakers for the supply of electricity to the railway undertakers for the purposes of haulage or traction, and all transmission lines used wholly or mainly for the purpose of giving a supply to any railway undertakers for the purposes of haulage or traction; and (iii) all investments and cash of any such undertakers and all rights and liabilities thereof in respect of income tax and excess profits tax; shall vest in the central authority and not in an area board."

Difficulties arise in the present case with regard to the question of what vested in the plaintiffs under the Act of 1947 by reason of the fact that the corporation carried on, not only the electrical undertaking, but all the other activities which are normally carried on by a local authority. Therefore, it is necessary for the purposes of the Act to ascertain what part of the assets which were vested in the local authority are to be attributed to the electricity undertaking, and should, accordingly, be treated as vesting in the plaintiffs. Section 15 of the Act provides:

"(1) In the case of any authorised undertakers being a local authority the provisions of the last foregoing section shall only apply to property held or used by the local authority wholly or mainly in their capacity as authorised undertakers, and rights, liabilities and obligations acquired or incurred by the local authority in the said capacity, and accordingly references in that section to the property, rights, liabilities and obligations of a body to whom this Part of this Act applies, or to any agreement to which any such body was a party, or to documents referring to any such body, or to legal proceedings or applications by or against any such body shall be construed as references to property held or used by the local authority wholly or mainly in their capacity as authorised undertakers and rights, liabilities and obligations acquired or incurred by the local authority in the said capacity or, as the case may be, to agreements, documents, legal proceedings or applications of or relating to the local authority in their capacity as authorised undertakers . . . (3) Any question arising under this section as to whether any property is or was held or used by any such local authority wholly or mainly in their capacity

as authorised undertakers, or whether any property is or was (for the purposes of the last foregoing sub-section) held or used partly in the said capacity and partly in other capacities, or whether any rights, liabilities or obligations were acquired or incurred by any such local authority in the said capacity or whether any agreements or documents relate or related to any such local authority in their capacity as authorised undertakers, shall, in default of agreement, be determined by the Minister of Health, and he shall have regard to whether or not entries relating to any property, rights or liabilities were or ought to have been included in accounts furnished by the local authority to the Electricity Commissioners under s. 9 of the Electric Lighting Act, 1882."

A

In the present case the procedure laid down by s. 15 (3) was not adopted because it was considered that the question was not exactly whether certain things shown in the accounts were assets for the purposes of s. 15, but whether certain things, which ought not to have been done, had been done by the local authority in such a way as to reduce the amount of assets which appeared to be available for transfer.

B

The question for decision lies in a comparatively small compass, but it is of considerable difficulty. It arises on the accounts which have been kept by the defendant corporation. It is claimed that a sum which appears in the corporation's account, headed "Net Revenue Account, Mar. 31, 1947", being a sum of £33,355, stated to be a "transfer in aid of rate", was wrongly transferred out of the account and should have been retained as part of the balance carried forward for the following year. Before considering how that is to be dealt with, it is necessary to deal with the position under the statutory provisions relating to electricity undertakings. The original Act dealing with these matters was the Electric Lighting (Clauses) Act, 1899. Section 7 (1) of the schedule to the Act, which is one of the provisions deemed to be incorporated in the statutory provisions relating to the undertaker, is in these terms:

C

D

"Where a local authority are the undertakers the following provisions shall have effect:—(1) All moneys received by the undertakers in respect of the undertaking, except (a) borrowed money, (b) money arising from the disposal of lands acquired for the purposes of the special order, and (c) other capital money received by them in respect of the undertaking, shall be applied by them as follows:—(a) In payment of the working and establishment expenses and cost of maintenance of the undertaking, including all costs, expenses, penalties, and damages incurred or payable by the undertakers . . . their officers or servants, in relation to the undertaking; (b) In payment of the interest or dividend on any mortgages, stock, or other securities granted and issued by the undertakers in respect of money borrowed for electricity purposes; (c) In providing any instalments or sinking fund required to be provided in respect of moneys borrowed for electricity purposes; (d) In payment of all other their expenses of executing the special order not being expenses properly chargeable to capital; (e) In providing a reserve fund, if they think fit, by setting aside such money as they think reasonable . . ."

E

F

G

in the manner mentioned. After certain provisions as to reserve funds, s. 7 (1), as amended by the Electricity (Supply) Act, 1926, s. 43 and sched. V, continues as follows:

H

"The undertakers shall apply the net surplus remaining in any year and the annual proceeds of the reserve fund when amounting to the prescribed limit—(a) in reduction of the charges for the supply of energy; or (b) in reduction of the capital moneys borrowed for electricity purposes; or (c) with the consent of the Electricity Commissioners in payment of expenses chargeable to capital; or (d) in aid of the local rate. Provided

that—(i) the amount which may be applied in aid of the local rate in any year shall not exceed $1\frac{1}{2}$ per cent. of the outstanding debt of the undertaking; and (ii) after Mar. 31, 1930, no sum shall be paid in aid of the local rate unless the reserve fund amounts to more than one-twentieth of the aggregate capital expenditure on the undertaking. Any deficiency of income in any year when not answered out of the reserve fund shall be charged upon and payable out of the local rate.”

A Those provisions applied to the defendant corporation until the passing of the Exeter Corporation Act, 1935, one of a series of local Acts passed about that time for the purpose of assisting local authorities to gain some benefits in respect of payments of income tax in regard to interest which they might have to pay to other persons. The material provisions of the Act of 1935 begin,

B for the purposes of this case, with s. 108 (1), which provides:

“Notwithstanding anything contained in any previous enactment all money received by the corporation whether on capital or revenue account including (but without prejudice to the generality of this provision)—

C (a) all money received by the corporation on account of the revenue of any undertaking of the corporation as from time to time existing from which revenue is derived; and (b) interest and other annual proceeds from time to time received by the corporation on the investments or balances forming part of any fund accumulated for the redemption of debt or as a reserve . . . or other similar fund . . . shall be carried to and form part of the general rate fund and all payments and expenses made and incurred by the corporation in respect of any such undertaking or in carrying

D into execution the powers and provisions of this or any other Act whether public or local (including interest on moneys borrowed by the corporation and all sums required by law to be paid or transferred or which the corporation may determine to pay apply or transfer to any such fund as is referred to in para. (b) of this sub-section) shall be paid or transferred out of the general rate fund.”

E It is thus plain that all the receipts of the corporation from its various operations and activities are to be paid into the general rate fund and will form part of that fund. On the other hand, all payments that have to be made by the corporation will have to be paid out of that fund.

Section 109 provides for the keeping of accounts. Section 109 (1) is:

F “The corporation notwithstanding the provisions of any Act or order to the contrary shall keep their accounts so as to distinguish capital from revenue and shall keep separate accounts in respect of each of the undertakings of the corporation as from time to time existing from which revenue is derived (each of which is in this section separately referred to as ‘the undertaking’) and as to revenue shall show under a separate heading or

G division on the one side all receipts in respect of the undertaking (including the income from any such fund as is referred to in [s. 108 (1) (b)] of this Act provided in connection with the undertaking) and on the other side all payments and expenses in respect of the undertaking such payments and expenses being divided so as also to show the amounts representing . . .”

The various matters which are to be shown in the account are then set out in

H paras. (a) to (f). Section 110 contains certain provisions as to the application of the revenue of the corporation’s undertakings, and s. 111 provides for reserve funds. Section 112 (1), which is the vital sub-section for the purposes of the present action, is:

“In lieu of the provisions of s. 7 (1) of the schedule to the Electric Lighting (Clauses) Act, 1899, and of the amendments to that sub-section set out in sched. V to the Electricity (Supply) Act, 1926, the following provisions shall apply with respect to the electricity undertaking (in addition to the

provisions of the section of this Act [s. 10] of which the marginal note is 'Application of revenue of undertakings') (namely):—If in any year the moneys received by the corporation on account of the revenue of the undertaking (including the interest and annual proceeds received by the corporation in that year on the investments representing or forming part of any such fund as is referred to in [s. 108 (1) (b)] of this Act of which the marginal note is 'Receipts and expenses' and as is provided in connection with the undertaking) shall exceed the aggregate of the moneys paid or expended by the corporation in respect of the undertaking for the several purposes mentioned in paras. (a) to (f) of sub-s. (1) of the section of this Act [s. 109] of which the marginal note is 'Accounts' then—(a) if the reserve fund in respect of the undertaking does not amount to more than one-twentieth of the aggregate capital expenditure for the time being on the undertaking a sum equal to the amount of such excess shall be credited to the revenue account of the undertaking for the next following year and the charges for electricity supplied by the corporation shall be reduced by such amount or respective amounts as will as nearly as reasonably practicable be equivalent in the aggregate to the said excess; (b) if the said reserve fund amounts to more than one-twentieth of the said aggregate capital expenditure such amount as the corporation may think fit (not being less in cases where the said excess of receipts over expenses is more than a sum equal to $1\frac{1}{2}$ per centum of the outstanding debt of the undertaking than the difference between the said excess and that sum) shall be credited to the revenue account of the undertaking for the next following year and the charges for electricity supplied by the corporation shall be reduced by such amount or respective amounts as will as nearly as reasonably practicable be equivalent in the aggregate to the amount so deemed to be revenue."

Section 112 (2) contains a provision in regard to the reserve fund. Section 112 (3) is:

"Section 7 (1) of the schedule to the Electric Lighting (Clauses) Act, 1899, shall be deemed to have ceased to be incorporated with any of the Acts or orders relating to the electricity undertaking."

Therefore, it is plain that, after the Exeter Corporation Act, 1935, came into force, the provisions of s. 7 (1) of the Electric Lighting (Clauses) Act, 1899, no longer applied, and, for the present purposes, the situation is regulated entirely by the terms of s. 112 of the Act of 1935.

I can now return to the accounts of the corporation. In the revenue account of Mar. 31, 1947, of the electricity undertaking, on the right-hand side are the credits, being, first, the balance on Mar. 31, 1946, brought forward in accordance with s. 112 (1) of the Act of 1935, and amounting to £42,161 8s. [After mentioning various items on the credit side, HIS LORDSHIP said:] Finally, there is an item "War Damage Insurance: Reserve written back, £40,000", which requires a word of explanation. Undertakings of this kind were exempted from the provisions of the War Damage Act, 1943, on the supposition that separate provisions were intended to be made by Parliament to deal with those cases, and eventually provision was made by the War Damage (Public Utility Undertakings, Etc.) Act, 1949. In the meantime, in each of four war years ending in 1945, the corporation had set aside from revenue a sum of £10,000 as a contingent reserve against the liability which might arise in the future under such statutory provisions as were envisaged by the Act of 1943. In March, 1947, that £40,000, the accumulation of four years, was treated as no longer needed for the purpose and was brought back as a credit in the revenue account of Mar. 31, 1947. The credit items of that account come to a total of £92,805 17s. [After mentioning various items on the debit side, HIS LORDSHIP

said:] We then come to the item of £33,355, which is treated as a transfer in aid of rate. It is further described in the balance sheet as

“Balance of contributions 1926/27-1942/43. Electricity (Supply) Act, 1926 (sched. V), as amended by Exeter Corporation Act, 1935 (s. 112).”

A It is, therefore, treated as though it represented contributions over a number of years. But in the argument before me that allocation was abandoned, and it was simply argued on the footing that this was a transfer in March, 1947, of £33,355 from the revenue account in respect of the electricity undertaking to the benefit of the rates. Then there is a contribution, in aid of rate for 1946/47, of £830, which represents the $1\frac{1}{2}$ per cent. on the amount of the outstanding debt according to the provisions which were set out in s. 112 (1) (b) of the Act of 1935. The result is that the debits show a credit balance to make up B the total of £37,099 0s. 4d., which was carried forward to the following year ending on Mar. 31, 1948. The contention of the plaintiffs is that the transfer of £33,355 in aid of rate was not authorised and was a breach of the corporation's duty under the Act of 1935, and, therefore, that the balance carried forward ought to have been some £70,000 instead of being merely some £37,000.

C In the account for Mar. 31, 1948, which relates to a period ending immediately before the appointed day, there is credited the sum of £37,099 odd, and various other items. On the debit side there is a loss of £21,963 15s. 3d., and there are items, “Contribution in aid of rate for 1947/48, £800”, and “Contributions in aid of rate for 1948/49”—which would be after the date of the transfer under the Electricity Act, 1947—“£1,000”. That leaves a balance of D £15,410 9s. 7d. The plaintiffs obtained the benefit only of that sum of £15,410 9s. 7d., instead of, as they contend should be the case, a sum larger by a considerable amount. As regards the two items amounting to £1,800, it was contended, originally, that the £1,000 was quite unauthorised as being in regard to a future year. But on examination of the figures it appears that, if one takes the amount of the debt at the end, and not at the beginning, of the financial year 1947/48, $1\frac{1}{2}$ per cent. of that amount would allow a figure E of £1,930 to be transferred, and, therefore, if that was the correct date to take, these two payments could, possibly, be justified, not, indeed, as partly a payment in respect of the year 1948/49, but within a figure of £50 in respect of the year 1947/48. I do not see any reason why the corporation should not take the amount standing at the end of their financial year as the basis for their figure for calculating the $1\frac{1}{2}$ per cent. Therefore, I do not propose to F trouble further about those two amounts of £800 and £1,000, because that would be the amount allowed, on that view, to be transferred to the rates. It is also to be observed that, in the final balance sheet of the undertaking on Mar. 31, 1948, on the basis of which the transfer to the electricity authority was actually made, there are these items to be considered. In the revenue account there are on one side investments amounting to £95,500, which G represents a reserve fund, and there are stock and stores in hand and sundry debtors, the benefit of which was transferred to the British Electricity Authority. On the other side there are sundry creditors amounting to £99,225, reserve and renewals amounting to £96,000 odd, the sum of £15,410 9s. 7d., which came from the net revenue account which I have just been dealing with, and there is an overdraft described as “Cash due to bank” amounting to H £54,463 12s. 8d. On the basis that there was an overdraft which was owing by the electricity undertaking of the corporation and which had, therefore, to be borne by the British Electricity Authority on the transfer, the electricity authority made a payment to the corporation to discharge that sum, with a reservation that such payment was made before the account had been examined in order to prevent further bank interest being incurred.

I now come to the questions which have to be decided in this case. The plaintiffs contended that the corporation were in breach of their statutory

duties in not carrying over the sum of £33,355, and they claimed that they were entitled to be recouped the loss which they had suffered by reason of the breach. The corporation contended, first, that the items in the accounts were merely matters of book entries, that all moneys received by them were paid into the general rate fund and ceased to be identifiable, and, therefore, one could not say that there was any actual cash which was attributable to the electricity undertaking rather than to any other particular activity of the corporation. The corporation further contended that, as the Act of 1935 contained no such provisions as those in the provisos to s. 7 (1) of the schedule to the Electric Lighting (Clauses) Act, 1899, as amended by the Act of 1926, there was nothing to prevent them paying over, in aid of the rate fund, part of the surplus of revenue over the outgoings in any particular year. Their final contention was that the £40,000, which was brought back from what might be termed a special reserve fund in respect of war damage contingency, should not have been brought into the revenue account, but should have been treated as coming back into the general rate fund, and, therefore, it formed no part of any balance which ought to be carried forward from 1947 to 1948 in regard to their electricity undertaking.

I was referred to certain authorities, including a number of cases with regard to gas undertakings. I do not think that the authorities relating to gas undertakings assist in the present case, as there were no similar provisions in regard to gas undertakings as those in the Act of 1935. There are, however, two cases in regard to electricity undertakings which I should mention in regard to the present matter. In *R. v. Minister of Housing & Local Government. Ex p. Hove Corpn.* (1) a local authority had in the bank, at the vesting date, a sum of £17,520, which they had received from transactions in their capacity as electricity undertakers and had carried to the general rate fund of the borough under the Local Government Act, 1933, s. 185, and included in that fund immediately before the vesting date. It was held that this sum was surplus net revenue which the local authority were not entitled to use for general purposes of rate reduction except to the limited extent authorised by the Electric Lighting (Clauses) Act, 1899, sched., s. 7, as amended; that they held the balance in their capacity as undertakers and in no other capacity; and that it constituted property or rights acquired by the local authority wholly or mainly in their capacity as authorised undertakers within the meaning of the Electricity Act, 1947, s. 15 (1), and, accordingly, vested in the British Electricity Authority. That case depended on the Electric Lighting (Clauses) Act, 1899, sched., s. 7 (1), proviso (i), which contained a prohibition of the transfer to the benefit of the rates of more than $1\frac{1}{2}$ per cent. of the outstanding debt of the electricity undertaking. That was a very definite provision which, it seems to me, would prevent the general rate fund acquiring the benefit of the sum in question to the exclusion of the electricity undertaking of the local authority. It seems to me, therefore, that the *Hove* case (1) cannot affect the matter which I have to consider, and I do not find that it helps me.

Allchin v. Coulthard (2), which is of importance, was a decision in regard to the South Shields Corporation, who had an electricity undertaking and a local Act not dissimilar from the local Act of the Exeter Corporation. That was a case in regard to income tax, and the decision of the Court of Appeal, which was in favour of the local authority, was affirmed by the House of Lords, who expressly approved the judgment of LORD GREENE, M.R. The principle of the decision of the Court of Appeal in that case is that the phrase "profits or gains brought into charge", as used in r. 19 and r. 21 of the General Rules Applicable to All Schedules to the Income Tax Act, 1918, does not indicate the cash resources out of which the payment of the interest is in fact made, but a fund in the accountancy sense of taxed profits up to but not exceeding the amount of the assessment ascertained for the purpose of an account between

the taxpayer and the revenue and deemed to be in his hands, to which the payment of the interest is to be debited, and that no profits which cannot be lawfully applied to the payment of the interest can be treated by the taxpayer as forming this fund or any part of it, but that, subject to this, apart from special circumstances (instances of which are provided by *Birmingham Corpn. v. Inland Revenue Comrs.* (3) and *Central London Ry. Co. v. Inland Revenue Comrs.* (4)), the taxpayer is entitled to treat the interest as having been paid out of that fund, no matter out of what cash resources he paid it. The facts of the case were as follows. South Shields Corporation paid out of their general rate fund, which consisted partly of untaxed income (namely, the rates collected) and partly of profits from its undertakings duly assessed to income tax, interest on a loan raised for the purpose of their electricity and transport undertakings and general purposes, deducting income tax in the usual way. The corporation claimed, under the provisions of the South Shields Corporation Act, 1935, to treat the assessed profits of the electricity and transport undertakings as part of the assessed profits out of which the interest was paid and to retain the amount of tax paid on those profits. It was held, reversing the decision of LAWRENCE, J., that by the provisions of the Act the profits of those undertakings could lawfully be applied to the payment of the interest on the whole of the loan, and, consequently, those profits as assessed to income tax formed part of the profits brought into charge out of which the interest was paid or deemed to be paid, notwithstanding that it appeared from the accounts of those undertakings, kept separately as required by the Act, that the surplus revenues of those undertakings had been treated as applied to certain specified purposes of those undertakings.

The provisions of s. 108 to s. 112 of the Exeter Corporation Act, 1935, are very similar to those of s. 112 to s. 115 of the South Shields Corporation Act, 1935. In particular, the provisions of s. 112 (1) of the Exeter Act and those of s. 115 (2) of the South Shields Act are almost alike, except that there are certain words in the Exeter Act which are not in the South Shields Act. Section 115 (2) of the South Shields Act is:

"If in respect of any year the moneys received by the corporation on account of the revenue undertaking . . . shall exceed the aggregate of (i) the moneys paid or expended by the corporation in respect of the undertaking for the several purposes mentioned in . . . the section of this Act of which the marginal note is 'Accounts'; and (ii) any moneys applied to a fund for providing working capital then—(a) if the reserve fund in respect of the electricity undertaking does not amount to more than one-twentieth of the aggregate capital expended for the time being upon the undertaking the charges for electricity supplied by the corporation shall be reduced by such amount or respective amounts as will as nearly as reasonably practicable be equivalent in the aggregate to the said excess; (b) if the said reserve fund amounts to more than one-twentieth of the said aggregate capital the corporation shall fix such amount as they may think fit (not being less in any case in which the said excess is more than a sum equal to $1\frac{1}{2}$ per centum of the outstanding debt of the undertaking than the difference between that sum and the said excess) and the charges for electricity supplied by the corporation shall be reduced by such amount or respective amounts as will as nearly as reasonably practicable be equivalent in the aggregate to the amount so fixed."

The words

" . . . shall be credited to the revenue account of the undertaking for the next following year . . . "

which appear in s. 112 (1) (b) of the Exeter Act, are not in s. 115 (2) (b) of the South Shields Act, and, after the words,

" . . . the charges for electricity supplied by the corporation shall be reduced by such amount or respective amounts as will as nearly as reasonably practicable be equivalent in the aggregate . . ."

which are in both Acts, para. (b) of the Exeter Act ends with the words " to the amount so deemed to be revenue ", instead of " to the amount so fixed ". Later, I shall consider whether or not that difference in the provisions of the two Acts is material.

The question in *Allchin v. Coulthard* (2) was whether, where a payment was made out of the general rate fund for interest, that interest could be taken as being paid out of a fund which had already borne tax, so that the local authority making the payment were entitled to retain the amount of the tax deducted after paying the interest, on the basis that they had already paid the tax. That question is very different from the one which is now before me, but the Exeter Corporation relied on the distinction drawn by LORD GREENE, M.R., between an amount which represents actual money and one which merely represents figures on paper. LORD GREENE, M.R., said ([1942] 2 All E.R. 44):

" Much of the obscurity which surrounds this matter is due to a failure to distinguish the two senses in which the phrase ' payment out of a fund ' may be used. The word ' fund ' may mean actual cash resources of a particular kind (e.g., money in a drawer or at a bank) or it may be a mere accountancy expression used to describe a particular category which a person uses in making up his accounts. The words ' payment out of ' when used in connection with the word ' fund ' in its first meaning connote actual payment, e.g., by taking the money out of the drawer or drawing a cheque on the bank. When used in connection with the word ' fund ' in its second meaning they connote that for the purposes of the account in which the fund finds a place, the payment is debited to that fund, an operation which, of course, has no relation to the actual method of payment or the particular cash resources out of which the payment is made. Thus, if a company makes a payment out of its reserve fund—an example of the second meaning of the word ' fund '—the actual payment is made by cheque drawn on the company's banking account, the money in which may have been derived from a number of sources. The phrase ' reserve fund ' only has a meaning as indicating the item in the company's accounts to which it decides to debit the payment. It will be seen, therefore, that to speak of an actual payment being made out of a fund in the second sense is really a misuse of language. A fund in the second sense is merely an accountancy category. It has a real existence in that sense, but not in the sense that a real payment can be made out of it as distinct from being debited to it. Unless the two meanings of the phrase ' payment out of a fund ' are kept distinct, much confusion of thought must ensue. A real payment cannot be made out of an imaginary fund: per LORD MACMILLAN in the *Central London Railway* case (4)."

LORD GREENE, M.R., thus reached the conclusion that there was nothing to prevent the South Shields Corporation treating payments of interest as being paid out of the profits of its undertaking, and, therefore, out of funds which had already borne tax. It may be that, in the present case, the fund which is treated in the accounts as a fund relating to the electricity undertaking of the Exeter Corporation is a fund in the second sense in which it is used by LORD GREENE, M.R., that is to say, that all the actual funds are in the general rate fund, although, for the purposes of the undertaking, certain funds are treated as falling to that undertaking, and, that, therefore, the entries in the account relating to the electricity undertaking must be regarded merely as a series of book-keeping entries for the purposes of ascertaining the financial situation of the electricity undertaking. I am prepared to accept that, but

I do not think that it necessarily follows that that disposes of the plaintiffs' claim, because it seems to me that, in considering what is to be taken over by the electricity authority in the present case, one has to ascertain what are to be treated as the assets of the Exeter Corporation in respect of their electricity undertaking. Therefore, it is not an answer to say that the items in the revenue account of the corporation's electricity undertaking are merely entries in accounts. It seems to me that they have to be treated, under the provisions of the Exeter Corporation Act, as part of the assets of the electricity undertaking of the corporation, and, that being so, when those assets are to be taken over by the body which is created by the Electricity Act, 1947, it may well be that it is those assets, or the amount equivalent to those assets, which has to be handed over, and it is not an answer to say: "Of course, the moneys actually are not in a separate account. They are in the general rate fund of the corporation".

In the event which has happened in this case, under s. 112 (1) of the Exeter Corporation Act, 1935, one has first to ascertain on the operations for the year whether the revenue of the undertaking exceeds the expenditure mentioned under the various heads of s. 109 (1) of the Act. I agree with the contention of counsel for the corporation that the provisions of s. 112 (1) are clearly related to operations of a given year. If there is an excess of revenue over expenditure, then the provisions of para. (a) or of para. (b) of s. 112 (1) are to be applied. In this case, the provisions of para. (b) are to be applied because the reserve fund amounts to more than one-twentieth of the aggregate capital expenditure. First, the corporation have to decide what amount shall be credited to the revenue account, and they are entitled to take out $1\frac{1}{2}$ per cent. of the outstanding debt of the undertaking and credit that to the benefit of the rates. Then para. (b) provides that that sum shall be credited to the revenue account of the undertaking for the next following year and the charges for electricity supplied by the corporation shall be reduced to correspond as nearly as possible with that sum, by which I understand that it is intended, theoretically at any rate, that the charges to be made by the corporation for the following year will be reduced so that the revenue received in respect thereof by the corporation will, in the following year, be less, if possible, by the amount which is carried over in the accounts, and the amount which is carried over in the accounts is so "deemed to be revenue". It seems to me that, if it is to be revenue, it has to be considered as revenue of the following year. Counsel for the corporation contended that it was to be treated as revenue for the year to which the account related, with the result that, at the end of the year, it went back again for the benefit of the rates. If that construction were correct, the result, on the figures, would be that the plaintiffs would, in fact, have been over-paid instead of being under-paid. It seems to me that that construction will not work. The opposite view produces, I agree, some odd results, because it means that the amount carried over will, in a sense, be carried over again, possibly, until it is extinguished, with the result that the charges will again have to be reduced, and, possibly, there may eventually be a loss which will require the charges to be increased again, whereas, according to the construction put forward by counsel for the corporation—which was attractive in many respects—once the sums were carried over to the following year, if the adjustments and charges were accurate, the surplus so carried over would, theoretically, be wiped out, there would be in hand revenue equivalent to the expenditure for the following year, and the sum carried over would be left intact. One would then have a state of equilibrium, all being well, and one would go on from year to year without having to reduce the charges unless the expense of generation, or something of that kind, was so reduced that a further excessive profit was made. I do not think, however, that that was the effect of s. 112 (1) (b), because, whatever may have been the intention of the

draftsman of the provisions, it seems to me that it cannot produce that result. If the sum carried over forms part of the revenue of the following year, it is deemed to be revenue for that year by the Act. Then, it seems to me, it must again come into consideration in ascertaining at the end of that year whether there is an excess of revenue over the outgoings, as contemplated by s. 109 (1) of the Act. If, on setting off the two sums against each other, there is again an excess of revenue over expenditure, I do not see how one can escape from the necessity of having to apply the provisions of s. 112 (1) (b) again, and one may have to reduce the charges further. I do not know whether or not that was the intention of the Act, but it seems to me to be the result. It seems to me that the Act does require, therefore, the whole of the excess of revenue over expenditure in any given year to be carried over to the following year and to be deemed to be revenue of that following year, and that the only amount that may be carried to the aid of the rates is the $1\frac{1}{2}$ per cent. on the amount of the debt.

That being so, it seems to me that I must reach the conclusion that the £33,355 ought to have been carried over to the year ending Mar. 31, 1948, as revenue of that year, in addition to the sum of £37,099 0s. 4d. which was, in fact, carried over. In regard to the sum of £40,000, which had been set aside for war damage insurance, that sum, undoubtedly, represents revenue of the undertaking originally, and I cannot see how it could have been dealt with, when brought back again as no longer required for the contingent liability, except by bringing it back into the revenue account. It seems to me that it was brought back into the account in a way which was perfectly proper, and that it must be treated, therefore, as being part of the revenue of the year into which it is brought. I was much impressed by the point which was taken by counsel for the plaintiffs—that, if one were entitled to depart from these accounts and treat the items in them as mere book-keeping assets having no real value, it is difficult to see how the electricity authority could have been responsible for the overdraft of £54,463 12s. 8d. It seems to me that the accounts must be treated as showing the assets of the undertaking for the purposes of the transfer under the Act of 1947, because, if the sums received by the corporation in respect of its electricity undertaking are to be treated as part of the revenue paid into the general rate fund, the liabilities must be treated in the same way, otherwise, in my opinion, there would have been no justification for requiring the electricity authority to discharge the overdraft shown in the balance sheet of the undertaking. It seems to me, therefore, that the plaintiffs are justified in the claim which they make that they have suffered financial loss to the extent of £33,355.

Judgment for the plaintiffs.

Solicitors: *R. A. Finn* (for the plaintiffs); *Sharpe, Pritchard & Co.*, agents for *C. J. Newman*, town clerk, Exeter (for the corporation).

[Reported by *R. D. H. OSBORNE, Esq., Barrister-at-Law.*]

HINCKLEY AND COUNTRY BUILDING SOCIETY v. HENNY.

[CHANCERY DIVISION (Upjohn, J.), February 3, 1953.]

Mortgage—Attornment clause—Notice to quit—Need of notice—Breach of covenant to repay principal by instalments—Claim by mortgagee to possession.

- A By cl. 4 of a legal charge under which the principal was repayable by instalments, it was provided that, if default were made by the borrower for thirteen weeks in payment of any one or more of the instalments, the mortgagee ("the society") might without any previous notice to or concurrence on the part of the borrower (inter alia) appoint a receiver and exercise its statutory power of sale. It was further provided by cl. 9:
- B " (1) The borrower hereby attorns tenant to the society of such parts of the property hereby charged as may at any time be in his occupation at the yearly rent of 6d. if demanded. (2) Provided that the society may at any time after such default has been made as set out in [cl. 4] hereof by giving to the borrower or leaving upon the property at least seven days' notice in writing of the intention of the society so to do determine the tenancy hereby created and enter upon the property . . ." The borrower made default in the payment of instalments within cl. 4, and without
- C further notice to him the society issued a summons for possession.

HELD: the society was bound to comply with the terms of cl. 9, and, as it had not given to the borrower at least seven days' notice in writing of its intention to determine the tenancy under that clause, it was not entitled to possession, and the summons would be dismissed.

- D *Woolwich Equitable Building Society v. Preston* ([1938] Ch. 129), distinguished.

Note in the ANNUAL PRACTICE, 1952 ed., p. 1128, criticised.

AS TO ATTORNMENT CLAUSE, see HALSBURY, Hailsham Edn., Vol. 23, p. 325, para. 489; and FOR CASES, see DIGEST, Vol. 35, pp. 327-331, Nos. 712-737.

- E Cases referred to:

- (1) *Jolly v. Arbuthnot*, (1859), 4 De G. & J. 224; 28 L.J.Ch. 547; 33 L.T.O.S. 263; 23 J.P. 677; 45 E.R. 87; 35 Digest 323, 677.
- (2) *Trent v. Hunt*, (1853), 9 Exch. 14; 22 L.J.Ex. 318; 22 L.T.O.S. 23; 156 E.R. 7; 35 Digest 320, 648.
- (3) *Re Stockton Iron Furnace Co.*, (1879), 10 Ch.D. 335; 48 L.J.Ch. 417; 10 L.T. 19; 35 Digest 328, 715.
- F (4) *Woolwich Equitable Building Society v. Preston*, [1938] Ch. 129; 107 L.J.Ch. 63; *sub nom.* *Woolwich Equitable Building Society v. Oriston*, 158 L.T. 216; Digest Supp.

- G PROCEDURE SUMMONS for an order that the defendant do deliver to the plaintiff possession of a dwelling-house and premises, No. 145 Grange Road, Hugglescote, Leicestershire.

By a legal charge, dated May 17, 1947, and made between the defendant, as borrower, and the plaintiff, the Hinckley and Country Building Society, as mortgagee, the borrower charged the said dwelling-house and premises with the repayment to the society of £950 and covenanted to pay that sum by instalments and to pay "all such other subscriptions fines and payments (if

H any) according to the rules of the society". By cl. 4 of the charge it was provided (so far as relevant):

" (1) If default be made by the borrower for thirteen weeks in payment of any one or more of the said instalments and other payments hereby covenanted to be made at the time and in manner aforesaid . . . then and in any of such cases the whole of the money payable or to become payable hereunder shall be deemed to be forthwith due and owing and

the society may without any previous notice to or concurrence on the part of the borrower—(i) Appoint a receiver under the statutory power and eject from the property the borrower the tenants workmen and all other persons then in possession or occupation thereof . . . (iii) In exercise of the statutory power sell all or any part of the property with full power in the meantime and until the property shall be sold as aforesaid to demise and lease (in extension of the statutory power) the same or any part thereof for such periods at such rents and upon such terms in all respects as the society shall think fit.”

By cl. 9 it was provided:

“(1) The borrower hereby attorns tenant to the society of such parts of the property hereby charged as may at any time be in his occupation at the yearly rent of 6d. if demanded. (2) Provided that the society may at any time after such default has been made as set out in section [sic] 4 hereof by giving to the borrower or leaving upon the property at least seven days’ notice in writing of the intention of the society so to do determine the tenancy hereby created and enter upon the property but so that the said tenancy shall not render the society liable to account to any person as mortgagees in possession.”

The borrower fell into arrear with the repayments for more than thirteen weeks, and the society, without notice to him, issued this summons for possession with a view to selling the property.

Plowman for the plaintiff.

The defendant did not appear.

UPJOHN, J.: This is a summons by the Hinckley and Country Building Society against a mortgagor for an order for possession of certain premises which had been mortgaged by the mortgagor to the society. The mortgage was to secure payment of a sum of £950, which was to be repaid by weekly instalments. The mortgage provided by cl. 4 that, if default were made by the mortgagor for thirteen weeks, then (to put it shortly) the mortgage should become enforceable. There was an attornment clause in these terms. [His LORDSHIP read cl. 9 of the legal charge, and continued:] In this case default has been made by the mortgagor and there is no doubt that, on giving seven days’ notice in writing to him, the society is entitled to determine the tenancy and to re-enter on the property. The sole question I have to determine is whether the society is entitled to re-enter on the property without giving the seven days’ notice provided by cl. 9.

The position of a mortgagor and a mortgagee where there is an attornment clause is well set out in a judgment of LORD CHELMSFORD, L.C., in *Jolly v. Arbuthnot* (1), where he says (4 De G. & J. 235):

“A mortgagor who remains in possession after the execution of a mortgage, and continues to enjoy the profits of the land, is not considered as a tenant from year to year to the mortgagee, nor even as a tenant at will; he receives the profits for his own use, and not as agent or bailiff of the mortgagee, and when he has once received them he is absolutely entitled to keep them as his own: per ALDERSON, B., *Trent v. Hunt* (2) (9 Exch. 22). But he may at any time be treated as a trespasser by the mortgagee, who may maintain ejectment against him without any previous notice or demand of possession. Such being the precarious dependence of a mortgagor upon the will of the mortgagee, it is competent to them to enter into an agreement by which the mortgagor’s possession may be rendered more secure by the creation of a tenancy. This is sometimes effected by a stipulation in the mortgage deed itself.”

The attornment clause, therefore, is designed to give a greater measure of protection to the mortgagor. It may also be designed to give additional

advantages to the mortgagee, e.g., if a substantial rent is reserved by the attornment clause, it may be possible (and before the various Acts dealing with bills of sale it certainly was possible) for a mortgagee to distrain on the mortgaged property and to secure payment of his rent. That is clear from the observations of BRAMWELL, L.J., in *Re Stockton Iron Furnace Co.* (3) (10 Ch.D. 357); see also the observations of CLAUSON, J., in *Woolwich Equitable Building Society v. Preston* (4) ([1938] Ch. 131). It is clear, therefore, that an attornment clause in a mortgage is valid and effectual and in order to regain or resume possession a mortgagee must give notice in accordance with the provisions of the tenancy.

The claim by the society in the present case that it is not bound to give such notice appears to be founded on a note in the ANNUAL PRACTICE under the heading "Possession" in the notes to R.S.C., Ord. 55, r. 5A:

- A "In proceedings claiming possession, as soon as the summons is issued, the applicant is deemed to have re-entered and the tenancy, year by year, as in the attornment clause, becomes a tenancy at will, and as soon as the summons is served, the tenancy at will is determined by the claim for possession. Therefore it is not necessary for the applicants to prove they had given a notice to quit determining the tenancy from year to year."
- B
- C *Woolwich Equitable Building Society v. Preston* (4) is relied on as authority for that note, but when that case is examined, it is apparent that the attornment clause was in a form, frequently found, which provides that after the power of sale has arisen the tenancy can be determined without any previous notice to quit. Of course, that provision is valid and effectual, and it enables the mortgagee to re-enter without giving any notice. In that case the issue of a summons claiming possession was treated as a re-entry so that the tenancy was determined, but that decision applies only, in my judgment, to cases where there is such a provision dispensing with notice to determine the tenancy when the security has become enforceable. In the present case there is no such provision, and it is clear on the construction of cl. 9 that, even after the borrower has made default, the society must give seven days' notice in writing to determine the tenancy. Until it does that, the borrower remains in possession as tenant, and, therefore, the claim for possession in this case, there having been no such notice, fails, and I must dismiss the summons.
- D
- E

Order accordingly.

Solicitors: *Preston, Lane-Claypon & O'Kelly*, agents for *Pilgrim & Webster*, Hinckley (for the plaintiff).

[Reported by R. D. H. OSBORNE, Esq., Barrister-at-Law.]

Re JOHN SMITH'S TADCASTER BREWERY CO., LTD.
THE COMPANY *v.* GRESHAM LIFE ASSURANCE SOCIETY,
LTD. AND ANOTHER.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Jenkins and Morris, L.JJ.),
February 4, 5, 1953.]

*Company—Alteration of members' rights—Proposal to increase capital—
Increase of ordinary share capital affecting rights of preference stockholders.*

Article 54 of the articles of association of a company limited by shares provided: "Subject to the provisions of [the Companies Act, 1929, s. 61, later replaced by the Companies Act, 1948, s. 72] all or any of the rights or privileges attached to any class of shares forming part of the capital for the time being of the company may be affected, modified, dealt with or abrogated in any manner with the sanction of an extraordinary resolution passed at a separate meeting of the members of that class." By art. 69 it was provided: "... on a show of hands every member personally present shall have one vote only, and in case of a poll every member shall ... have one vote for every share held by him ...". The directors of the company, of which the issued paid-up capital consisted of £1,740,000 five per cent. cumulative preference stock and one million nine hundred and twenty thousand ordinary shares of £1 each, proposed to increase the capital of the company by the creation of two hundred and eighty thousand ordinary shares of £1 each, to capitalise an amount standing to the credit of the company's reserve account, and to apply the same in paying up the new ordinary shares which would then be distributed among ordinary shareholders credited as fully paid.

Held: notwithstanding that the position of the ordinary shareholders would be thereby strengthened as compared with the preference stockholders, the proposed transactions did not affect the rights of the preference stockholders within the meaning of art. 54.

White v. Bristol Aeroplane Co., Ltd. ([1953] 1 All E.R. 40), applied.

Decision of DANCKWERTS, J. ([1952] 2 All E.R. 751), reversed.

AS TO RIGHTS OF PREFERENCE SHAREHOLDERS, see HALSBURY, 1949 Edn., Vol. 5, p. 156, para. 282; and FOR CASES, see DIGEST, Vol. 9, pp. 226-230, Nos. 1449-1466.

Cases referred to:

- (1) *White v. Bristol Aeroplane Co., Ltd.*, [1953] 1 All E.R. 40.
- (2) *Re Mackenzie & Co., Ltd.*, [1916] 2 Ch. 450; 85 L.J.Ch. 804; 115 L.T. 440; 9 Digest 563, 3734.
- (3) *Greenhalgh v. Arderne Cinemas, Ltd.*, [1945] 2 All E.R. 719; *affd.* C.A., [1946] 1 All E.R. 512; 2nd Digest Supp.

APPEAL by a holder of ordinary shares in John Smith's Tadcaster Brewery Co., Ltd., from an order of DANCKWERTS, J., dated Oct. 9, 1952, reported [1952] 2 All E.R. 751.

DANCKWERTS, J., held that transactions proposed by the directors of the company, involving the increase of the capital of the company by the creation of two hundred and eighty thousand ordinary shares of £1, the capitalisation of money standing to the credit of the company's reserve account, and the application thereof in paying up the new ordinary shares which would then be distributed among existing ordinary shareholders, would affect the rights of the preference stockholders, and, therefore, could only be carried out with their sanction as provided in art. 54 of the articles of association of the company. DANCKWERTS, J., further held that the rights of the preference stockholders were exhaustively defined in the articles and they had no right in a winding-up to share in the surplus assets after the ordinary capital had been repaid. From this latter part of HIS LORDSHIP'S decision there was no appeal.

Gedge, Q.C., and *M. M. Wheeler* for the second defendant, a holder of ordinary shares.

Raymond Jennings, Q.C., and *Raymond Walton* for the first defendant, a holder of preference stock.

K. W. Mackinnon for the plaintiff, the company.

SIR RAYMOND EVERSHED, M.R.: The question raised in this appeal is of a very similar character to that which was raised and decided by this court in *White v. Bristol Aeroplane Co., Ltd.* (1), viz., whether a proposed distribution of surplus profits among the ordinary shareholders by way of capitalisation in accordance with the company's articles affects the rights or privileges attached to the preference stockholders. The articles of the company with which we are now concerned are not in all respects the same as the articles in *White v. Bristol Aeroplane Co., Ltd.* (1), and counsel for the preference stockholders has relied on the difference to show that the result in this case should not follow or be treated as governed by the decision in the *Bristol Aeroplane Co.* case (1).

At the present time, the issued paid-up capital of the company consists of £1,740,000 five per cent. cumulative preference stock and one million nine hundred and twenty thousand ordinary shares of £1 each. The proposal is to distribute £280,000 undistributed profits in paying up in full two hundred and eighty thousand new ordinary shares of £1 each, such shares to be issued to the existing ordinary shareholders. The transaction is to take effect pursuant to art. 115 of the company's articles which deals with the capitalisation of profits. The result then will be to swell the amount of issued ordinary shares and to give the holders of those shares added strength in any matter which the holders of the two classes of stock or shares are together considering. The present articles were adopted in 1943, at the time of a scheme of arrangement between the company and the holders of its preference stock and ordinary shares, and the form of one, at any rate, of the articles is in some measure a reflection of one of the provisions of that scheme of arrangement. Article 47, which contains a statement of certain of the special privileges attached to the preference stockholders, provides:

"The following provisions shall have effect:—(A) The holders of the preference stock in the capital of the company shall have the right to receive a fixed cumulative preferential dividend at the rate of five per cent. per annum on the amount of stock held by them respectively in priority to the holders of any other class of stock or shares of the company. (B) The preference stock shall in a winding-up of the company rank for repayment of capital, together with all arrears of the fixed preferential dividend thereon, whether declared or earned or not, up to the commencement of the winding-up in priority to all other stock or shares in the capital of the company. (C) The holders of the ordinary shares in the capital of the company shall be entitled between them to the surplus profits of the company which it shall from time to time be determined to distribute by way of dividend and in a winding-up shall rank for repayment of capital after payment off of the capital and arrears of dividend represented by the said preference stock. (D) The right of the holders of the preference stock to receive notice of or attend or vote at general meetings of the company shall be restricted in manner hereinafter mentioned."

Those provisions, together with the subsequent provisions as to the modification of rights and the expanded reference to votes, contain a statement of the privileges or rights of the preference stockholders. One matter which came before *DANCKWERTS, J.*, arose under art. 47 (C), being the question whether the rights there given to the holders of the ordinary shares in the capital of the company on a winding-up were such as to exclude any participation of the

preference stockholders in those surplus assets after the preference stockholders had received in priority repayment of capital and any unpaid dividend. The learned judge decided that the preference stockholders had no right of further participation in a winding-up. There has been no appeal against that decision, and it is unnecessary, therefore, (and, indeed, not right) that I should say anything further about it.

Article 48, which is headed "Increase of Capital", provides:

"The company may from time to time, in general meeting, whether all the shares for the time being authorised shall have been issued, or all the shares for the time being issued shall have been fully called up or not, increase its capital by the creation of new shares, such aggregate increase to be of such amount and to be divided into shares of such respective amounts as the general meeting resolving upon the creation thereof shall direct. Subject and without prejudice to any rights for the time being attached to the shares of any special class, any shares in such increased capital may have attached thereto such special rights or privileges as the general meeting resolving upon the creation thereof shall direct, or, failing such direction, as the directors shall by resolution determine, and in particular any such shares may be issued with a preferential, deferred or qualified right to dividends or in the distribution of assets and with a special or without any right of voting. With the sanction of a special resolution, any preference share may be issued on the terms that it is or at the option of the company is liable to be redeemed."

I note that that article corresponds with the article which, as a matter of construction, was treated by this court as of some significance in the *Bristol Aeroplane Co.* case (1), viz., art. 62, but in that case there was an added provision as regards the right to issue new preference shares or stock which does not find any place in this article. In my judgment in *White v. Bristol Aeroplane Co., Ltd.* (1) I said, I think inaccurately, that what I called the second part of art. 62 did not find its place in the present case (ante, p. 46) but, in truth, the second part of this art. 48 does correspond with the second part of art. 62 in that case.

Article 50 provides:

"Subject to any directions that may be given in accordance with the powers contained in the memorandum of association or these articles, any capital raised by the creation of new shares shall be considered as part of the original capital, and shall be subject to the same provisions with reference to the payment of calls, transfer, transmission, forfeiture, lien and otherwise as if it had been part of the original capital."

That differs from the corresponding article in *White v. Bristol Aeroplane Co., Ltd.* (1) in that there was in the latter a provision to the effect that, in the absence of any special determination as to the character of the new shares, they should be treated as though they were ordinary shares: see ante, p. 42.

Article 54 is the "Modification of Rights" clause, and I may say that, as a matter of construction, it is substantially the same as the corresponding article in *White v. Bristol Aeroplane Co., Ltd.* (1).

"Subject to the provisions of s. 61 of the Act [of 1929, corresponding to s. 72 of the Companies Act, 1948] all or any of the rights or privileges attached to any class of shares forming part of the capital for the time being of the company may be affected, modified, dealt with or abrogated in any manner with the sanction of an extraordinary resolution passed at a separate meeting of the members of that class. To any such separate meeting all the provisions of these articles as to general meetings shall mutatis mutandis apply, but so that the necessary quorum shall be . . ."

as therein provided. The only material difference is, I think, that the draftsman (or I might almost say lexicographer) of this article did not include the word "varied", as his colleague had in *White v. Bristol Aeroplane Co., Ltd.* (1): see ante, p. 42.

Article 69 is entitled: "Votes of Members", and provides:

- "Subject to any special rights, restrictions or prohibitions as regards voting for the time being attached to any special class of shares in the capital of the company, on a show of hands every member personally present shall have one vote only, and in case of a poll every member shall (subject as hereinafter provided) have one vote for every share held by him. The holders of the preference stock shall not as such be entitled to receive notice of or to attend or vote at any general meeting of the company unless (A) the fixed cumulative preferential dividend on the preference stock is in arrears or unpaid for six months prior to the date of the meeting; or (B) a resolution is proposed to be passed at such meeting for the sale of the company's undertaking, or for the winding-up or reduction of the capital of the company, or for altering the regulations of the company so as directly to interfere with or affect the rights and privileges of the said holders . . ."
- C As a matter of language, that article differs to an appreciable extent from the corresponding article of the Bristol Aeroplane Co., Ltd., but the difference is, for present purposes, I think, not material. For one thing, in the present case we are not concerned with the question whether the preference stockholders are entitled to be summoned to a general meeting. I observe, however, that, as a matter of drafting, it is a curious feature of the article that if the rights
- D and privileges of the stockholders are to be directly interfered with or affected otherwise than by or as part of an alteration of the regulations, and the case is not one of winding-up, reduction of capital, or a sale of the company's undertaking, it would appear that the preference stockholders are not, at any rate by the express terms of this article, entitled to be summoned to the meeting. It is that passage, "so as directly to interfere with or affect", which is in some
- E measure a reflection (a point I made earlier) of the terms of the scheme of arrangement of 1943, though, as counsel for the preference stockholders has pointed out, this draftsman (who had apparently, as he said, a liking for this word "affect") inserted in the article, after the words "directly to interfere with", the words "or affect".

- F The articles referring to the powers of paying dividends I do not propose to read in full, but I mention art. 107 and art. 108, and capitalisation is provided for in art. 115:

- "The company in general meeting may at any time and from time to time pass a resolution that any sum not required for the payment or provision of any fixed preferential dividend, and . . . standing to the credit . . . [of certain accounts] be capitalised, and that such sum be
- G appropriated as capital to and amongst the ordinary shareholders in the shares and proportions in which they would have been entitled thereto if the same had been distributed by way of dividend on the ordinary shares, and in such manner as the resolution may direct . . ."

- H It is argued by counsel for the preference stockholders (an argument which found favour with the learned judge), that the court must regard the use of the word "affected", particularly in art. 54, and give it a meaning distinct from its associated words, "modified, dealt with or abrogated", and that, if it does, the conclusion is inevitably reached that the present proposal, which will swell the voting rights of the ordinary shareholders as a body, as compared with the preference stockholders, does involve an "affecting" of the rights or privileges of the preference stockholders. In my judgment, notwithstanding the differences that are to be discerned between these articles and those of the

Bristol Aeroplane Co., Ltd., we are in this case bound by the decision of this court in *White v. Bristol Aeroplane Co., Ltd.* (1) and must hold, contrary to the argument of counsel for the preference stockholders, that there is no such "affecting" of the rights or privileges of the preference stockholders as entitles them to be summoned to a separate meeting. It is to be noted that in the *Bristol Aeroplane Co.* case (1) this court decided that the word "affect" in articles of this kind is not to be given so broad a sense as to mean or cover any "affecting" in a business sense. Without taking time to read it, I refer to what I myself said in *White v. Bristol Aeroplane Co., Ltd.* (1) (ante, p. 43), where I made reference to the two earlier cases of *Re Mackenzie & Co., Ltd.* (2) and *Greenhalgh v. Arderne Cinemas, Ltd.* (3). Of course, articles which come before the court may be such that, as a matter of construction, the general principle which I have stated is shown to be inapplicable, but I do not think that is so in the present case. The absence from art. 48 of certain sentences which found their place in the corresponding art. 62 in *White v. Bristol Aeroplane Co., Ltd.* (1), does not, in my judgment, create such a distinction. Nor does the absence from art. 50 in the present case of the provision that, in the absence of some direction in the resolution creating the new shares, they shall be automatically ordinary shares, even when added to the other differences, cause any difference in result.

It seems to me that, if the argument is carried to its logical conclusion, in this case, as in *White v. Bristol Aeroplane Co., Ltd.* (1), absurd results would follow. Carried to its fullest extent, the argument must, I think, mean that any activity on the part of the directors in pursuance of their powers which may in any way affect or touch the value of any of the privileges attached to the preference stock would be rendered ineffective save with the prior sanction of a special meeting of the preference stockholders. Such a conclusion obviously runs counter to the ordinary conception of the relationship between preference and ordinary stockholders in a company of this character. Even if some limit is put on the word "affect", what follows? The most that can be said here is that the swelling of the number of ordinary shareholders affects the voting rights. It does not. As JENKINS, L.J., pointed out (and the analogy seems to me a good one), if it is discovered that there are more adult persons in the country than you thought, the voter would on this view be enabled to say that his voting rights were affected merely because a greater number of other people had similar voting rights. That seems to me to be wrong.

There is a third point in the present case which seems to me to point strongly in the same direction. Article 115 of the articles, the "Capitalisation of Reserves", on its fair construction, obviously contemplates, I should have thought, that, if resort is had to the powers conferred thereby, the undistributed profits not required to satisfy the prior claims of the preference stockholders may and will be utilised in paying up in full ordinary shares, or, perhaps, debentures, to be distributed to the existing ordinary shareholders. There is no hint in art. 115 that such a transaction will involve an "affecting" of the rights of the preference stockholders so as (in the result) only to be possible if the prior authority of an extraordinary resolution of the existing preference stockholders has been obtained. It is true that the words "subject to the provisions of art. 54" would not necessarily be required if, in truth, the powers of art. 115 could only be exercised subject to the prior sanction of such an extraordinary resolution of the preference stockholders, but I think that the absence of any such reference is a strong indication that the sort of thing which is now proposed was not regarded, and could not have been regarded, according to the fair interpretation of the article, as involving any modification of the rights, or other affecting of the rights, of the preference stockholders. If in some respects it is thought that the present articles are slightly less favourable from the point of view of the ordinary shareholders than were the articles in

White v. Bristol Aeroplane Co., Ltd. (1), on the other hand, in the latter case it was a marked feature of the scheme under debate that the new shares which were to be paid up in the hands of the ordinary stockholders included a block of preference shares in number sufficient, at a meeting exclusively of preference stockholders and preference shareholders, to enable the ordinary stockholders to outvote the existing preference stockholders. No such feature appears in the present case.

- A I do not find it necessary to pursue this matter, but I venture to refer to one other point. Article 54, in which this word "affected" has been inserted, is of a nature very common and well-known to those concerned in this branch of the law. It is a provision headed in these articles (as such provisions are, so far as I know, invariably headed), "Modification of Rights". It would be a curious heading if modification were only one aspect of a far wider subject-matter, viz., affecting of rights in any way as a matter of business or as a matter of law. The answer might well be, as JENKINS, L.J., suggested, that the word "affected" ought rather to be construed by reference to the three expressions which follow, "modified, dealt with or abrogated", i.e., that those last three words should be treated as exegetic of the word "affected".
- B If that be right, at any rate it makes the heading of the article, "Modification of Rights", less misleading. For the reasons I have given, I have formed a view different from that which commended itself to DANCKWERTS, J., and I think that this appeal should be allowed.
- C

- JENKINS, L.J.: I agree. There is very little which I can usefully add, for I think this appeal is in substance covered by the decision of this court in *White v. Bristol Aeroplane Co., Ltd.* (1), as the reasoning in the judgment just delivered by my Lord sufficiently shows. But I may, perhaps, allow myself to add this. It is claimed that the issue of further ordinary shares, carrying the normal voting rights accorded by art. 69, will "affect" the rights or privileges attached to the preference stock, within the meaning of art. 54, and the only right or privilege now in question as allegedly so "affected" is the right of voting. In other words, it is said that the preference stockholders have a right of voting which is in the nature of a right or privilege attached to that class of stock and which will be affected by the issue of further ordinary shares with the normal voting rights accorded to holders of ordinary shares under the articles.
- D
- E

- F In order to assess the merits of that contention it is necessary to consider what rights the preference stockholders have in regard to voting, for until that is done one cannot say whether what is proposed will affect those rights or not—as was, indeed, pointed out by ROMER, L.J., in his judgment in *White v. Bristol Aeroplane Co., Ltd.* (1). If I may be forgiven for reading the first few lines of art. 69 again, the only provision conferring any right of voting on anybody, as I understand these articles, is this:

- G "Subject to any special rights, restrictions or prohibitions as regards voting for the time being attached to any special class of shares in the capital of the company, on a show of hands every member personally present shall have one vote only, and in case of a poll every member shall (subject as hereinafter provided) have one vote for every share held by him."

- H There is no question of any special rights as to voting in this case. There are certain restrictions (as appears from the latter part of art. 69) imposed on the preference stockholders in regard to the receiving of notices and the right to attend and vote at meetings, but there are no special rights of voting here in question, and the only substantive provision conferring any right of voting on the preference stockholders is the portion of art. 69 which I have read. As I understand it, the word "member" in that article means member for

the time being. I think that is borne out by the statutory definition of "member" in the Companies Act, 1929, s. 25 (2), which is reproduced in s. 26 (2) of the Act of 1948. Section 25 (2) of the Act of 1929 provides:

"Every other person who agrees to become a member of a company, and whose name is entered in its register of members, shall be a member of the company."

Indeed, it is obvious that "member" in this article means member for the time being and is not confined to a member who became such on or before some particular date. Thus, the right given in terms is a right conferred on every member for the time being of the company, and it is only because the preference stockholders are included amongst the members for the time being of the company that they have any right of voting at all. It seems to me that where a right of voting is given in those terms it is impossible for a member of a company to say that it entitles him to object to the right of voting thus provided for being enjoyed by any other members for the time being who may become members in respect of shares in the capital of the company issued after he himself has become a member. The right is in terms a right to be enjoyed in common by all shareholders for the time being, and there is no special right attached to any particular class of shares and, in particular, no special right attached to the preference stock. It is no part of the bargain contained in art. 69—or, indeed, any other article, so far as I have been able to discover—between the company and the preference stockholders or the ordinary shareholders that when new shares are issued they shall not carry the ordinary voting rights provided for by art. 69. Indeed, the articles clearly contemplate that unless some special provision is made in regard to voting rights on the issue of new shares they shall carry the ordinary right of voting conferred by art. 69. It follows, in my opinion, that the rights as to voting conferred on the preference stockholders are such that it is quite impossible to say that those rights are "affected", within the meaning of art. 54, by what is proposed to be done here as regards the issue of further ordinary shares. Accordingly, I agree that this appeal should be allowed.

MORRIS, L.J.: I agree.

Appeal allowed.

Solicitors: *Slaughter & May* (for the defendants); *Slaughter & May*, agents for *Middletons*, Leeds (for the company).

[Reported by F. GUTTMAN, ESQ., Barrister-at-Law.]

ISLE OF WIGHT COUNTY COUNCIL v. WARWICKSHIRE
COUNTY COUNCIL.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Lynskey and Pearson, JJ.),
February 5, 6, 1953.]

Children and Young Persons—Approved school order—Residence of young person unknown—No power, on appeal, of court of summary jurisdiction or quarter sessions to name local authority within whose district offence committed—Children and Young Persons Act, 1933 (c. 12), s. 70 (2), s. 90 (2), (3).

On Sept. 7, 1951, a juvenile court found a young person guilty of larceny and ordered him to be sent to an approved school under s. 57 (1) (a) of the Children and Young Persons Act, 1933, naming in the order, for the purposes of s. 70 (2) of the Act, the respondents as the local authority within whose district the boy was resident. On Apr. 29, 1952, a court of summary jurisdiction heard an appeal by the respondents under s. 90 (2) of the Act and varied the order by substituting for the name of the respondents that of the appellants as the local authority within whose district the boy was resident. The appellants appealed under s. 90 (3) of the Act to quarter sessions, and on June 19, 1952, the appeal committee found that at the date on which the approved school order was made the boy was not resident anywhere for the purposes of s. 70 (2) of the Act, and held that they had jurisdiction to vary the order as made by the juvenile court by substituting therein for the name of the respondents the name of the appellants as the local authority within whose district the boy committed the offence.

HELD: the appellants' appeal to quarter sessions was brought under s. 90 (3) of the Act, and under that sub-section it was an appeal only against the order made by the court of summary jurisdiction under s. 90 (2) and not an appeal against the order made by the juvenile court; the power, where the residence of a young person was unknown, to name, for the purposes of s. 70 (2), the local authority within whose district the offence was committed, was confined to the juvenile court acting under s. 57 (1) (a) and was not conferred on a court of summary jurisdiction dealing with an appeal under s. 90 (2) or on quarter sessions dealing with an appeal under s. 90 (3); and, therefore, the decision of the appeal committee was wrong.

Per curiam: There is a lacuna in s. 90 (2) in that it gives a local authority a right to appeal only if they desire to contend that the person to whom the order relates (i) was resident in the district of some other local authority, or (ii) was resident outside England. It confers no right of appeal where a local authority deny that the person was resident in their district and allege that the place of his residence is unknown.

FOR THE CHILDREN AND YOUNG PERSONS ACT, 1933, s. 90, see HALSBURY'S STATUTES, Second Edn., Vol. 12, p. 1040.

Case referred to:

(1) *Stoke-on-Trent Borough Council v. Cheshire County Council*, [1915] 3 K.B. 699; 85 L.J.K.B. 36; 113 L.T. 750; 79 J.P. 452; 19 Digest 577, 135.

CASE STATED by Isle of Wight Quarter Sessions.

The appeal committee of the County of the Isle of Wight Quarter Sessions, sitting at Newport, on June 19, 1952, dismissed an appeal by the appellants, the Isle of Wight County Council, under s. 90 (3) of the Children and Young Persons Act, 1933, against an order dated Apr. 29, 1952, made under s. 90 (2) of the said Act by a court of summary jurisdiction sitting at Ryde, whereby an approved school order, dated Sept. 7, 1951, and made by a juvenile court

sitting at Ryde under s. 57 (1) (a) of the Act, was varied by substituting therein the name of the appellants in place of the respondents, the Warwickshire County Council, as the local authority within whose district a boy, Allan White, was resident.

Before the appeal committee it was proved or admitted that the boy was born on June 25, 1935, and was at all material times a "young person" within the meaning of s. 107 (1) of the Act; that at all material times the parents of the boy were separated, the father living near Rugby in the county of Warwick and the mother's last known address in August, 1948, being Butlin's Holiday Camp, Skegness; that in August, 1948, the mother put the boy on a train at Peterborough and sent him to his grandmother who lived near Rugby; that the grandmother was unable to care for the boy, that the father could not or would not have the boy to live with him, and that the respondents took him temporarily into their care under s. 1 of the Children Act, 1948, and accommodated him in Warwickshire until July 28, 1950, the Warwickshire Education Committee accepting responsibility for his maintenance; that from July, 1950, until Sept. 5, 1950, he stayed with friends in Warwickshire; that on the latter date he joined the Royal Navy, but was discharged, "services no longer required", on Aug. 14, 1951, and provided with a railway ticket to Rugby, as the place of residence of his father as next of kin; that he used the ticket as far as London and then travelled by train to Southampton to join the merchant navy; that during his search for a recruiting office he saw a steamer bound for the Isle of Wight, and, thinking he might obtain work there, purchased a single ticket to Cowes arriving there on Aug. 15, 1951; that the boy remained on the Isle of Wight until Aug. 18, 1951, sleeping in the open and taking meals in cafés; that on Aug. 17, 1951, he took a sailing dinghy at Cowes and sailed it out to sea, but, finding the sea too rough, returned and landed at Bembridge; that at Bembridge he boarded a yacht, and on Aug. 18, 1951, cast off intending to make for France, but that on Aug. 19, 1951, the yacht was intercepted by a motor torpedo boat and the boy was brought back to England; that on Sept. 7, 1951, a juvenile court, sitting at Ryde, found the boy guilty of the larceny of the yacht and made an approved school order, naming the respondents as the local authority within whose district the boy was resident.

It was contended on behalf of the appellants (i) that for the purposes of s. 70 (2) of the Act the material date on which residence had to be determined was the date on which the approved school order was made, and that residence for the purposes of the said section meant the place at which the young person ordinarily had his home; (ii) that at the material date there was no evidence that the boy was resident in the Isle of Wight; (iii) that, the juvenile court having determined that the boy was resident at the material dates in the county of Warwick and having named the respondents in the approved school order under s. 70 (2) of the Act, the court of summary jurisdiction to whom the respondents appealed under s. 90 (2) of the Act had power to vary the said order only if they established that the boy was either resident in the district of some other local authority or was resident outside England, and that s. 90 (2) conferred no power on the court of summary jurisdiction to vary the said order by substituting for that of the respondents the name of the appellants as the local authority within whose district the boy committed the offence, his residence at the material date being unknown; (iv) that the respondents had failed to discharge the burden of proof that the boy was resident in the appellants' district, and that the decision of the court of summary jurisdiction must be reversed unless the appeal committee had jurisdiction to vary the approved school order and by an order to exercise any power which might have been made and exercised by the juvenile court; (v) that the right of appeal to quarter sessions was confined, by s. 90 (3), to such persons as were aggrieved

by a decision or order of a court of summary jurisdiction under s. 90 (2); and (vi) that, in view of the limitations on the powers granted to a court of summary jurisdiction by s. 90 (2), the jurisdiction of the appeal committee of quarter sessions was confined to the making of any order which might have been made by the court of summary jurisdiction under s. 90 (2), and did not extend to the making of any order which might have been made by the juvenile court.

A It was contended on behalf of the respondents (i) that for the purposes of s. 70 (2) residence had to be determined at the date of the commission of the offence, that residence ordinarily meant the place where a person ate and slept, and that at the date of the commission of the offence the boy was resident in the Isle of Wight; alternatively, (ii) that the boy's residence at the material date was unknown and the juvenile court should have named in the approved school order the local authority within whose district the boy committed the offence, and that by virtue of s. 1 of the Summary Jurisdiction (Appeals) Act, 1933, the appeal committee had jurisdiction to make any order which the juvenile court might have made, and, consequently, had jurisdiction to vary the order in accordance with s. 70 (2) of the Children and Young Persons Act, 1933, by naming the appellants in place of the respondents as the local authority within whose district the boy committed the offence.

C The appeal committee were of the opinion: (i) that for the purposes of s. 70 of the Act the material date on which residence had to be determined was the date on which the approved school order was made, on which date the boy was not resident anywhere; (ii) that the proper order to make was to vary the approved school order by substituting therein for the name of the respondents the name of the appellants as the local authority within whose district the boy committed the offence; (iii) that there was jurisdiction to make such an order because (a) if the Act could reasonably be construed in such a way as to obviate what, as was conceded, would otherwise be a lacuna in its provisions, it should be so construed; (b) when an approved school order was made by a juvenile court the local authority was frequently neither heard nor represented; (c) consequently, the right of appeal to a court of summary jurisdiction conferred on such a local authority by s. 90 (2) of the Act frequently represented the first opportunity for such a local authority to be heard at all; (d) the words "may appeal to" in s. 90 (3) should be construed as "may apply to"—the analogous procedure under the previous provisions of s. 74 of the Children Act, 1908, was therein stated to be by way of application; (e) the right of appeal conferred by s. 90 (3) of the Act on any person aggrieved by an order made under the last foregoing sub-section was a right of appeal against an approved school order made by a juvenile court although varied by a court of summary jurisdiction and not merely a right of appeal against a decision of a court of summary jurisdiction; (f) there was, therefore, jurisdiction to review the approved school order as made by the juvenile court and to employ all the powers conferred on the appeal committee by s. 31 of the Summary Jurisdiction Act, 1879, as substituted by s. 1 of the Summary Jurisdiction (Appeals) Act, 1933. The appellants appealed.

Brodrick for the appellants.

Marshall, Q.C., and *M. G. Polson* for the respondents.

H LORD GODDARD, C.J.: This is a Case stated by the appeal committee of the quarter sessions for the Isle of Wight, before whom an appeal was brought by the appellants against an order made by a court of summary jurisdiction under s. 90 (2) of the Children and Young Persons Act, 1933. The case raises a curious and interesting point, and I am conscious that in allowing this appeal the result may not seem to be one that operates with conspicuous justice. The conclusion to which we have come is based on the fact that there is a curious lacuna in s. 90 of the Children and Young Persons Act, 1933, to which, if our decision is not reversed by any higher court, it is desirable that the

attention of the Home Office should be called with a view to considering an amendment of the law by legislation.

On Sept. 7, 1951, a boy was brought before the justices in the Isle of Wight, sitting as a juvenile court, charged with stealing a yacht. He had gone on board a yacht which was lying in Bembridge Harbour and was endeavouring to sail it to France, but he was caught by a motor boat, was brought back, and was charged with and convicted of stealing the yacht. The justices committed him to an approved school and made an order on the respondents as the local authority responsible for his maintenance, no doubt because the information before them was that his father lived near Rugby. The respondents having been served with that order, but not having been present at the hearing before the justices, which, apparently, was not necessary, took advantage of s. 90 (2) of the Children and Young Persons Act, 1933, and appealed to a court of summary jurisdiction sitting in the Isle of Wight, contending that the boy was resident in the district of some other local authority than theirs, and that, therefore, the name of some other local authority ought to be inserted in the order instead of the Warwickshire County Council. The justices heard that appeal and substituted the appellants as the local authority. The appellants then appealed under s. 90 (3) of the Act against that order to quarter sessions, where the appeal committee upheld the order, but stated a Case for the opinion of this court.

[HIS LORDSHIP stated the facts and continued:] The appeal committee found that the boy was not resident either in Warwickshire or in the Isle of Wight, and this court cannot see that they have any power to say that because the boy was "sleeping rough" in the Isle of Wight for two nights he must be deemed to have been residing in the Isle of Wight. At any rate, he seemed to have no intention of residing there, for, if he had gone there thinking he was going to find work, he seems to have abandoned his intention very quickly because he got in the yacht and sailed away. The case seems to me, with all respect, to be wholly different from what might have been the position if the boy had gone into some employment in the Isle of Wight because then, like any other servant, he would be residing there: see *Stoke-on-Trent Borough Council v. Cheshire County Council* (1). That being the case, when this boy was brought before the justices and found guilty of larceny, the justices had to consider the provisions of s. 70. By s. 70, as amended by the Children Act, 1948, s. 60 and sched. IV, Part I, it is provided:

"(1) Every approved school order shall contain a declaration—(a) as to the age; and (b) as to the religious persuasion; of the child or young person with respect to whom it is made. (2) Every approved school order, other than an order . . . made by reason of the commission of an offence under s. 10 of this Act (which relates to the punishment of vagrants preventing children from receiving education), shall name the local authority within whose district the child or young person was resident, or if that is not known, the local authority or one of the local authorities within whose district the offence was committed or the circumstances arose (as the case may be) rendering him liable to be sent to an approved school: Provided that— . . . (b) in the case of a child or young person not resident in England, the order shall, instead of naming a local authority, state that he was resident outside England."

Therefore, when a case is before the juvenile court the justices may, and, indeed, must, inquire so far as they can where the young person is resident. If they can find where he is resident, they insert in the order the name of the local authority for that place of residence, but, if they cannot find where he is resident, they should put in the district in which the offence was committed. The third case is where he is resident out of England, but we can leave that out of account. So that, when the boy was brought before the juvenile court,

if the justices had not found he was resident in Warwickshire, they could have inserted the name of the appellants since the Isle of Wight was the place where the offence was committed, but they did not do so. They named the respondents.

By s. 90 (2) it is provided:

A "A court by which an approved school order is made shall cause a copy thereof to be served forthwith on the local authority named in the order, and if that authority desire to contend that the person to whom the order relates was resident in the district of some other local authority or was
B resident outside England they may, by notice in writing given at any time within three months after the service upon them of the order, appeal—
C (a) if the order was made by a petty sessional court, to a court of summary jurisdiction acting for the same petty sessional division or place; and
(b) if the order was made by a court which was not a petty sessional court, to a court of summary jurisdiction having jurisdiction in the place where that court sat, or in the place from which the person to whom the order relates was committed for trial, and if, upon the hearing of the appeal, the court is satisfied that the person to whom the order relates was resident in the district of that other local authority, or was resident outside England, the court may by order vary the approved school order by substituting therein the name of that other authority or, as the case may be, a statement that the said person was resident outside England."

D It will be observed that the local authority does not have to be served until the order has been made. The curious thing about that section is that the draftsman has entirely overlooked the fact that if the place where the young person is resident cannot be ascertained, the place to be named in the order is the place where the offence was committed. Section 74 in the Children Act, 1908, did make such a provision, but in the Act of 1933 there is the curious lacuna that
E s. 90 (2) for some reason or another, which I can only assume to be an oversight, omitted to deal with the case of a local authority being able to say: "This boy does not reside in our district and the district to be named in the order is the district where the offence was committed". It only gives them power to go to the court and say: "He does not reside in our district, but he resides in the district of some other local authority". What is to be done in a case where a local authority satisfies the court that the boy does not reside in their district, but cannot show where he does reside? The section has not made any provision for it, but the power that is given by the section to the court on the appeal, as
F the statute calls it, or application, as counsel for the respondents invites us to call it, is to insert the name of another local authority where it is proved that the boy resides in the district of that local authority. It does not, as it appears to me, give any power to the court, where proceedings are taken under s. 90 (2), to insert in the approved school order the name of the local authority in whose district the offence was committed, and, unless the court can insert the name of another local authority on it being proved that the boy is resident there,
G which is the only power that is given to the court, it follows that the order made by the juvenile court must stand.

H The result does not seem just to the respondents, but an order was made on them, they cannot show that the boy is resident in the district of any other local authority or out of England, and there does not seem to be any power in the court to vary the order. The court of summary jurisdiction varied the order by inserting the name of the local authority, not within whose district the boy resided, but the authority within whose district the offence was committed, and it does not appear to me that the section gives them power to do that.

Counsel for the respondents invited us to say that the order should be upheld because the appeal committee ought to have held that the boy was resident in the Isle of Wight since he had slept there for two nights preceding

the offence. The appeal committee state that they find as a fact that he did not reside in the Isle of Wight, and, on the evidence, we think they were amply justified in coming to that conclusion. I should have come to that conclusion on the evidence. I do not think it can be said that the boy resided anywhere. He went to the Isle of Wight, and then left it; he had no place in which to live there, and I think it would be wholly wrong to say that he was residing in the Isle of Wight. It was also said that this appeal could be treated by the appeal committee as an appeal against the order of the juvenile court. I think that is the way in which the appeal committee did regard the matter and thought they were able to do what they considered to be justice and so get over the difficulty caused by this lacuna, but I am afraid that that is really writing something into the Act which is not there. Admittedly, this appeal was brought under s. 90 (3) as an appeal against an order which was made under s. 90 (2)—the “last foregoing sub-section”—and it cannot be an appeal against the original order which was made some time before under s. 57 (1) (a). Section 90 (2) and (3) appear to me to give particular, peculiar, and special remedies to a local authority—a right of appeal to a court of summary jurisdiction under sub-s. (2) if they find they have been named in an order when they ought not to have been so named, and a right of appeal to quarter sessions under sub-s. (3) against the decision of the court of summary jurisdiction. I do not think that the local authority in such a case as this can appeal to quarter sessions under s. 102 (1) (c), as amended by the Children Act, 1948, s. 60 and sched. III, which provides for an appeal to quarter sessions and reads:

“In the case of an order requiring a person to contribute in respect of himself or any other person, by the person required to contribute.”

But it is not necessary to decide the point. I think that that is an appeal which is given to a parent or guardian, or a person who stands in loco parentis, who may be ordered to contribute to the upkeep of the child. I think an appeal by a local authority is an appeal which is given by s. 90 (3) and by no other provision. For these reasons, not without considerable hesitation and some regret, I think this appeal succeeds.

LYNSKEY, J.: I agree for the reasons given by my Lord. I hope steps will be taken to fill the gap which appears to exist in s. 90 (2) of the Act.

PEARSON, J.: I agree.

Appeal allowed.

Solicitors: *L. H. Baines*, clerk of the county council (for the appellants); *Sharpe, Pritchard & Co.*, agents for *R. M. Willis*, Warwick (for the respondents).

[Reported by F. GUTTMAN, ESQ., Barrister-at-Law.]

Re HENRY WILL TRUST. MUSSETT *v.* SMITH AND OTHERS.

[CHANCERY DIVISION (Upjohn, J.), February 4, 1953.]

Will—Legacy—Gift of income until marriage—Thereafter disposition of corpus—Death of legatee unmarried—Devolution of corpus.

By his will, dated May 22, 1899, a testator, who died on Mar. 22, 1901, declared: "To my trustees I give the sum of £2,000 upon trust to pay the income thereof to my grand-niece [M.A.M.] until she marries and then to settle the said sum upon her for her benefit as my trustees think fit". The testator then disposed of his residuary estate. On Sept. 20, 1951, M.A.M. died, a spinster. On the question who was entitled to the corpus of the legacy,

HELD: in view of the disposition of corpus directed to take effect on the marriage of M.A.M., the gift to her until she married was not an indefinite gift of income, but a gift of income for a time, and, as she did not marry, the disposition did not take effect, and on her death the £2,000 fell into the residuary estate.

Rishton v. Cobb (1839) (5 My. & Cr. 145), distinguished.Dictum of BUCKLEY, L.J., in *Re Mason* ([1910] 1 Ch. 700), applied.

AS TO UNLIMITED GIFT OF INCOME, see HALSBURY, Hailsham Edn., Vol. 34, p. 243, para. 295; and FOR CASES, see DIGEST, Vol. 44, pp. 667-669, Nos. 5066-5094.

Cases referred to:

(1) *Rishton v. Cobb*, (1839), 5 My. & Cr. 145; 9 L.J.Ch. 110; 41 E.R. 326; 44 Digest 220, 442.

(2) *Re Boddington*, (1884), 25 Ch.D. 685; 53 L.J.Ch. 475; 50 L.T. 761; 44 Digest 1225, 10603.

(3) *Re Howard*, [1901] 1 Ch. 412; 70 L.J.Ch. 317; 84 L.T. 296; 44 Digest 961, 8144.

(4) *Re Mason*, [1910] 1 Ch. 695; 79 L.J.Ch. 605; 102 L.T. 514; 44 Digest 1178, 10194.

(5) *Jones v. Westcomb*, (1711), 1 Eq. Cas. Abr. 245 (21 E.R. 1022); Prec. Ch. 316 (24 E.R. 149); 44 Digest 1175, 10165.

ADJOURNED SUMMONS to determine, inter alia, whether, on the true construction of the will of Thomas Henry, deceased, the legacy of £2,000 bequeathed to his trustees on trust to pay the income thereof to Margaret Alice Mussett until she married and then to settle the said sum on her for her benefit was vested absolutely and indefeasibly in the first defendant, her legal personal representative, as part of her estate notwithstanding that she died without ever having been married, or whether, on the death of Margaret Alice Mussett, the said legacy fell into the testator's residuary estate.

R. W. Goff for the plaintiff, the sole surviving trustee of the will.*Parbury* for the first defendant, the legal personal representative of Margaret Alice Mussett.*Peter Foster* for the second and fourth defendants, interested in residue.*N. S. S. Warren* for the third defendant, the Treasury Solicitor, representing persons interested in property not effectively disposed of by the will.

UPJOHN, J.: The first question in this summons raises an interesting point of construction on the will of Thomas Henry. The will is dated May 22, 1899, the testator died on Mar. 22, 1901, and his will with a codicil was proved by the executors named in the will on Apr. 24 of the same year. The plaintiff is the surviving trustee of the will.

By his will, the testator bequeathed a number of pecuniary legacies. I am concerned only with one, which was bequeathed in this form:

"To my trustees I give the sum of £2,000 upon trust to pay the income

thereof to my grand-niece Margaret Alice Mussett until she marries and then to settle the said sum upon her for her benefit as my trustees may think fit."

After giving certain further pecuniary legacies, the testator disposed of his residuary estate. On Sept. 20, 1951, Margaret Alice Mussett died, and her personal representative is the first defendant. The question is whether, as Miss Mussett died a spinster, her estate is entitled to the corpus of the legacy of £2,000 or whether it falls into residue.

I propose, in the first place, to consider the construction of this clause apart from any authority. There is a gift of income to Margaret Mussett until she marries and then a direction to settle the sum on her for her benefit. That plainly means on her marriage. Apart from authority, I should have thought that a gift until marriage was necessarily a gift which must come to an end on death or marriage. That is followed by a gift of corpus on marriage, but, nothing being said with regard to the disposition of corpus on death unmarried, I should have thought that it was undisposed of, and, therefore, fell into residue. A direction to settle upon a person for her benefit on marriage clearly cannot be construed as including a direction to settle "for her benefit" on death unmarried.

It is said, however, that there are authorities which bind me to hold that this is an indefinite gift of income until marriage and that, as the lady died a spinster, that indefinite gift continues and carries the corpus. The principle which it is said is applicable was first laid down in *Rishton v. Cobb* (1), in which there was a direction to invest £2,000 in the names of the trustees and to pay the income to the legatee "so long as she shall continue single and unmarried". There was no gift over in express terms of the income or of the corpus on marriage. LORD COTTENHAM, L.C., said (5 My. & Cr. 152):

"If, therefore, she had been single and unmarried, and had so remained, she would have been entitled to the dividends, without any limitation of time. Her interest would not have been determinable by her death, but (independently of the forfeiture upon alienation) only by her ceasing to be single and unmarried. This is different from a gift of dividends during widowhood. The state of widowhood must determine with the life of the widow; but the gift, so long as the legatee shall remain single and unmarried, must be considered as requiring the act of marriage to determine the interest. This gift, therefore, is of the dividends of stock, without limitation as to time, which carries the stock itself . . ."

That decision has been severely criticised. In *Re Boddington* (2) the EARL OF SELBORNE, L.C., sitting in the Court of Appeal, plainly did not like it. He said (25 Ch.D. 689):

"With regard to the case of *Rishton v. Cobb* (1), the respect I feel for the great judge who decided it prevents my saying more of the judgment than that I do not understand it, and that if it were applicable to this case I should hesitate for some time before I could follow it."

In 1901, however, the late SIR GEORGE FÁRWELL, in *Re Howard* (3), dealing with the passage from *Rishton v. Cobb* (1) which I have read, said ([1901] 1 Ch. 413):

"I understand LORD SELBORNE to mean that *Rishton v. Cobb* (1) can be supported on the ground stated by LORD COTTENHAM in the above passage. The Court of Appeal did not, and in my opinion could not, overrule it, and it is binding on me."

In that case, again, it is to be observed that the direction to pay to the wife was so long as she remained unmarried, and there was no further disposition of corpus.

In 1910 the matter was again before the Court of Appeal in *Re Mason* (4), and again the decision in *Rishton v. Cobb* (1) came in for criticism. COZENS-HARDY, M.R., said with regard to the will in *Re Mason* (4) ([1910] 1 Ch. 697):

"It will be observed here that there is not in form an absolute indefinite gift of income to Alice. In form it is limited up to a time. It is until she shall marry. It will also be observed that there is a gift over of the residue to the sons in the event of her marriage—a gift over of the residue, diminished only in that event by a capital gift of £3,000 to the daughter. The question of construction for us to determine is whether on the face of this will, having regard to that gift over, we are bound to say that by construction there is an absolute indefinite gift of income to Alice, and that the period which and which alone was to limit it has never happened and can never happen, and that therefore the gift over can never take effect."

He proceeds to discuss the decision in *Rishton v. Cobb* (1) which JOYCE, J., in the court below, had reluctantly felt bound him. After dealing with that case, the Master of the Rolls dealt with *Re Howard* (3). He said (*ibid.*, 699):

"A similar point came before FARWELL, J., in *Re Howard* (3). There there was no gift over—nothing whatever but a simple trust to pay the income to Amelia Howard so long as she remained unmarried. FARWELL, J., held that in the absence of a gift over the passage I have read from *Rishton v. Cobb* (1) ought to be followed, that he had no power to overrule it, and that the lady was therefore entitled absolutely. In the present case I think there is enough in the fact of the gift over to enable us to hold that the gift here is to be read as a gift to the daughter during her life or until marriage, and, that being so, I think that the gift over, although it is only expressed to be a gift over on her marriage, falls within the well-known rule of *Jones v. Westcomb* (5) and takes effect either on the death or on the marriage of Alice—in the case of her marriage, subject to the deduction of the £3,000 legacy to her; in the case of her death, without any such deduction. On the whole, therefore, I think that the judgment of JOYCE, J., must be reversed and that this appeal must be allowed."

BUCKLEY, L.J., said (*ibid.*, 700):

"The learned judge felt himself constrained by authority to hold that Alice Mason took an absolute interest. The question is whether that is right. Now Alice does not take an absolute interest unless there is an indefinite gift of income. Reading this will I cannot find that there is. There is a gift of income to Alice until a time, and after that time there is another gift, a gift of the corpus. The testatrix has divided the time into two periods, one until Alice marries, and the other after she marries. She disposes of the income during the first period and she disposes of the capital at the commencement of the second period. There is no indefinite gift of income."

Then he discusses *Rishton v. Cobb* (1), and says that he cannot follow (obviously he means "follow" in the sense of "understand") the decision of LORD COTTENHAM.

The fact, however, remains that SIR GEORGE FARWELL regarded the authority of *Rishton v. Cobb* (1) as binding on him. It has, as I have pointed out, been criticised, but in every case where it has been criticised it has been distinguishable, and I regard *Rishton v. Cobb* (1) as binding on me if it is applicable to the words of this will. I do not, however, regard it as so applicable. As I have already indicated, I think that this testator has given income to Miss Mussett until her marriage, and has then disposed of the corpus. It is true that the disposition of corpus on marriage cannot be appropriately described as a gift over, which was the case in *Re Mason* (4); but I do not regard that nicety of

distinction as decisive in this matter. The true distinction is to be found in the passage ([1910] 1 Ch. 700) which I have read from the judgment of BUCKLEY, L.J. There is a disposition of income for a time that is followed by a disposition of corpus, and there is no indefinite gift of income. That is the situation here, and, for the reasons I have given, as Margaret Mussett never did marry, in my judgment, the corpus falls into the residuary estate.

In these circumstances, I think it is unnecessary for me to come to any conclusion on the question whether the direction to settle could be treated as a direction to settle on the usual marriage settlement trusts or whether it was virtually a gift of corpus to her on marriage. The cardinal fact remains that the testator was intending to dispose of corpus on marriage, and that, I think, distinguishes this case from *Rishton v. Cobb* (1). I, therefore, propose to declare that the legacy fell into residue.

Order accordingly. B

Solicitors: *Moon, Gilks & Moon* (for the plaintiff and first defendant); *Sharpe, Pritchard & Co.* (for the second and fourth defendants); *Treasury Solicitor*.

[Reported by R. D. H. OSBORNE, Esq., Barrister-at-Law.]

RIVLIN v. BILAINKIN. C

[QUEEN'S BENCH DIVISION (McNair, J.), December 18, 1952.]

Libel—Privilege—Communication to member of Parliament within precincts of Parliament—Publication not connected with proceedings of Parliament—Contempt of court—Breach of injunction against repetition of libel.

The defendant in an action for libel and slander, against whom an interlocutory injunction had been granted restraining him from further publication of the alleged defamatory statements, delivered to an attendant at the House of Commons a document in a sealed envelope addressed to a member of Parliament, to whom it was handed the same day. The document contained a repetition of the statements which were the subject of the interlocutory injunction.

Held: as the publication was not connected with any proceedings of the House, its delivery to a member of Parliament was not privileged, and the defendant was guilty of contempt of court.

AS TO PARLIAMENTARY PRIVILEGE, see HALSBURY, Hailsham Edn., Vol. 20, p. 466, paras. 565, 566; and FOR CASES, see DIGEST, Vol. 32, p. 109, Nos. 1414-1418.

Cases referred to:

- (1) *Jay & Topham (Proceedings in Parliament: Upon case)*, (1689), 12 State Tr. 821.
- (2) *Lake v. King*, (1670), 1 Saund. 131 (85 E.R. 137); 1 Lev. 240 (83 E.R. 387); 2 Keb. 832 (84 E.R. 526); 1 Sid. 414 (82 E.R. 1189); 22 Digest 146, 1228.
- (3) *Bradlaugh v. Gossett*, (1884), 12 Q.B.D. 271; 53 L.J.Q.B. 209; 50 L.T. 620; 14 Digest 127, 990.
- (4) *Gee's Case*, (1693-97), HOUSE OF COMMONS JOURNAL, pp. 599, 699.

APPLICATION to a judge in chambers for an order of committal for contempt of court, the judgment being delivered in open court.

On Sept. 5, 1951, the plaintiff, Dr. Lilian Rivlin, issued a writ for an injunction and damages in an action for slander and libel against the defendant, George Bilainkin, her former husband. On Oct. 19, 1951, DONOVAN, J., granted an interlocutory injunction in the action restraining the defendant from further publication of slanders relating to the plaintiff and of the libels concerning her contained in a letter or letters written between December, 1950, and April, 1951, by the defendant to the National Society for the Prevention of Cruelty

to Children, or any similar slanders or libels. On Nov. 24, 1952, the defendant delivered to an attendant at the House of Commons a document contained in a sealed envelope addressed to Colonel George Wigg, M.P., to whom it was handed on the same day. On the same day he handed to the attendant four copies of the document in sealed envelopes addressed to four other members of Parliament. The document contained repetitions of accusations against the plaintiff which had been the subject of the interlocutory injunction.

A *Shelley, Q.C.*, and *Dennis Lloyd* for the plaintiff.
Gardiner, Q.C., and *Finer* for the defendant.

McNAIR, J., stated the facts and continued: On examining the contents of the document, I am satisfied that they constitute a repetition of the same accusations against the plaintiff as were the subject-matter of the original application for an injunction made to DONOVAN, J., on Oct. 19, 1951, and, accordingly, in my judgment, it is clear that they are a libel which falls within the injunction granted by that judge. It is argued on behalf of the defendant that this court has no jurisdiction to make an order for committal as the matter complained of, the publication to Colonel Wigg, occurred in the precincts of Parliament and was connected with an attempt to get Parliamentary redress for an alleged grievance. Having examined the authorities, I am satisfied that no question of Parliamentary privilege arises for a variety of reasons, and, particularly, I rely on the fact that the publication was not connected in any way with any proceedings of the House of Commons.

D The defendant has filed an affidavit in which he alleges that his action in approaching the members was bona fide and that he did not realise that it involved any breach of the order in this court, and he makes an apology. In the affidavit he says:

E "At the time I sincerely believed I was not committing any breach of the order. Had I thought it was a breach, I would certainly not have done it as I have no wish to do anything which is in contempt. I respectfully say that I have not wilfully disobeyed the order, but if it is decided that the communication was in breach, then I most humbly apologise, and I ask that in the circumstances I should be excused."

F Having given the matter my most anxious consideration, I have decided that I am prepared to accept that expression of regret, and, accordingly, I will make no order on this application save that the defendant will pay the plaintiff's costs. But the defendant should be warned in no uncertain terms that, if anything of this character occurs again and is brought to the attention of this court, he will be liable to instant committal, and it will not be open to him again to say that he acted in ignorance of his legal rights. No doubt, any judge before whom this matter may come again will bear in mind the warning which I now give him.

Order accordingly.

Solicitors: *Rubinstein, Nash & Co.* (for the plaintiff); *Montagu's and Cox & Cardale* (for the defendant).

[Reported by F. A. AMIES, ESQ., Barrister-at-Law.]

**Re WILLIAMS' WILL TRUSTS. CHARTERED BANK OF
INDIA, AUSTRALIA AND CHINA AND ANOTHER v.
WILLIAMS AND OTHERS.**

[CHANCERY DIVISION (Danckwerts, J.), February 6, 1953.]

*Will—Advancement clause—Advancement in “business”—Medical practice—
Purchase of dwelling-house.*

By his will, dated Dec. 30, 1932, a testator, who died on Oct. 10, 1937, directed his trustees to invest nine-tenths of the net proceeds of the sale of his residuary estate and to pay the income thereof to his son J. for life on protective trusts as therein provided, and further declared that “notwithstanding anything hereinafter contained on my said son attaining the age of thirty-five years my trustees shall have power in their absolute discretion to raise and pay to my said son any part or parts of the said nine-tenths not exceeding altogether twenty-five per cent. thereof for the purpose of starting my said son in business or for the advancement of any business with which he may be concerned”. In 1942 J. became qualified as a medical practitioner and, on Sept. 20, 1943, he attained the age of thirty-five years.

Held: the object of the advancement clause being to assist J. to acquire a gainful occupation, the word “business” included medical practice, and, the possession of a residence convenient (either by reason of its situation or because its accommodation included a surgery) for the purposes of practice being an important element in the advancement in his profession of a medical practitioner, the trustees, on the true construction of the advancement clause, were empowered to expend moneys up to the limit of one-quarter of the fund in purchasing a dwelling-house for J. and his family to be used in connection with a prospective medical practice.

AS TO PRINCIPLES OF CONSTRUCTION OF WORDS IN WILLS, see HALSBURY, Hailsham Edn., Vol. 34, pp. 192-198, paras. 246-253; and FOR CASES, see DIGEST, Vol. 44, pp. 574-583, Nos. 3911-4054.

Cases referred to:

- (1) *Smith v. Anderson*, (1880), 15 Ch.D. 247; 50 L.J.Ch. 39; 43 L.T. 329; 9 Digest 72, 255.
- (2) *Manchester Corpn. v. Buttle*, [1929] 2 Ch. 390; 98 L.J.Ch. 394; 142 L.T. 14; 94 J.P. 33; Digest Supp.
- (3) *Rolls v. Miller*, (1884), 27 Ch.D. 71; 53 L.J.Ch. 682; 50 L.T. 597; 43 Digest 6, 10.

ADJOURNED SUMMONS to determine (i) whether on the true construction of an advancement clause, cl. 4 (3) (c), in the will of John Huw Williams, deceased, the profession of a medical practitioner was a “business” within the meaning of that clause, and, if so, (ii) whether the trustees, in the exercise of the power of advancement contained in that clause, had power to raise and pay moneys to the extent therein specified in or towards the purchase of a dwelling-house to be used as a residence for the first defendant with a view to advancing his prospects in the medical profession.

Rubin for the plaintiffs, the trustees.

R. W. Goff for the first defendant, Jack Islwyn Williams, the son of the testator.

Parbury for the second and third defendants, the wife of the first defendant, and a niece of the testator ultimately entitled.

DANCKWERTS, J.: The will which I have to construe in this case is dated Dec. 30, 1932, and raises a point which seems to me of some interest. The testator died on Oct. 10, 1937, and the clause in question relates to part

of his residuary estate. By the will the testator's residuary estate is devised and bequeathed on the usual trusts for conversion, with a direction that one-tenth of the residuary estate is to be divided between certain persons, with whom I am not concerned, and that the other nine-tenths is to be held on trust for the testator's son, Jack Islwyn, subject to forfeiture in the event of bankruptcy and other events which would disentitle him from receiving the income, with the usual discretionary trust in favour of the son and his wife or their issue if the forfeiture should take effect. After the death of the son, there is a trust of the income for the son's widow and trusts for his children or their issue, and eventually, in case there be no issue, trusts in favour of other persons. The trust for the son is initially, therefore, a determinable life interest, but there is a power of advancement, which is the material clause that I have to construe. That clause, which is cl. 4 (3) (c), is in these terms:

"Provided nevertheless and I declare that notwithstanding anything hereinafter contained on my said son attaining the age of thirty-five years my trustees shall have power in their absolute discretion to raise and pay to my said son any part or parts of the said nine-tenths not exceeding altogether twenty-five per cent. thereof for the purpose of starting my said son in business or for the advancement of any business with which he may be concerned."

In or about 1934 the son decided to go into the profession of medicine, and he became qualified as a doctor in 1942. He served some time in the Royal Army Medical Corps, and it was not until after the war that he had any opportunity of settling down as a normal civilian medical practitioner. On Sept. 20, 1943, he attained the age of thirty-five, and the power of advancement became exercisable. He found considerable difficulty in obtaining a settled practice in medicine and has acted as assistant to doctors and as a "locum", and so on, after the usual hospital appointments which a doctor obtains on being qualified. He desires that the trustees should exercise their powers so that he may obtain a house with a surgery, or, in certain circumstances, without a surgery, because he takes the view—and there is evidence supporting him—that, without the acquisition of convenient premises for the purpose of the practice of his profession, his chances of obtaining a vacancy under the scheme created by the National Health Service Act, 1946, are doubtful. Consequently, the question is raised whether the trustees are entitled to make advances to him in connection with the acquisition by him of some premises for the practice of his medical profession.

I will deal, first, with the question of principle, i.e., whether the words "for the purpose of starting my said son in business or for the advancement of any business with which he may be concerned" will include the purpose of starting or advancing him in the medical profession. It seems to me that this is a clause which ought not to receive a narrow construction. Its object is to assist the son in providing himself with a gainful occupation for the purpose of maintaining himself in life. It has been argued that I ought not to give a wider meaning to the words than is required for advancement for a commercial business, because at the date of the will, and, indeed, for some years afterwards, the son had not contemplated the medical profession and had first been employed in a tea firm and afterwards had gone to Canada, which suggests that ordinary commercial business was an occupation which he had in mind, or, at any rate, was trying for the purposes of his maintenance. That does not seem to me a sound argument. I see no reason why the clause should be limited by those circumstances.

I turn to the meaning of the word "business", and it seems to me that it is plain, on the meanings found attributed to the word in the dictionaries and in the authorities, that "business" is capable of including the practice of a profession. The OXFORD DICTIONARY gives, among others, this meaning:

"Habitual occupation; profession; trade". That plainly includes the profession of a doctor. In *Smith v. Anderson* (1), decided in 1880, a case which, on its facts, has nothing to do with the present, SIR GEORGE JESSEL, M.R., (15 Ch.D. 258, 259) refers with approval to various meanings which he finds of the word "business" in JOHNSON'S DICTIONARY and in the IMPERIAL DICTIONARY. In the latter dictionary he refers to the definition "Business, employment; that which occupies the time and attention and labour of men for the purpose of profit or improvement". SIR GEORGE JESSEL, M.R., goes on to say (15 Ch.D. 258):

"That is to say, anything which occupies the time and attention and labour of a man for the purpose of profit is business. It is a word of extensive use and indefinite signification."

Quoting again from the IMPERIAL DICTIONARY, he says (ibid.):

"'Business is a particular occupation, as agriculture, trade, mechanics, art, or profession, and when used in connection with particular employments it admits of the plural, that is, businesses'. Therefore the legislature [in the relevant Act] could not well have used a larger word."

In *Manchester Corpn. v. Buttle* (2) EVE, J., was concerned with a water Act. Under the Manchester Corporation Waterworks and Improvement Act, 1869, s. 16, no person is entitled to require, nor is the corporation bound to supply, any dwelling-house in the borough with water (otherwise than by meter or special agreement) where any part of such dwelling-house is used for any trade or business purposes. In that case it was held that the residence of a dentist where he practised the profession of dentistry was a dwelling-house used in part for business purposes, and, therefore, the corporation was entitled to demand and be paid an annual sum in addition to the ordinary domestic and public water rates charged in respect of dwelling-houses not so used, although the water supplied was used for domestic purposes within the meaning of a local Act of 1847. In *Rolls v. Miller* (3) LINDLEY, L.J., said (27 Ch.D. 88):

"When we look into the dictionaries as to the meaning of the word 'business', I do not think they throw much light upon it. The word means almost anything which is an occupation, as distinguished from a pleasure—anything which is an occupation or duty which requires attention is a business—I do not think we can get much aid from the dictionary."

That was a case about a restrictive covenant. It is plain, in my view, that the word "business" in this advancement clause is wide enough to include any profession.

The circumstances of the medical profession at the present time require a little examination, because the old custom of buying a practice or a partnership has been largely superseded by the provisions of the National Health Service Act, 1946. The present situation is described in the MEDICAL PRACTITIONERS' HANDBOOK, a book issued by the British Medical Association, in which I find this passage (1950 ed., p. 92):

"As in the past there are three methods of becoming a principal in general practice: (1) To put up one's plate. This method, as it has always been, is both uncertain and expensive. A survey has been made and published of areas where the number of general practitioners appears to be inadequate, but it cannot always be assumed that prospects can be assessed by a study of the doctor-patient ratio alone. A doctor starting a new practice may apply for a basic salary of £300 a year to help tide him over the difficult period of starting. The granting of this salary is vested in the executive council or on appeal to the Minister. There are, however, other factors to be considered. He must obtain a house, a car, furniture and equipment for his surgery, and the outlay may be considerable. Even

in advantageous conditions the outlook facing the 'squatter' is hard, and he should weigh the prospects carefully. (2) To take over a practice rendered vacant by death or retirement. In the past this was effected by purchase and the responsibility for finding a successor fell to the executors or the retiring practitioner. Now the position is changed, and it is the responsibility of the executive council to fill the vacancy, though actual appointments have to be approved by a central professional committee—the medical practices committee. Here again housing difficulties may complicate the picture and it is not surprising that there is very keen competition for vacancies with large lists or in desirable surroundings. Where the list is small or of moderate size, it may be easier to obtain a vacancy, but the successful applicant faces, though perhaps to a lesser degree, the same difficulties that beset the squatter. It must always be remembered that even when there is no delay (and in a death vacancy some delay is inevitable) a practice suffers to some extent when it changes hands. (3) To obtain an 'assistantship with view' to succession or partnership. This method has the advantage that it offers security from the outset and it is the method of choice for those who cannot command the resources to enable them to wait for their list of patients to grow. Introduction is effected by the medical practices advisory bureau or one of the medical agencies and after a probationary period the assistant either becomes the 'logical successor' when his principal retires, or is made a partner. He must expect to remain a junior partner in the firm until he has built up his own part of the practice and has thus acquired goodwill in his own right. During this time he contributes to the work of the whole practice and in return receives a share which is unrelated to the actual number of patients on his own list."

The evidence which is before me shows that, even in the second case, it is common for it to be a condition of succession that the premises in which the surgery is situate, and where, perhaps, the previous doctor lived, should be taken over by the applicant for succession. It is plain that in every case the chances of an aspiring doctor to succeed to a practice must be affected very largely by his ability to acquire premises in which either there is a surgery for the carrying on of his profession, or, at any rate, where he can reside and be available for the purposes of the practice, and, therefore, it is impossible to see how the starting of the son in business (using that word in the sense of a medical practice) can be advanced more certainly than by providing him with the capital to purchase a house with or without a surgery for the purposes of his profession. Accordingly, it is within the powers of the trustees to utilise the quarter of the fund which is available, or such part up to the maximum of a quarter as they think proper, for the purpose of assisting the son to purchase a house in connection with a prospective medical practice, and they are entitled so to apply the money though the house in question may be one in which he resides but does not necessarily include a surgery. It seems to me that it must be the kind of house which is purchased, not simply to provide a residence for the son and his wife or family, but one which is purchased by him by reason of the fact that he wishes to carry on a practice in a particular locality.

Order accordingly.

Solicitors: *Bentleys, Stokes & Lowless* (for all parties).

[*Reported by R. D. H. OSBORNE, Esq., Barrister-at-Law.*]

**YORKSHIRE DYEING AND PROOFING CO., LTD. v.
MIDDLETON BOROUGH COUNCIL.**

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Lynskey and Pearson, JJ.),
February 4, 5, 1953.]

Sewer—Discharge of effluent into—Trade effluent—Trade premises—Discharge from premises before 1937—New premises added in 1946—Effluent from both premises same in nature and amount as before 1937—Need for notice of discharge of effluent after 1946—Public Health (Drainage of Trade Premises) Act, 1937 (c. 40), s. 2 (1), s. 4 (1), s. 14 (1).

A

B

C

D

E

F

G

H

For a considerable time before, during, and after 1937 the appellants, occupiers of trade premises, discharged trade effluent into a public sewer. In 1946 they acquired new premises to which they moved some of their plant. Thereafter trade effluent was produced on the new premises and was conveyed to the old premises where it was mixed with effluent produced on the old premises and with that effluent was discharged into the sewer through the same two pipes as had been used prior to the acquisition of the new premises. The nature and total amount of the effluent discharged did not differ from or exceed the nature or amount of the effluent discharged in and before 1937. No notice of a proposed discharge of effluent into the sewer having been given since the acquisition of the new premises, the appellants were charged under the Public Health (Drainage of Trade Premises) Act, 1937, s. 2 (5) (a), that being occupiers of trade premises they did discharge trade effluent into a public sewer of the local authority without giving notice to and without the consent of the local authority, contrary to s. 2 (1) of the Act.

HELD: the total effluent was not produced at the same premises as those at which the effluent had been produced within the year ending on Mar. 3, 1937, either because the new premises were separate from the old premises, or, if the two sets of premises were to be treated as an aggregate, because the premises so treated were not the same as the old premises; "discharged" in s. 2 (1) of the Act of 1937 referred to the direct or indirect discharge of the effluent; and, therefore, the discharge of the effluent was not exempted from the provisions of the Act by s. 4 (1) thereof, and the appellants were guilty of the offence charged.

FOR THE PUBLIC HEALTH (DRAINAGE OF TRADE PREMISES) ACT, 1937, s. 2, s. 4 and s. 14, see HALSBURY'S STATUTES, Second Edn., Vol. 19, pp. 511, 513 and 521, respectively.

CASE STATED by Lancashire justices.

At a court of quarter sessions sitting for the county of Lancaster on June 20, 1952, the appellants appealed against convictions on two informations which had been laid against them by Frank Johnston, clerk of the Middleton Borough Council. The informations charged that the appellants, being occupiers of certain trade premises at Spring Vale, Middleton, on July 25, 1951, discharged into a public sewer of the council of the borough of Middleton a certain trade effluent, contrary to the Public Health (Drainage of Trade Premises) Act, 1937, s. 2, no trade effluent notice having been served and that the said effluent was discharged without the consent of the council.

It was proved or admitted that the appellants had for many years, and, in particular, during the year ending Mar. 3, 1937, occupied certain trade premises at Spring Vale, Middleton, and from those premises had discharged through two pipes into a public sewer of the council trade effluents produced on those premises. In January, 1946, the appellants occupied, in addition to their original premises, some adjoining premises which had belonged to a foundry, and to them the appellants moved some of their plant and machinery. Trade effluent was produced in the new premises and passed into the old

premises where it mixed and blended with an approximately equal amount of effluent produced on the old premises and then was discharged into the public sewer through the same pipes as had been used before the acquisition of the new premises. It was also found that the amount so discharged did not exceed the maximum quantity lawfully discharged in 1937; that the rate of discharge was the same as in 1937; that the mixed effluent was of the same nature or composition as the effluent then discharged; that on July 25, 1951, no trade effluent notice had been served on the council; and that the appellants had not obtained the consent of the council to the discharge of any effluent produced on the new premises.

It was contended on behalf of the appellants that (i) the trade effluent was produced in part in the course of trade or industry carried on in the old premises, (ii) the discharge was from the old and not from the new premises, and (iii) the new premises were part of premises from which effluent of the same nature and composition had been lawfully discharged in 1937, and that, in consequence, the appellants were protected under the Public Health (Drainage of Trade Premises) Act, 1937, s. 4 (1), and had committed no offence in not serving notice on or obtaining the permission of the council so to discharge their trade effluent. On behalf of the respondents it was contended that (i) part of the discharge was from the new premises, (ii) no discharge came from those premises during 1937, (iii) the new premises were not part of premises from which trade effluent of the same nature and composition had been lawfully discharged in 1937, and that, consequently, offences had been committed under s. 2 of the Act in not serving the necessary notice on or obtaining the permission of the local authority. Quarter sessions dismissed the appellants' appeal.

Willis, Q.C., and C. T. B. Leigh for the appellants.
Diplock, Q.C., and Cantley for the respondents.

LORD GODDARD, C.J.: This is a Case stated by the appeal committee of the quarter sessions for the county of Lancaster, before whom the appellants appealed against two convictions by justices in petty sessions. The first was:

"For that they on July 25, 1951 were the occupiers of certain trade premises situate at Spring Vale, Middleton, from which premises a certain trade effluent was discharged into a public sewer of the council of the borough of Middleton, the local authority, in contravention of s. 2 of the Public Health (Drainage of Trade Premises) Act, 1937 (hereinafter called the Act) no trade effluent notice having been served."

The second conviction is on the same facts except that the offence alleged was the discharging of the effluent without the consent of the local authority. The appeal committee dismissed the appeals subject to the Case which they have stated.

For many years before 1937 the appellants occupied a dye works at Middleton and discharged their trade effluent into the local authority's sewer. In 1946 they acquired adjoining premises which had been a foundry, and made them part of their works. That was a substantial addition to the premises. It was not within the original curtilage or in the original ownership of the firm. Having acquired the new premises the appellants transferred part of their dye works to them, and in that new dye house a certain trade effluent is produced. Effluent continues to be produced in the old works, and the effluent from the new dye house and the old dye house merges on the old premises. Therefore, the discharge into the sewer still takes place from the old premises, but it is not only of the effluent from the old premises but also of the effluent from the new premises.

The matter depends principally on s. 4 of the Public Health (Drainage of Trade Premises) Act, 1937, and s. 14, the definition section. The Act is intended to prohibit the discharge of trade effluent into the sewers of local authorities

except with the consent of the authorities, which is to be applied for by serving a notice on the authority under s. 2 (1), and under s. 2 (3) the authority can impose conditions under which the effluent can be discharged. The Act, however, by s. 4 (1), exempts from its provisions the discharge of trade effluent which was lawfully discharged at some time within the period of one year ending on Mar. 3, 1937, subject to certain conditions. Section 4 (1) provides:

"For the purposes of this Act the consent of a local authority to the discharge of any trade effluent from any trade premises into a sewer of the local authority shall not be necessary, if any trade effluent of the same nature or composition as that of the trade effluent in question was lawfully discharged as aforesaid from those premises into that sewer at some time within the period of one year ending on Mar. 3, 1937, and if and so long as—(a) the quantity of the trade effluent discharged from the premises into the sewer on any one day does not exceed the maximum quantity thereof so discharged on any one day during the said period, and (b) the rate at which the trade effluent is discharged from the premises into the sewer is not higher than the highest rate at which it was so discharged during the said period . . ."

The justices found that the composition of the effluent is the same, that the quantity does not exceed the maximum specified, and that the rate at which it is discharged is not higher than the rate at which it was discharged. It would appear as though the merits of this case were with the appellants—at any rate it is not easy to see why, as they are not discharging any more or different effluent into the sewer than they did before 1937, the local authority object—but we have to consider whether or not the case does come within the exemption. If it does not come within the exemption, the offence has been committed notwithstanding the fact that it would appear the merits are not conspicuously against the appellants. The definition section, s. 14 (1), which has given rise to a good deal of discussion, provides:

" 'Trade effluent' means any liquid, either with or without particles of matter in suspension therein, which is wholly or in part produced in the course of any trade or industry carried on at trade premises and, in relation to any trade premises, means any such liquid as aforesaid which is so produced in the course of any trade or industry carried on at those premises, but does not include domestic sewage."

I think that the words "wholly or in part" relate to the composition or constitution of the trade effluent, and that "trade effluent" for this purpose means a fluid which is composed partly of the product of the trade or business and partly of something else which in the ordinary course would be water.

In my opinion, the whole question depends—and I take the same view as did quarter sessions—on whether or not this trade effluent which is now going into the local authority's sewer is produced at the same premises as those at which it was produced before March, 1937. Quarter sessions took the view that it is not because it is now the effluent of two sets of premises and not the effluent of one set. They have held, and I think rightly held, that the new dye house is not a part of the old premises, but constitutes separate and new premises, and it seems to me impossible to say that the effluent which is being produced in the new dye house is not being discharged into the local authority's sewer. It is true that it passes through the old premises and mingles there with the effluent which is produced in the old premises, but none the less it seems to me that the effluent produced is being produced in the new premises and discharged into the sewer. For these reasons, I feel bound to say that I think quarter sessions came to a right decision, and this appeal fails.

LYNSKEY, J.: I agree. Under the Public Health Act, 1936, s. 34 (1) (a) (i) which is referred to as the principal Act in the Public Health (Drainage of

Trade Premises) Act, 1937, there was a complete prohibition against the discharge either directly or indirectly of trade effluent into public sewers, but by the Act of 1937 provision was made to enable such effluent to be discharged subject to certain notices being given and the consent of the local authority obtained and to a right of appeal to the Minister of Health. It is provided by s. 2 (5):

A "If, in the case of any trade premises—(a) any trade effluent is discharged in contravention of this section, or without such consent (if any) as is necessary for the purposes of this Act, or (b) any direction or condition given or imposed under this section is contravened, the occupier of the premises shall be guilty of an offence."

B [HIS LORDSHIP stated the facts.] The first point that arises is whether what took place constituted a discharge of effluent from the new premises into the sewer? It has been suggested on behalf of the appellants that "discharge" must mean direct discharge. Having regard to the wording of the Act and the results which would follow if one narrowed the meaning of the word "discharge" to direct discharge, I take the view that "discharge" here means discharge directly or indirectly into the sewer. The result of that is, on the finding of the justices, that the effluent from the new premises is discharged into this sewer. Those premises were C not in use for this purpose in 1937, and in 1937 there was no discharge of effluent from those premises into the sewer. It follows that there was a discharge of effluent from the new premises into the sewer which could not be brought within the provisions of the exemption in s. 4 (1). Prima facie, that was clearly an offence, but it is suggested by the appellants that the effect of s. 4 (1) is D to enable them to carry the effluent from the new premises through their old premises and discharge it into the sewer because the total effluent discharged from the two sets of premises does not exceed in quantity or differ in nature from the effluent which was discharged in 1937. The whole matter seems to me to turn on the interpretation of s. 4 (1) and the definition section, s. 14 (1), dealing with trade effluent. The definition there is

E "any liquid, either with or without particles of matter in suspension therein, which is wholly or in part produced in the course of any trade or industry carried on at trade premises . . ."

That is the definition of "trade effluent", an effluent in part produced by the trade operation and in part coming from other sources. Then the definition goes on:

F ". . . and, in relation to any trade premises, means any such liquid as aforesaid which is so produced in the course of any trade or industry carried on at those premises . . ."

In my view, the object of the second part of the definition was to restrict the trade effluent to the particular premises on which the trade is carried on, and G it would not bear a construction which would enable the effluent from the new premises, which were not covered by s. 4 (1), to be discharged under the umbrella of the exemption which the old premises acquired under s. 4 (1) of the Act. In those circumstances, I take the view that quarter sessions were right, and this appeal should be dismissed.

H PEARSON, J.: I agree. I think the first question is whether one should regard for the present purpose the two sets of premises as one aggregate or as two separate sets of premises. I do not think it would be right to treat them as one aggregate having regard to the previous history of the premises and what has been found by the justices here. In any case, if it were right to treat them as one aggregate, in my view, they would clearly be different premises from those which were occupied by the appellants in 1937. If it were right to treat them as one aggregate, being different premises from anything

that existed in 1937, s. 4 (1), which confers the exemption, would have no application, and that would put the appellants here in the worst possible position. But be it assumed that the old and the new premises are two separate sets of premises, which is the way the justices have approached this question, then one has to consider two problems:—(i) Is the direct discharge of the effluent in question from the old premises into the sewer covered by the provisions of s. 4 (1)?; and (ii) Is the indirect discharge of the effluent from the new premises through the old premises also covered by s. 4 (1)?

As to the first question, I think that the second part of the definition in s. 14 (1), when one makes the necessary substitutions for the words “such liquid as aforesaid” and the word “so”, comes to this: “‘Trade effluent’ in relation to any trade premises means any liquid, either with or without particles of matter in suspension therein, which is wholly or in part produced in the course of any trade or industry carried on at those premises.” It seems to me that the word “so” must be regarded as incorporating the words “wholly or in part”. One must read as a whole the words which follow

“in the course of any trade or industry carried on at those premises.”

It seems to me that that requirement is satisfied as regards the old premises because the effluent which is discharged from there into the local authority’s sewer is in part liquid of the kind described, produced in the course of a trade or industry carried on in the old premises, and it does not prevent the application of that definition that some part of what is discharged has been produced in other premises. It would not matter whether the premises were in the occupation of the same or a different company. I think that part of the definition read literally, which it should be unless it produces an impossible conclusion, would have that result, and, therefore, the appellants are innocent so far as that direct discharge is concerned.

There is, however, the further question whether s. 4 (1) protects the appellants in respect of the indirect discharge from the new premises. One has to consider whether the word “discharge” means direct or indirect discharge or is limited only to direct. I entirely agree that it is important to look back to s. 34 (1) (a) (i) of the Public Health Act, 1936, which imposed an absolute prohibition on the discharge of liquid from a factory into a sewer, subject to certain conditions. Section 1 (1) of the Public Health (Drainage of Trade Premises) Act, 1937, mitigates that prohibition. Section 34 (1) (a) (i) of the Act of 1936 uses the words “discharge directly or indirectly”, and, as s. 1 (1) of the Act of 1937 is introducing a relaxation of that prohibition, I think the word “discharge” in that sub-section—and, therefore, throughout the Act—should have the same meaning of “directly or indirectly discharge”. Also, I think that, without any limiting words, one would naturally read the word “discharge” as meaning directly or indirectly. Therefore, I think it is necessary for the appellants to show some justification for their indirect discharge from the new premises into the sewer. They have not shown it, and for this purpose they clearly do not come within s. 4 (1) since there was no discharge in or before 1937 from those premises into the sewer, and, therefore, they have failed to show any right to make that indirect discharge without the consent of the local authority, and I agree that the appeal should be dismissed.

Appeal dismissed.

Solicitors: *Charles Russell & Co.*, agents for *Skelton & Co.*, Manchester (for the appellants); *Sharpe, Pritchard & Co.*, agents for *Frank Johnston*, town clerk, Middleton (for the respondents).

[Reported by MICHAEL MALONEY, Esq., Barrister-at-Law.]

Re A DEBTOR (No. 48 of 1952). *Ex parte AMPTHILL RURAL DISTRICT COUNCIL v. THE DEBTOR.*

[COURT OF APPEAL (Jenkins and Morris, L.J.J., and Roxburgh, J.), January 14, February 10, 1953.]

Bankruptcy—Bankruptcy notice—“Final order” against debtor—Order by court of summary jurisdiction for payment of arrears of water rate and costs—Summary Jurisdiction Act, 1879 (c. 49), s. 35—Direction to levy distress in default of payment—Bankruptcy Act, 1914 (c. 59), s. 1 (1) (g)—Water Act, 1945 (c. 42), s. 38 (3).

A A rural district council, as statutory water undertakers, obtained in a court of summary jurisdiction an order under the Water Act, 1945, s. 38 (3), against the debtor for payment of a water rate and costs. The order, as drawn up, was: “It is adjudged that the [debtor] pay the [council] the sum of £2 12s. 6d. for debt and the sum of 3s. for costs to be paid forthwith and in default of payment that the sum due thereunder be levied by distress and sale of the [debtor’s] goods.” The debtor having failed to pay, the council served on him a bankruptcy notice in respect of the sum due, but, on an appeal to a Divisional Court of the Chancery Division by the debtor against an order of a registrar, the notice was set aside on the ground that the words in the order directing the levy of distress imposed a limitation and precluded the issue of a bankruptcy notice. On appeal by the council,

B HELD: the amount set out in the bankruptcy notice was properly recovered as a civil debt recoverable summarily; the fact that, in the order of the justices it was provided that, in default of payment, the sum due might be levied by distress and sale of the debtor’s goods did not diminish the validity and effectiveness of the order, which was and remained a final order against the debtor and one within the words “execution thereon not having been stayed” in s. 1 (1) (g) of the Bankruptcy Act, 1914; the court of summary jurisdiction had no power to make an order that no bankruptcy notice should be issued in respect of the sum adjudged to be due, and what they could not have done by express order could not be regarded as having been done by implication; and, therefore, the concluding words of the order did not preclude the issue of a bankruptcy notice.

E AS TO BANKRUPTCY NOTICE, see HALSBURY, Hailsham Edn., Vol. 2, pp. 32-36, paras. 44-46; and FOR CASES, see DIGEST, Vol. 4, pp. 86, 87, Nos. 778-788, and pp. 90-93, Nos. 813-834.

Cases referred to:

(1) *Re McGreavy. Ex p. McGreavy v. Benfleet Urban District Council*, [1950] 1 All E.R. 442; [1950] Ch. 269; 114 J.P. 185; 2nd Digest Supp.

G (2) *R. v. London JJ.*, [1899] 1 Q.B. 532; *sub nom. R. v. London JJ. Ex p. Bayne*, 68 L.J.Q.B. 383; 80 L.T. 286; 63 J.P. 388; 18 Digest 422, 1602.

H APPEAL by Amptill Rural District Council from an order of the Divisional Court of the Chancery Division, dated Nov. 10, 1952, allowing an appeal by the debtor from an order of the registrar of Brentford County Court, dated Sept. 10, 1952, whereby he dismissed an application by the debtor to set aside a bankruptcy notice served on him by the council.

The debtor had failed to pay to the council a sum due to them under an order of a court of summary jurisdiction. The concluding words of the order directed that, in default of payment, the sum due thereunder should be levied by distress and sale of the debtor’s goods. The Divisional Court held that these words precluded the issue of a bankruptcy notice.

J. Davidson for the rural district council.

The debtor in person.

Cur. adv. vult.

Feb. 10. **MORRIS, L.J.**, read the following judgment of the court. On Apr. 26, 1951, the rating authority for the Ampthill rural district obtained an order against the debtor in a court of summary jurisdiction at Ampthill for the payment of £2 12s. 6d. and also for the payment of the sum of 3s. costs. The sum of £2 12s. 6d. represented a water rate which the rural district council, as statutory water undertakers, claimed against the debtor in respect of a house, which he owned, called "Woodfield" at Aspley Guise. The Water Act, 1945, s. 38 (3), provides:

"The water rate payable by any person may after a demand therefor be recovered from him by the undertakers either summarily as a civil debt, or as a simple contract debt in any court of competent jurisdiction . . ."

The order of the court at Ampthill was drawn up in the following words:

"It is adjudged that the defendant pay the plaintiff the sum of £2 12s. 6d. for debt and the sum of 3s. for costs to be paid forthwith and in default of payment that the sum due thereunder be levied by distress and sale of the defendant's goods."

On Aug. 22, 1952, a bankruptcy notice, dated Aug. 21, 1952, was served on the debtor at the instance of the council in respect of the sum of £2 15s. 6d. The bankruptcy notice was in the prescribed form and was issued by the Brentford County Court. The debtor filed an affidavit stating that he applied to set aside the bankruptcy notice on the ground that he had a counterclaim, set-off or cross-demand which equalled or exceeded the amount claimed by the council and which he could not have set up in the action or other proceedings in which the judgment or order was obtained against him. He did not set out any particulars of his counterclaim, set-off or cross-demand. The registrar heard the application on Sept. 10, 1952, when the debtor appeared in person. The registrar decided that no counterclaim or set-off had been established and dismissed with costs the application to set aside the bankruptcy notice. The debtor was granted leave to appeal against the order of the registrar and an extension of time for entering his appeal. He filed his notice of appeal on Oct. 18, 1952, and in it he set out his grounds of appeal, as follows: (i) that the hearing of the case at Ampthill petty sessions was invalid; (ii) that, even if the said hearing at Ampthill were valid, the debtor had the right to set off, as a contra against the £2 15s. 6d. demanded, money previously paid under protest on rates on another house belonging to him and called "Eton Lodge", Woburn Sands East (because of a caretaker), which had not been the subject of any hearing at Ampthill or elsewhere; (iii) that certain information given by the council was misleading; and (iv) that certain expenses claimed by the council were needlessly incurred.

When the matter came before the Divisional Court, where the debtor again appeared in person, the court experienced difficulty in finding out the nature of the counterclaim and expressed no concluded view either for or against its validity. The court raised, however, a point not advanced or suggested by the debtor himself, to the effect that the words contained in the judgment or order of the court at Ampthill, i.e., the words

" . . . and in default of payment that the sum due thereunder be levied by distress and sale of the defendant's goods ",

were words which imposed a limitation and precluded the issue of a bankruptcy notice. Feeling it incumbent on them to take notice of the point so raised and holding it to be effective, the court allowed the appeal and discharged the bankruptcy notice. By leave, appeal is now brought to this court against the order made by the Divisional Court.

Certain other facts were before us and may be briefly mentioned, though, in our judgment, they have no direct bearing on the questions to be determined. On the same day (Apr. 26, 1951) as the order for payment of the £2 15s. 6d. was made, the court of summary jurisdiction at Amptill issued warrants of distress in respect of certain general and special rates levied on the debtor. The warrants were for sums totalling £64 14s. 8d., which represented general and special rates, partly on "Woodfield" and partly on "Eton Lodge".

A For such rates no recovery by action was possible, though for the amount of them there could be a petition in bankruptcy and proof in bankruptcy: see *Re McGreavy. Ex p. McGreavey v. Benfleet Urban District Council* (1). To the warrants for distress so issued there was a return of nulla bona. Before such return was made, the debtor had appealed to quarter sessions against the issue of the distress warrants, but quarter sessions held that, as the appeal to them was before levy, it was premature: see *R. v. London J.J.* (2). The £64 14s. 8d. did not include the £2 12s. 6d. or any water rate. [Dealing with the question whether the debtor had established the principal point which he had intended to raise before the Divisional Court, i.e., the question whether he had a counterclaim, set-off or cross-demand which equalled or exceeded the amount of £2 12s. 6d. claimed by the rural district council and which he could not have set up in the proceedings in the Amptill court, HIS LORDSHIP reviewed the evidence, and continued:] Whatever may be the precise facts, it is sufficient to say that the debtor did not "satisfy" us, any more than he satisfied the learned registrar, that he had a counterclaim, set-off or cross-demand.

We pass, therefore, to consider the aspect of the matter which was raised by the Divisional Court and guided them to their conclusion. The Bankruptcy Act, 1914, s. 1 (1), provides:

"A debtor commits an act of bankruptcy in each of the following cases . . . (g) If a creditor has obtained a final judgment or final order against him for any amount, and, execution thereon not having been stayed, has served on him . . . a bankruptcy notice under this Act, and he does not . . . either comply with the requirements of the notice or satisfy the court that he has a counterclaim set-off or cross-demand which equals or exceeds the amount of the judgment debt or sum ordered to be paid, and which he could not set up in the action in which the judgment was obtained, or the proceedings in which the order was obtained: For the purposes of this paragraph and of s. 2 of this Act, any person who is, for the time being, entitled to enforce a final judgment or final order, shall be deemed to be a creditor who has obtained a final judgment or final order."

In our view, there was "a final judgment or final order" against the debtor. Furthermore, execution was not stayed. It becomes necessary, therefore, to consider the meaning and effect of the final words in the judgment or order of the court at Amptill, i.e., the words

" . . . and in default of payment that the sum due thereunder be levied by distress and sale of the defendant's goods."

It is said that the presence of those words results in a limitation, with the consequence that, as distress is expressly mentioned, the issue of a bankruptcy notice is precluded.

The Summary Jurisdiction Act, 1879, s. 35, is in the following terms:

"Any sum declared by this Act, or by any future Act, to be a civil debt, which is recoverable summarily, or in respect of the recovery of which jurisdiction is given by such Act to a court of summary jurisdiction, shall be deemed to be a sum for payment of which a court of summary jurisdiction has authority by law to make an order on complaint in pursuance of the Summary Jurisdiction Acts: Provided as follows: (1) A warrant

shall not be issued for apprehending any person for failing to appear to answer any such complaint; and (2) An order made by a court of summary jurisdiction for the payment of any such civil debt as aforesaid or of any instalment thereof, or for the payment of any costs in the matter of any such complaint, whether ordered to be paid by the complainant or defendant, shall not, in default of distress or otherwise, be enforced by imprisonment, unless it be proved to the satisfaction of such court or of any other court of summary jurisdiction for the same county borough or place, that the person making default in payment of such civil debt instalment or costs either has, or has had since the date of the order, the means to pay the sum in respect of which he has made default, and has refused or neglected, or refuses or neglects, to pay the same, and in any such case the court shall have the same power of imprisonment as a county court would for the time being have under the Debtors Act, 1869, for default of payment if such debt had been recovered in that court, but shall not have any greater power. Proof of the means of the person making default may be given in such manner as the court to whom application is made for the commitment to prison think just, and for the purposes of such proof the person making default and any witnesses may be summoned and examined on oath according to the rules for the time being in force under this Act in relation to the summoning and examination of witnesses, or if no such rules are in force, to the rules for the like purpose made in pursuance of the Employers and Workmen Act, 1875."

It seems plain from a reading of the section that, in the present case, the wording of the order would not preclude its enforcement by imprisonment on proof of means to pay as prescribed in the section. If after the making of the order there was a failure to pay, as was the case here, there might have been an application for a warrant of distress on the debtor's goods. Inasmuch as warrants of distress issued on Apr. 26, 1951, for £64 14s. 8d. met with a return of *nulla bona*, there would have been no point in making application for a warrant of distress for £2 15s. 6d., but there is nothing to exclude the applicability of that part of s. 35 (2) which may apply "in default of distress or otherwise". In conjunction with s. 35, reference should also be made to s. 6 of the Summary Jurisdiction Act, 1879, which provides:

"Where under any Act, whether past or future, a sum of money claimed to be due is recoverable on complaint to a court of summary jurisdiction, and not on information, such sum shall be deemed to be a civil debt, and if recovered before a court of summary jurisdiction shall be recovered in the manner in which a sum declared by this Act to be a civil debt recoverable summarily is recoverable under this Act, and not otherwise; and the payment of any costs ordered to be paid by the complainant or defendant in the case of any such complaint shall be enforced in like manner as such civil debt, and not otherwise."

The issue of distress warrants is provided for by the Summary Jurisdiction Act, 1848, s. 19, which is in the following terms:

"... Where a conviction adjudges a pecuniary penalty or compensation to be paid, or where an order requires the payment of a sum of money, and by the statute authorising such conviction or order such penalty, compensation, or sum of money is to be levied upon the goods and chattels of the defendant by distress and sale thereof, and also in cases where by the statute in that behalf no mode of raising or levying such penalty, compensation, or sum of money, or of enforcing the payment of the same, is stated or provided, it shall be lawful for the justice or justices making such conviction or order, or for any justice of the peace for the same county, riding, division, liberty, city, borough, or place, to issue his or their warrant of

A distress for the purpose of levying the same, which said warrant of distress shall be in writing under the hand and seal of the justice making the same; and if after delivery of such warrant of distress to the constable or constables to whom the same shall have been directed to be executed sufficient distress shall not be found within the limits of the jurisdiction of the justice granting such warrant, then, upon proof alone being made on oath of the handwriting of the justice granting such warrant before any justice of any other county or place, such justice of such other county or place shall thereupon make an indorsement on such warrant, signed with his hand, authorising the execution of such warrant within the limits of his jurisdiction; by virtue of which said warrant and indorsement the penalty or sum aforesaid, and costs, or so much thereof as may not have been before levied or paid, shall and may be levied by the person bringing such warrant, or by the person or persons to whom such warrant was originally directed, or by any constable or other peace officer of such last-mentioned county or place, by distress and sale of the goods and chattels of the defendant in such other county or place . . .”

B
C
D
E
F
A consideration of these sections leads us to the view that the amount set out in the bankruptcy notice was properly recovered as a civil debt recoverable summarily. The fact that, in the order as drawn up, it is provided that, in default of payment, the sum due may be levied by distress and sale of the debtor's goods does not diminish the validity and effectiveness of the order. The order is and remains a final order against the debtor—and one within the words “execution thereon not having been stayed”, in s. 1 (1) (g) of the Bankruptcy Act, 1914. If the concluding words in the order had not been expressly inserted, the power of the court to issue a distress warrant would not have been affected. Whether they inserted those words or not, the court of summary jurisdiction had no power or authority to make an order that no bankruptcy notice should be issued in respect of the sum adjudged to be due. That which they could not have done by express order cannot be regarded as having been done by implication. In our judgment, there was nothing which precluded the issue of a bankruptcy notice. The debtor did not substantiate any contentions denoted under (i) or (iii) or (iv) of his notice of appeal, dated Oct. 18, 1952. Accordingly, for the reasons which we have indicated, we consider that the registrar came to the correct conclusion and that this appeal should be allowed and his order restored.

Appeal allowed.

Solicitors: *Crossman, Block & Co.*, agents for *Sharman & Trethewey*, Ampthill (for the rural district council).

[*Reported by F. GUTTMAN, ESQ., Barrister-at-Law.*]

GREEN v. DUNN.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Croom-Johnson and Pearson, JJ.), January 19, 1953.]

Street Traffic—Accident—Failure to report—Motor car struck by motor cycle—Driver of car giving name and address to driver of motor cycle—Obligation to report to police—Road Traffic Act, 1930 (c. 43), s. 22 (1), (2).

A motor car, while being driven on a road, was struck by a motor cycle, which was slightly damaged in consequence. The driver of the car stopped, and, at the request of the driver of the motor cycle, gave his name and address and particulars of the car, as required by the Road Traffic Act, 1930, s. 22 (1). He did not report the accident to the police. He was convicted by a court of summary jurisdiction of an offence against s. 22 (2) of the Act in that he had failed to report the accident at a police station or to a police constable within twenty-four hours of its occurrence. On appeal,

HELD: the driver of the car was not guilty of an offence against s. 22 (2).

AS TO THE DUTY TO REPORT A ROAD ACCIDENT, see HALSBURY, Hailsham Edn., Vol. 31, p. 675, para. 998; and FOR CASES, see DIGEST Supps.

FOR THE ROAD TRAFFIC ACT, 1930, s. 22, see HALSBURY'S STATUTES, Second Edn., Vol. 24, p. 595.

EDITORIAL NOTE. There appears to have been no reported English decision hitherto on the question whether a driver, who has complied with the requirements of the Road Traffic Act, 1930, s. 22 (1), is under a duty to report the accident to the police, under s. 22 (2). There has been a Scottish case on the point, *Adair v. Fleming*, 1932 S.C. (J.) 51, the decision being the same as in the present case. It would seem that the inference from *Dawson v. Winter* expressed in the Editorial Note to *Peek v. Towle* [1945] 2 All E.R. 611 should be replaced by the intention behind the section indicated in the present case.

Case referred to:

(1) *Adair v. Fleming*, 1932 S.C. (J.) 51; Digest Supp.

CASE STATED by Upper Strathfirth and Tickhill, West Riding of Yorkshire, justices.

On Apr. 26, 1952, the appellant was driving a motor car on a road in Rotherham when it was struck by a motor cycle driven by one Walker and slight damage was caused to the motor cycle. The appellant stopped, and, at Walker's request, gave to him his name and address, the name and address of the owner of the car, and the identification marks of the car. The appellant did not report the accident to the police, having agreed with Walker not to do so. On June 24, 1952, at a court of summary jurisdiction sitting at Rotherham, an information was preferred by the respondent charging the appellant with an offence against the Road Traffic Act, 1930, s. 22 (2), in that he had not reported the accident at a police station or to a police constable as soon as practicable, and in any case within twenty-four hours of the occurrence thereof. The appellant contended that, as he had given his name and address and particulars of the car in accordance with the requirements of s. 22 (1) of the Act, there was no obligation on him under s. 22 (2) to report the accident to the police at any time. The respondent contended that the words "and in any case within twenty-four hours of the occurrence thereof" in s. 22 (2), made it obligatory on the appellant to report the accident to the police within twenty-four hours of its occurrence, notwithstanding that he had complied with the requirements of s. 22 (1). The justices were of the opinion that the Scottish decision of *Adair v. Fleming* (1), to which their attention was drawn, ought not to be followed, since the intention of s. 22 was that all accidents involving damage or injury to any person, vehicle or animal must, in any case,

be reported to the police within twenty-four hours of its occurrence, otherwise persons guilty of serious driving offences could, by merely exchanging names and addresses, escape the consequences of prosecution unless information regarding accidents came to the knowledge of the police from other sources. Therefore, they were of the opinion that, under s. 22 (2), the appellant was under an obligation to report the accident within twenty-four hours of its occurrence, and they convicted him of the offence with which he was charged.

Skelhorn for the appellant.

R. A. R. Stroyan for the respondent.

LORD GODDARD, C.J.: This appeal is allowed and the conviction quashed. It is not worth delivering a judgment because the case is so clear. The appeal is allowed with costs.

CROOM-JOHNSON, J., and PEARSON, J., concurred.

Appeal allowed.

Solicitors: *A. J. A. Hanhart*, agent for *Gichard & Co.*, Rotherham (for the appellant); *Cummings, Marchant & Ashton*, agents for *R. C. Linney*, Wakefield (for the respondent).

[Reported by G. A. KIDNER, ESQ., Barrister-at-Law.]

Re KENDREW (*deceased*). *HIRD v. KENDREW AND OTHERS*.
[COURT OF APPEAL (Jenkins and Morris, L.JJ., and Vaisey, J.), February 6, 1953.]

Will—Condition—Gift to housekeeper if she continued in service of testatrix's husband—Marriage between husband and housekeeper.

By her will a testatrix devised and bequeathed her freehold dwelling-house and household and personal effects to her trustees on trust for her husband during his life, and from and after his death she gave the said dwelling-house and effects to M. "for her own use and benefit absolutely if she continues in the service of the survivor of myself and my husband". On Dec. 3, 1938, the testatrix died, and was survived by her husband and M., who continued her employment as housekeeper to the husband. On Mar. 18, 1940, the husband and M. executed an agreement under seal, in which it was recited that the parties intended to marry and it was agreed that the husband should continue to employ M., that M. should continue to serve the husband as his housekeeper during their joint lives, and that the husband should pay M. £52 per annum for her services. The agreement further provided that it should continue in force notwithstanding the intended marriage. On Mar. 26, 1940, the husband and M. inter-married and thereafter they lived together, with M. managing the household and receiving the remuneration provided for in the agreement, until the husband's death on Dec. 27, 1951.

HELD: on the true construction of the will the condition on which the gift to M. depended required her to continue in the service of the husband until his death; as the agreement of 1940 was performed up to that date, the condition was literally fulfilled, and the additional relationship of husband and wife did not destroy the existing relationship of master and servant; and, therefore, the gift was good.

Cases referred to:

(1) *Thomas v. Thomas*, [1948] 2 All E.R. 98; [1948] 2 K.B. 294; [1948] L.J.R. 1943; 112 J.P. 345; 2nd Digest Supp.

(2) *Wanbon v. Wanbon*, [1946] 2 All E.R. 366; 2nd Digest Supp.

APPEAL by the ultimate residuary legatees under the will of Augusta Kendrew, deceased, from an order of **WYNN-PARRY, J.**, dated Oct. 28, 1952.

WYNN-PARRY, J., held that the defendant, Mary Kendrew, was entitled to receive gifts devised and bequeathed to her by the testatrix "if she continues in the service of the survivor of myself and my husband" and "if still in the service of the survivor of myself and my . . . husband at the time of his death", notwithstanding that after the death of the testatrix the said defendant had married the testatrix's husband. His LORDSHIP found that, having regard to a service agreement under seal entered into by the husband and this defendant before their marriage under which the relationship of employer and housekeeper was maintained after the marriage, the conditions on which the gifts depended had been performed.

Sir Lynn Ungood-Thomas, Q.C., and *F. E. Skone James* for defendants, the ultimate residuary legatees.

Elverston for the plaintiff, the trustee of the will.

Russell, Q.C., and *Burnett-Hall* for the first defendant, Mary Kendrew.

JENKINS, L.J.: This appeal raises a somewhat unusual point. The question is whether in the events which happened two gifts to a lady, named Mary Clark, took effect on the true construction of the conditions attached to them by the will of the testatrix, Augusta Kendrew. The will was dated Sept. 7, 1933. The testatrix died on Dec. 3, 1938, survived by her husband and by Mary Clark, who was housekeeper to the testatrix and her husband at the time of her death. The will was duly proved on Jan. 17, 1939. By cl. 3 the testatrix made this disposition:

"I bequeath free of duty my freehold house known as 'Heatherstone' and all my furniture and household and personal effects in or about or appropriated or belonging to the said dwelling-house at my death unto my trustees upon trust for my said husband during his life and from and after the death of my said husband I bequeath free of duty my said dwelling-house and my said furniture and household and personal effects to Mary Clark the daughter of George Clark of Osmotherley for her own use and benefit absolutely if she continues in the service of the survivor of myself and my husband."

In cl. 5 there is a general residuary devise and bequest followed by beneficial trusts of the net residue, in these terms:

"Upon trust to pay the income thereof to my said husband George Kendrew during his life and after his death upon trust to realise my residuary trust fund in manner aforesaid and out of the proceeds thereof (a) To purchase an annuity of £104 a year which I give free of duty to the said Mary Clark if still in the service of the survivor of myself and my said husband at the time of his death in manner hereinafter provided."

Then there is a trust for the payment of certain legacies, followed by a gift of the ultimate residue to other persons. There is a direction in cl. 7 as to buying an annuity of the amount of £104 for Mary Clark, that being merely an administrative provision on which nothing turns.

It appears that in or about March, 1940, the testatrix's husband, George Kendrew, and Mary Clark, who had continued in his service as housekeeper since the death of the testatrix, were minded to get married, and they appreciated (one assumes on advice) that, if they got married without taking some special measures, the result might be to determine Mary Clark's service with Mr. George Kendrew, and, therefore, disqualify her from receiving the gifts made to her by the will of the testatrix inasmuch as these gifts depended on her continuing in his service. So, in order to provide, so far as they could, against that untoward result, they entered into an agreement under seal dated Mar. 18, 1940, whereby, after a recital that "Mary Clark was for many years in the service of the said George Kendrew and his late wife Augusta Kendrew as

housekeeper", and a recital further that "a marriage has been arranged and is intended shortly to be solemnised between the said George Kendrew and the said Mary Clark", it was agreed as follows:

"(1) The said George Kendrew shall as from the date hereof continue to employ the said Mary Clark as his housekeeper and the said Mary Clark shall continue to serve the said George Kendrew as his housekeeper during the remainder of their joint lives. (2) The said George Kendrew shall pay to the said Mary Clark for her services as such housekeeper as aforesaid as from the date of this agreement a salary of £52 per annum such salary to be paid quarterly on Mar. 18, June 18, Sept. 18 and Dec. 18 in every year and the first of such payments to be made on June 18 next. (3) This agreement shall continue in force and the said Mary Clark shall continue in the service of the said George Kendrew as his housekeeper hereunder in the event of and after and notwithstanding the said intended marriage of the said George Kendrew and the said Mary Clark."

That agreement having been duly signed, sealed and delivered, George Kendrew and Mary Clark were married on Mar. 26, 1940. Thereafter the household continued much as before and they lived together until the death of Mr. George Kendrew on Dec. 27, 1951.

In those circumstances the question arose whether Mary Kendrew (as she now was) had become entitled to both or either of the gifts to her contained in cl. 3 and cl. 5 of the testatrix's will. A summons was issued for determination of that question which WYNN-PARRY, J., by his order of Oct. 28, 1952, decided in favour of Mary Kendrew. The residuary legatees now appeal from that order and they claim that the conditions prescribed by the testatrix on which these gifts to Mary Kendrew depended were not, in the events which happened, fulfilled. If I might return briefly to them, it will be remembered that the gift to her, after the death of Mr. George Kendrew, of the freehold house and furniture and household and personal effects was subject to this condition: "if she continues in the service of the survivor of myself and my husband".

I am inclined to agree with counsel for the residuary legatees that the true construction of that provision is to require that Mary should continue in the service of the survivor of the testatrix and her husband down to the death of such survivor. The point is, perhaps, open to some doubt, and it is true that in cl. 3 there is no such express reference to a continuance in the service down to the death of the husband as is to be found in cl. 5. I think, on the whole, that the requirement of continuance in the service in cl. 3 is naturally construed as referring to continuance down to the death of the husband inasmuch as that is the date on which the gift to Mary is to take effect if the condition is fulfilled. It is clear, too, that, if the testatrix had, in fact, been the survivor, the service contemplated would be service continuing down to the date of her death. The other condition (which, as I have said, is in slightly different language) is also imperfectly expressed, being in these words: "if still in the service of the survivor of myself and my said husband at the time of his death". The phrase "at the time of his death" is not a happy expression in the context inasmuch as the first part of the condition requires Mary to be still in the service of the survivor of the testatrix and her husband, and I think one may say that by "at the time of his death" the testatrix meant at the time of the death of the survivor, but she was assuming (and it was quite a natural assumption for her to make for the purposes of the disposition in question) that her husband would survive her.

Those are the two conditions, and, as I have said, in effect, I am prepared to construe them both as requiring Mary, in order to qualify for the gift, to continue, in the events which happened, in the service of the testatrix's husband from the time of the testatrix's death down to that of her husband's death. The question is whether that condition has been fulfilled. Counsel for the residuary legatees have persuasively argued that the condition has not been fulfilled. They

say that the testatrix had in mind simply the ordinary relationship of master and servant. They say that the marriage between Mr. George Kendrew and Mary Clark fundamentally altered her status, which ceased to be that of a housekeeper and became that of a wife. They say, further, that it cannot possibly have been in the contemplation of the testatrix when she set about making a testamentary provision for an old servant of herself and her husband that the servant for whose retirement she was providing might become her husband's second wife and nevertheless qualify for the same bounty. Junior counsel for the residuary legatees added an argument, which he found it necessary to buttress by authority (*Thomas v. Thomas* (1) and *Wanbon v. Wanbon* (2)), to the effect that in our matrimonial courts it is recognised that one of the functions of a wife is to perform the ordinary household duties in the home. Therefore, he said that when Mary became the wife of George Kendrew there ceased to be any duties to which the service agreement could relate inasmuch as she was bound to perform like duties without remuneration in her new status as the wife of George Kendrew. Apart from other differences in the two relationships, that argument seems to me to overlook the fact that Mary's employment subsequent to the service agreement of Mar. 18, 1940, was employment under an agreement under seal, so that this could not be said to be one of those cases where there was an agreement amounting to no more than nudum pactum because one party was merely undertaking to perform that which she was already bound to perform. A

A further argument presented for the residuary legatees was to the effect that a servant is one thing and a wife is another when it comes to making provision for them. It was pointed out that the position of Mary, on the assumption that she did not marry George Kendrew, but simply remained in his service until his death, would be very different from what it would be on the footing that she married him and on his death became his widow. In the latter event she would have all the expectations of a widow under his will or intestacy. In the former case she would have no similar claim on his bounty and would have to rely, by way of provision for her retirement, on what, if anything, either the testatrix or Mr. George Kendrew chose to give her in recognition of her past services. That consideration is relied on as lending further support to the view that the testatrix cannot have intended to include as continuance in the service of her husband within the meaning of the condition the event of Mary marrying her husband. It was also pointed out that Mr. George Kendrew had quite substantial assets of his own out of which he could have made provision for a second wife if so minded. D

I am far from saying that these arguments are without force, but what the court has to do is to construe these conditions according to the proper meaning of the language used and see whether or not as a matter of law they have been fulfilled in the events which have happened. It is not disputed on the part of the residuary legatees that it is possible in law for a husband to enter into an agreement with his wife in the nature of a contract of service. In other words, it is not disputed that the two relationships of husband and wife and of master and servant are not, as a matter of law, incompatible. It is undoubted that from and immediately after the death of the testatrix Mary was in the service of the husband, Mr. George Kendrew, and it is not in dispute that she continued in such service down to the time when the service agreement was entered into and thereafter down to the time when she married Mr. George Kendrew. Inasmuch as the service agreement continued in force for the rest of the life of George Kendrew, Mary (as appears from the evidence) having been regularly paid the quarterly sum of £13 (making £52 a year as stipulated in the agreement) with the immaterial exception that for some few quarters a larger sum was inadvertently paid, it appears to me to follow that she did remain in George Kendrew's service down to the date of his death. If it cannot be said, as a matter of law, that the marriage put an end to the service agreement, there seems to me to be no escape from the conclusion that the relationship of master and servant continued down E F G H

to that date, and although it may well be that the testatrix never contemplated the possibility of Mary doubling the role (if I may use that expression) of housekeeper under an agreement under seal with that of wife, nevertheless the condition she actually imposed was no more than that Mary Clark should continue in the service of the husband for the rest of his life. That condition, for the reasons I have endeavoured to indicate, seems to me to have been fulfilled, and if the relationship of master and servant did continue so that the condition was literally fulfilled according to its terms, I cannot for my part see how it can be successfully contended that the effect of the continuance of that relationship as a sufficient fulfilment of the condition was destroyed on account of the additional relationship of husband and wife which supervened on the existing relationship of master and servant. There is no doubt an air of artificiality in the measures taken by Mr. George Kendrew and Mary Clark for the purpose of fulfilling the condition, but that is not necessarily any ground for holding that the measures they took did not attain the object in view. They wished to marry without producing the result that Mary ceased to fulfil the condition of continuing in Mr. George Kendrew's service. To achieve that end they adopted the expedient of entering into this service agreement under seal, and, in my judgment, that agreement was effective to produce the desired result. For these reasons, I am of opinion that in this curious and not altogether easy case WYNN-PARRY, J., came to a right conclusion and this appeal fails and should be dismissed.

MORRIS, L.J.: I am entirely of the same opinion. When the testatrix made her will in 1933 Mary Clark was employed as a housekeeper. She had been a housekeeper since the previous year, and for many years before that she had also been employed, having previously been a companion-help. Mary Clark continued thereafter to act as housekeeper until the death of the testatrix in December, 1938. The testatrix was survived by her husband, Mr. Kendrew. Mary Clark, undoubtedly, continued in the service of Mr. Kendrew until March, 1940. She then married him. We have been told that Mr. Kendrew was in possession of a substantial income. At the time of the marriage Mary Clark might have adopted the attitude that just as Mr. Kendrew and the first Mrs. Kendrew had a housekeeper so, if she was to become the second Mrs. Kendrew, a new housekeeper should be employed. She did not adopt that attitude, but she agreed to continue as housekeeper, and she entered into a binding contract with Mr. Kendrew that she would continue as his housekeeper during their joint lives. In my judgment, therefore, she qualifies within the language of both cl. 3 and cl. 5 of the will in that she continued to be in the service of Mr. Kendrew until he died.

VAISEY, J.: I am of the same opinion, and for the same reasons as appear in the judgments of my Lords.

Appeal dismissed.

Solicitors: *Wilberforce Allen & Bryant*, agents for *Tempest, Watson & Croysdale*, Leeds (for the residuary legatees); *Bell, Broderick & Gray*, agents for *Hunt & Wrigley*, Northallerton (for the trustee); *Jaques & Co.*, agents for *E. J. Place & Blair*, Northallerton (for the first defendant).

[*Reported by F. GUTTMAN, Esq., Barrister-at-Law.*]

SILVERSTONE v. SILVERSTONE.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Pearce, J.), January 30, 1953.]

Injunction—Husband and wife—Husband restrained from occupying matrimonial home pending petition by wife for judicial separation.

In or about 1940 the parties moved into a flat which had ever since been the matrimonial home. The flat belonged to the husband. On Dec. 23, 1952, the wife filed a petition for judicial separation, alleging cruelty and adultery by the husband. On a summons by the wife for an injunction preventing the husband from using the flat pending the trial of the petition,

HELD: the wife had a right to be in the matrimonial home while the petition was pending; the court had power to protect that right, and, in order to ensure that pressure was not put on her to abandon her petition by evicting her from the home, to prevent the husband occupying the home, even though it belonged to him; and the injunction would be granted.

Observations of DENNING, L.J., in *Bendall v. McWhirter* ([1952] 1 All E.R. 1311), applied.

AS TO LEGAL PROCEEDINGS BETWEEN HUSBAND AND WIFE, see HALSBURY, Hailsham Edn., Vol. 16, pp. 739-741, paras. 1209-1214; and FOR CASES, see DIGEST, Replacement Vol. 27, pp. 258-265, Nos. 2087-2135.

Cases referred to:

- (1) *Bendall v. McWhirter*, [1952] 1 All E.R. 1307; [1952] 2 Q.B. 466.
- (2) *Robson v. Headland*, (1948), 64 T.L.R. 596; 31 Digest, Replacement, 660, 7621.
- (3) *Hutchinson v. Hutchinson*, [1947] 2 All E.R. 792; 27 Digest, Replacement, 263, 2121.

SUMMONS by the wife for an injunction against the husband to prevent him from using the flat which had been the matrimonial home of the parties.

On Dec. 23, 1952, the wife filed a petition for judicial separation, alleging cruelty and adultery by the husband, and at the same time she took out the present summons. On the same date she applied ex parte to UPJOHN, J., who granted an injunction pending the hearing of the summons. On Jan. 7, 1953, PEARSON, J., dismissed the husband's application to vary or discharge the order of UPJOHN, J., and ordered that the injunction should continue until the hearing of the summons. The husband now applied by a cross-summons for an injunction against the wife to restrain her from interfering with his use of the flat.

C. N. Shawcross, Q.C., and *A. R. Campbell* for the wife.

A. H. Bray for the husband.

PEARCE, J.: The wife is applying to me to continue an injunction obtained by her against the husband to prevent him from using a flat which has been the matrimonial home for twelve years. She obtained the injunction ex parte before UPJOHN, J., on Dec. 23, 1952, and on Jan. 7, 1953, PEARSON, J., continued the injunction until this summons could be heard by me. The parties have been married for thirty years. The flat belongs to the husband, but the wife claims that she owns substantially all the furniture. The husband makes a similar claim. A petition is pending in which she alleges cruelty and adultery. There is also pending litigation about the furniture. Voluminous affidavits have been filed dealing with many controversial points. When one is exercising one's discretion in an interlocutory judgment it is very undesirable to express opinions on questions of fact that will later be decided between the parties on oral evidence given at the trial, and I do not propose to do so.

It is argued by counsel for the husband that there is no case in which a husband has been excluded from premises of which he is the owner and no case in which a wife who has no definite legal or equitable interest in the premises has

A been able to exclude the husband. He argues that I have no power in law to restrain the husband from entering his own flat. He concedes that, if he is right in law, the effect would be that where a wife, possibly with small children, has been treated cruelly by a husband who owns the home, and where she has filed a petition on that ground, she would be at the mercy of her husband pending the hearing if he insisted on returning to the house and living there. He might force her either to abandon her petition or go out of the home with her children, and the court would be powerless to prevent that injustice. That is not a merely hypothetical case. I have had to deal with such cases, and I have done so by making the order now asked for so that a wife and children might be secured in their home until the trial of the action.

B The husband, in his turn, asks me for an order to restrain the wife from interfering with his use of the flat. The argument of counsel for the husband is that I am entitled to allow the wife to occupy the flat, and that, as the husband is prepared to share it with her, I cannot prevent him living there. In my view, that argument is incorrect. The wife is not without rights in the matrimonial home even though it belongs to the husband. DENNING, L.J., expressed the following view in *Bendall v. McWhirter* ([1952] 1 All E.R. 1311):

C "In my opinion, therefore, the right of a deserted wife to stay in the matrimonial home proceeds out of an irrevocable authority which the husband is presumed in law to have conferred on her. This accounts for the fact that the husband cannot turn the wife out. It also accounts for the fact that, as against the landlord, the wife must assert her right in the husband's name. The authority which is thus conferred on her is an authority to stay in the house until the court orders her to go out. This authority flows from the status of marriage, coupled with the fact of separation owing to the husband's misconduct. It ceases when the marriage comes to an end by death or divorce: *Robson v. Headland* (2); but it does not cease when there is a judicial separation: *Hutchinson v. Hutchinson* (3). The authority is, of course, purely personal to her. She alone can exercise it. She cannot assign it. It does not give her any legal interest in the land. She may, perhaps, sub-let some of the rooms so as to help keep herself, but even then, she does so, not out of any legal interest of her own in the land, but on the presumed authority of her husband. Her possession is not always exclusive. If the husband has only been guilty of desertion and nothing else he is entitled to come back at any time asking to be forgiven, and she is then bound to receive him. She cannot then keep him out of his house. But if he has, in addition to desertion, been guilty of cruelty or adultery, she is not bound to take him back. She can keep him out of the house. Her possession may then be quite exclusive. But, whether her possession is exclusive or not, there can be no doubt that she is not a tenant of her husband."

G It is not necessary here to decide the exact nature of a wife's right or to say that it goes to the full extent of the words quoted. In my view, she has a right to be in the matrimonial home while a petition is pending before this court and this court is entitled to protect that right and ensure that pressure is not put on a wife to abandon her petition by evicting her from the home. In the present case I am satisfied that if I let the husband return to the house I am really driving the wife out.

H This Division of the High Court deals with problems somewhat different from those of other Divisions, and the position pending trial is one of its particular problems. To protect the position of a wife pending trial this court may order a husband to pay her alimony pendente lite and give security for her costs even although she appears to have little chance of success in her litigation. It is desirable, if its powers allow, that it should prevent her being bullied out of her remedy or deterred by pressure from seeking the help of the court. If the argument of counsel for the husband is right, there is a serious and regrettable gap in

the powers of this court. But, in my view, his argument is not right and I have a discretion. The practical common sense of the position is that I am deciding who is the person who goes out of, and who is the person who stays in, the home pending the trial. The fact that the husband is the owner of the flat is obviously of importance. On the other hand, this has been the wife's home for twelve years out of the thirty years of the marriage. She says the furniture is hers, but she may be proved wrong at the trial. The husband has of late been away for many periods from the flat although the extent of his absences is disputed. A He has of late been living in a flat belonging to the woman named. Owing to the directions I have given, this case will be tried in six weeks or so from now. A speedy trial is really the only proper solution in this sort of case, because any interlocutory order by way of injunction or otherwise may bear hardly on one party or the other and create an injustice until the subsequent trial determines the truth of the case. I think the fair way of dealing with the matter for the next six weeks is to leave the wife in possession of the flat and to make any provisions possible to ensure that she does not inconvenience the husband thereby more than is absolutely necessary. Counsel for the husband says that by preventing the husband from returning home I might be preventing a reconciliation which he now desires. I do not agree. On the evidence of incidents set out in the affidavits I am satisfied that if I were at this moment to let these two persons share the flat and come up against one another constantly pending the trial any attempt at reconciliation would be quite futile. I have arranged that the court welfare officer shall visit them both. It is very desirable that after a marriage has lasted thirty years one should fully explore the possibility of reconciliation. If, as a result of interviews with the welfare officer it is desired that the injunction should be altered in any way, that can easily be done by a consent order in chambers. I shall, pending the trial of the action, continue the injunction which has been granted. B C D

Order accordingly.

Solicitors: *Howard, Kennedy & Co.* (for the wife); *Alec Woolf & Turk* (for the husband).

[*Reported by A. T. HOOLAHAN, Esq., Barrister-at-Law.*]

Re DICK (deceased). KNIGHT v. DICK AND OTHERS.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Jenkins and Morris, L.JJ.), February 2, 3, 4, 1953.]

Power of Appointment—Fraudulent exercise—Intention to benefit non-object—Absence of moral suasion.

- A Under the will of her father S. had a limited power of appointment, the objects of which were her brothers and sisters and their issue. By her will, dated May 28, 1947, S., who died on May 31, 1950, recited her power of appointment and exercised it in favour of her sister D. absolutely, but, if D. should not survive her for one calendar month, she directed the fund to be held in trust for her nephew, P. After the death of S., there was found with her will a memorandum wherein S. recited the appointment contained in her will and declared that it was her wish, but without imposing any trust or legal obligation, that (i) D. or P., as the case might be, should provide out of the funds so appointed an annuity of £300 per annum for F.C. (who was not an object of the power) for his life, and (ii) D. or P. should in addition transfer to F.C. out of the trust fund securities producing an income which, with the said annuity, would bring the annual income of F.C. up to £800 per annum free of income tax. The memorandum contained alternative provisions in favour of P.F.C. (who was also not an object of the power) in the event of F.C. not surviving S. for one calendar month. The memorandum bore the same date as the will and was signed by S. F.C. was a servant of S. who had been in her service since 1926, and P.F.C. was his daughter, who was a godchild of S. It appeared that since 1936 S. had made several wills and on each occasion she had made contemporaneously with the will a memorandum in formal language in which (certainly in those made in and after 1938) she plainly expressed her wishes in relation to benefits for F.C., his wife, and P.F.C. Between 1940 and 1948 she frequently discussed with D. the subject-matter of the memoranda, although D. did not know the precise terms of the memorandum of 1947 until after S.'s death. A fortnight before S.'s death, D. received from her a letter reiterating as her "last wish" that provision should be made to an extent which she specified for F.C., his wife, and P.F.C. After payment of estate duty the trust fund was of the value of approximately £35,000, and it was estimated that the capital sum required to produce £800 per annum free of income tax would be some £22,000. It was not alleged that there was a bargain between S. and D. that D. should carry out S.'s wishes.
- B
- C
- D
- E
- F

HELD: although it might well be that it was not shown on the evidence that in S.'s view D. was subject to moral suasion to carry out S.'s wishes so strong that she would find it irresistible, it was shown that S.'s deliberate purpose and intention in making the appointment was to benefit persons not objects of the power, and, therefore, the exercise of the power by her was fraudulent and void.

Dictum of LORD PARKER OF WADDINGTON in *Vatcher v. Paull* ([1915] A.C. 378), applied.

Re Crawshaw ([1948] 1 All E.R. 107), explained.

- H AS TO FRAUDULENT APPOINTMENTS, see HALSBURY, Hailsham Edn., Vol. 25, pp. 581-585, paras. 1033-1035; and FOR CASES, see DIGEST, Vol. 37, pp. 504-515, Nos. 972-1066.

Cases referred to:

- (1) *Re Crawshaw*, [1948] 1 All E.R. 107; [1948] Ch. 123; [1948] L.J.R. 586; 2nd Digest Supp.
- (2) *Re Wright*, [1920] 1 Ch. 108; 88 L.J.Ch. 452; 121 L.T. 549; 37 Digest 453, 555.

(3) *Vatcher v. Paull*, [1915] A.C. 372; 84 L.J.P.C. 86; 112 L.T. 737; 37 Digest 492, 865.

APPEAL by the first defendant, Fanny Ridehalgh Dick, from an order of WYNN-PARRY, J., dated Oct. 10, 1952, declaring that in the events which had happened the power of appointment given to Minnie Tennant Sherman by the will and codicils of William Bruce Dick, deceased, had not been validly exercised by the said Minnie Tennant Sherman in her will. A

Rink for the first defendant.

H. A. Rose for the plaintiff, one of the trustees of the will of William Bruce Dick, deceased.

Hamawi for the remaining defendants (interest in default of appointment).

SIR RAYMOND EVERSHED, M.R.: The appellant in this case is a daughter and the seventh child of one William Bruce Dick, who died in 1905. By the will of William Bruce Dick (to whom I will refer as "the testator") considerable personal property, in the form of shares in companies and a large residue, was bequeathed in such a way that the youngest of his children, Mrs. Minnie Tennant Sherman (who died in 1950 without issue), had certain limited powers of appointment, both in respect of the shares and of the residue. The objects of the powers were her own brothers or sisters and their respective issue, and the testator's will provided that, in default of the valid exercise of those limited powers, the portions of the testator's shares and of the residue of the income of which Mrs. Sherman had been in enjoyment during her life should go by way of accruer to the other like portions the trusts of which on her death were still subsisting. B C D

Mrs. Minnie Sherman was born in February, 1877. In 1918 she married Mr. Sherman, who was the widower of one of her own sisters. Mr. Sherman survived that marriage for but five years, and, therefore, from 1923 during the remaining twenty-seven years of her life Mrs. Sherman was a widow. The appellant, Miss Dick, who was six years Mrs. Sherman's senior, has never married, but it appears that the two sisters were, by natural affinity and in the circumstances which affected their lives, thrown somewhat closely together, and, indeed, after Mr. Sherman's death in 1923, this affinity may be said to have increased. Though the two had separate establishments for some time, in 1940 Miss Dick joined her sister at the latter's house in Cornwall, and they lived together there until some two years before Mrs. Sherman's death. During those last two years, Mrs. Sherman lived with two persons for whom she had obviously acquired considerable affection, a Mr. and Mrs. Claydon. Mr. Claydon had entered the service of Mrs. Sherman in the capacity of gardener and handyman in 1926, when he was himself twenty-three years old. Three years later Mr. Claydon married his present wife, Alice Lucy Claydon, and in 1931 a daughter was born to them, Miss Pamela Claydon, who became the god-daughter of Mrs. Sherman. E F

The problem which has been presented to the court is whether the exercise by Mrs. Sherman in her last will of the power of appointment over residue which I have mentioned in favour of her sister, Miss Dick, constituted what is known to the courts of equity as a fraud on the power. WYNN-PARRY, J., after a close review of all the circumstances of the case (and let me say at once that, as must almost always be the fact, the circumstances were in some respects of a very special character), came to the conclusion that the exercise was a fraud on the power, so that the appointment was invalid and ineffectual. Miss Dick has appealed to this court against that decision. I confess, for my part, that I have found the case one of the most vexing difficulty, but, on the whole, I have come to the conclusion that I could not hold the judge wrongly to have determined the issue presented to him. G H

I shall certainly make no attempt to make an exhaustive formulation of the principles on which or the circumstances in which the court will hold an exercise

of a limited power to have been "fraudulent", within the meaning of that expression. We have been, naturally, much referred to a recent decision in this court of *Re Crawshay* (1). In that case the judgment of the court (which was a reserved judgment) was delivered by COHEN, L.J., and early in this judgment he referred to certain propositions which had been accepted by the unsuccessful appellant in that case ([1948] 1 All E.R. 114):

- A "The six propositions are as follows: (i) One case of a fraud on a power is where the donee of a special power of appointment makes an appointment intended to benefit some person not an object of the power. (ii) To establish a fraud on a power it is not necessary to prove a bargain between the donee of the power and the appointee. (iii) What the court looks to is the intention or purpose of the appointor in making the appointment. (iv) It is not necessary that (a) the appointee should be a party to or know of the corrupt intention or purpose, or (b) that the purpose should, in fact, take effect. (v) The relevant date as at which the intention of the appointor has to be ascertained is the date of the exercise of the power. (vi) Evidence is admissible as to the state of mind of the appointor, including statements by the appointor which go to show his or her state of mind at the material date. C Such statements may be material though they are not contemporaneous with the date of exercise of the power."

It will be observed that those six propositions are some of them affirmative in form, some negative, some are general in scope, some are particular, and, indeed, procedural. I do not understand that COHEN, L.J., in those six propositions intended exhaustively to formulate the principles governing frauds on a power D or the methods of establishing the allegations of frauds on a power.

- The propositions (as I have already indicated) had been put forward in the case by the respondents and accepted by the appellant for the purposes of the argument, and in order to make clear what I conceive to be the real scope and limits of those propositions I will state in brief form what the circumstances were that gave rise to the question in *Re Crawshay* (1). A testator had (as in the present case) disposed of his estate in settled shares among his children, giving E in certain circumstances special powers of appointment to the children in favour of other members of his family. One of his daughters, a Mrs. Williams, had contracted a marriage with a gentleman of whom the testator violently disapproved, and he, therefore, provided by codicil that the issue of that marriage should in no circumstances be objects of the exercise of the limited powers given. There F were in fact two sons of that marriage, referred to as Eliot and Leslie. It was quite obvious that the whole family regarded this exclusion of Mrs. Williams' issue by her husband as being grossly unjust, and the utmost care was taken to see whether somehow or another that exclusion could be circumvented. In the event Mrs. Williams' own share had to be disposed of by her as though she had no issue, for the marriage with Mr. Williams was her only marriage. The advice G was sought of eminent counsel as to the best steps to be taken to achieve the object in view, i.e., somehow or another to contrive that Mrs. Williams' share of the corpus of this estate should reach her two boys, Eliot and Leslie. Acting on that advice, Mrs. Williams proceeded then to exercise by will her power of appointment in favour of one of her nephews, Jack Crawshay, who was an object of the power and was, at the time of the making of the will, a boy of some H thirteen years old. A little later, Jack Crawshay's own father proceeded to make his own disposition of his own property, and (again without taking time by going into detail) he clearly brought the greatest possible pressure to bear on his own son to see or to secure that the son would dispose of anything that he took under the exercise of Mrs. Williams' power of appointment by transferring it to Eliot and Leslie. Having regard to the unanimous and strong views taken by the whole of the family it is not surprising that the boy, out of natural decency and filial piety, did what was expected of him. It may be added that when Mrs.

Williams executed a new will a little later containing a similar appointment in favour of Jack Crawshay she accompanied it by a letter addressed to the boy. It is worth while reading that letter ([1948] 1 All E.R. 116):

“ ‘ My dear Jack, You will not, I am sure, misunderstand what I have done with regard to the disposition of money in my will. It is scarcely to be imagined that any question will arise that would possibly deprive your cousins Eliot and Leslie of their just inheritance, and I have only exercised my power of appointment under your grandfather’s will in case by any possibility any difficulty should arise, and must in that event trust to your honour that reparation should be made. In case you may not know, it was decided by your father’s and uncles’ lawyers, that, in consequence of the codicil to your grandfather’s will, the £100,000 he left to me came to them at my death, and they were honourable, kind, and just enough to give up all right to it, so that there can hardly be any question of claim on the part of anyone, in the matter, except the rightful inheritors, Eliot and Leslie. I have not, dear Jack, as yet seen very much of you; before this letter reaches you we may be better acquainted. In any case I trust the transaction may not cause you any trouble or bother and that these few words from one then no longer here may not impose a very painful duty, and that you will not regard unkindly, Your affectionate aunt, Rose Williams.’ ”

COHEN, L.J., in the judgment, stated that the propositions he had enunciated were derived from certain observations of P. O. LAWRENCE, J., in *Re Wright* (2), and he went on (*ibid.*, 114):

“ We respectfully agree with those observations. We would add that the second proposition is founded on the observations of LORD PARKER OF WADDINGTON ([1915] A.C. 378) in the Privy Council in *Vatcher v. Paull* (3), which were cited by VAISEY, J. ([1947] 1 All E.R. 648) in the court below, namely: ‘ . . . a bargain is not essential. It is enough that the appointor’s purpose and intention is to secure a benefit for himself, or some other person not an object of the power ’. A difficulty, however, arises in determining what, short of a bargain, establishes such purpose and intention. On the one hand, if the appointor appoints to an object of the power, hoping that the appointee will so dispose of the appointed property as to benefit a non-object, but intending to benefit the object whatever disposition he may make of the appointed property, the appointment will be valid, but, if he makes the appointment to an object with the belief that the object will be subject to strong moral suasion to benefit a non-object, which suasion the object would, in the appointor’s opinion, be unable to resist, the appointment would, we think, be invalid as a fraud on the power.”

It has, perhaps not unnaturally, been contended before us on behalf of Miss Dick that that antithesis embraces all possible cases short of a bargain, and, in consequence, that, unless it is shown by proper proof (and the onus, it has been conceded, lies on him who challenges the validity of the exercise of the power) that the object of the power in whose favour it was exercised is “ subject to strong moral suasion to benefit a non-object, which suasion the object would, in the appointor’s opinion, be unable to resist ”, then the case must fall within the first alternative and be regarded as being no more than a hope or expectation, subject to an overriding intention of benefiting, or benefiting primarily, the object of the power. In other words, that, unless a moral suasion of the character indicated is proved, the appointment must be good.

I do not think that that is a just interpretation of this passage in the judgment. The learned lord justice was stating the necessary proposition in order to found his judgment on the facts of the case in *Re Crawshay* (1), and on the facts as I have stated them it is, perhaps, not entirely surprising that the court came to the conclusion that Jack Crawshay, though he had never made any sort of bargain or any kind of promise, was under a moral suasion so strong that in Rose

Williams' opinion he could not be expected for a moment to have resisted. The more general rule, I think, which is to guide the court is that stated by LORD PARKER ([1915] A.C. 378) and earlier quoted by COHEN, L.J. ([1948] 1 All E.R. 114):

“ ‘ It is enough that the appointor's purpose and intention is to secure a benefit for himself, or some other person not an object of the power ’ .”

- A I should not wish to be thought to lay it down that whenever there is any intention, however much secreted in the bosom of the appointor, that some non-object will be in some measure benefited, therefore, the exercise of the power is bad. After all, although the phrase “ fraud on the power ” does not carry the sense of deceit which the word “ fraud ” bears in other contexts, still it indicates the doing of something which is not right, using those words in their broad sense—
- B at least, a deliberate defeating of what the donor of the power has authorised and intended. To take an example which has been discussed during the argument, if A., having no free estate, but having a limited power of appointment, exercises that power in favour of some object to whom he has natural inclinations of affection, and says to that person, either by contemporaneous document or otherwise: “ I am in this difficulty. I have no free estate, and, therefore, I
- C hope that you will find it in your heart to look after the persons to whom I feel a natural obligation ”. If he not only says that, but also thinks that the object will be sensible to those claims, I should not wish it to be thought that I was holding that such an appointment, made in such circumstances, must be invalid. But refinements of that kind are not necessary, in my judgment, for consideration in the present case, for if (to go to the other end of the scale) the proper inference
- D from all the facts is that what the appointor has deliberately set out to achieve, via the appointment made, is the benefiting of some non-object, then, as it seems to me, the appointment falls within the disability expressed by LORD PARKER, and, as I have already indicated, on the whole I am not prepared to say that the judge was wrong in reaching that result in the present case.

- E I must return to the narrative. Mrs. Sherman was (to use the judge's own expression) from a testamentary point of view active during many years towards the end of her life. She made a number of wills, the earliest of the existence of which we know anything being in 1936. That will is not, however, extant, nor is a memorandum which she made at the same time as that will. We know nothing of what that memorandum provided. From that time onwards this lady (following, apparently, a common precedent) proceeded to make codicils shortly
- F after each will, and one succeeded the other quite frequently. On each occasion from 1938 onwards until her last will in 1947 she made contemporaneously with the will a formal memorandum in which she plainly expressed what she wished to happen as regards the Claydons. Not only that, but it is also proved in evidence that, during the period of cohabitation of the two sisters from 1940 to 1948, they frequently discussed together the dispositions they were going to
- G make, and, in particular, the subject-matter of these memoranda. We understand that Miss Dick had herself made a will in favour of Mrs. Sherman, which would, of course, have operated if Miss Dick had been the first to die. Oddly enough, though Mrs. Sherman was six years the junior of Miss Dick, the possibility that she might survive Miss Dick never, apparently, entered her head. It is also apparent that during this period she consulted somewhat closely about her
- H affairs and her testamentary dispositions a solicitor at Truro, a Mr. Harvey, who, as will be seen, witnessed many of these documents. We have from Mr. Harvey's firm a short statement, to which the learned judge referred, showing the frequency of the consultations that took place, but, save that it provides a kind of chronological account of their several meetings, that statement gives no indication of what was the advice given at any particular time.

The last will is dated May 28, 1947. In one respect (and this is important) this will differed from its predecessors. Until this document it appears that Mrs.

Sherman had confined her dispositions to her sister, Miss Dick. As I have said, she assumed always that Miss Dick would survive her, and, therefore, the appointment was to Miss Dick, and no provisions were made in the event of Miss Dick predeceasing her, Mrs. Sherman. But on this occasion she did make provision, not for the predecease of Miss Dick, but for the event of Miss Dick not surviving her for one calendar month. The provision she made in that event was that the appointee would be a nephew, a Colonel Pardington, of whom, and of the inferences from his mention in the will, I shall say something hereafter. The form of the will was quite simple. In the event of Miss Dick surviving for a calendar month she was the sole executor and she was the appointee of this share of residue. If she did not so survive, her place was taken by Colonel Pardington. There were then a number of small gifts and legacies. Among the legatees the Claydons appear prominently, and the final residue, which was unsubstantial, was left to Mr. Claydon. In September, 1947—true to form, if I may say so—Mrs. Sherman executed a codicil, but it is not significant and I pass it over.

Although I have not so far stated it, it will, perhaps, have been appreciated that in the earlier memoranda the wish (to put it no higher for the moment) which she had so often expressed was that benefits should be conferred out of the subject-matter of the power of appointment on the Claydons. I will now read the whole of the last memorandum, which is dated on the same day as the will:

“Whereas by my will dated May 28, 1947, I have exercised the power of appointment given to me by the will of my late father William Bruce Dick by appointing that the trustees thereof shall after my death stand possessed of the share of the trust funds in which I have a life interest in trust for my sister Fanny Ridehalgh Dick absolutely or if she shall not survive me for the space of one calendar month then for my nephew George Evelyn Pardington absolutely: Now I hereby declare that it is my wish but without imposing any trust or legal obligation that (i) My said sister or my said nephew as the case may be shall provide out of the said funds so appointed by me as aforesaid an annuity of £300 to Francis Arthur Claydon of Ashdown Playing Place Kea Cornwall during his life to be payable by quarterly payments the first payment to be made at the expiration of three calendar months from my death. (ii) My said sister or my said nephew as the case may be shall in addition to providing the said annuity make over and transfer into the name of the said Francis Arthur Claydon out of the said trust funds investments and property so appointed to her or him as aforesaid as soon as she or he conveniently can do so securities producing at the date of transfer an income which with the said annuity will bring the annual income of the said Francis Arthur Claydon up to the sum of £800 per annum free of income tax at the rate then prevailing in addition to the property and chattels given to him by my said will. (iii) If the said Francis Arthur Claydon shall not survive me for the period aforesaid my said sister or my said nephew as the case may be shall pay the sum of £150 per annum free of income tax to my god-daughter Pamela Frances Claydon until she shall attain the age of twenty-one years and thereupon shall transfer into the name of the said Pamela Frances Claydon securities forming part of the said trust funds sufficient to provide an income of £150 free of income tax at the rate then prevailing. And lastly I declare that this memorandum shall not be deemed to have any testamentary character or effect.”

She appended her signature. It is not in doubt that that was prepared by Mr. Harvey, who had attested her will, as he attested her later codicil. I add that that memorandum differed from its predecessors, and, in particular, from its immediate predecessor, in that the sum of £800, which was the total income that Claydon was to have, was now expressed, as will have been observed, as free of income tax, a benefit not indicated in the earlier memorandum.

It may be convenient to conclude what I want to say about the written material

by adding my reference to another document, which has been called "the death-bed letter", and in doing so I have in mind what counsel for Miss Dick pointed out and what COHEN, L.J., said in *Re Crawshaw* (1) ([1948] 1 All E.R. 114), that intention at the date of the appointment is the vital thing but that evidence may be received, not contemporaneous with the appointment, so far as it throws light on the state of the appointor's mind at the date of the appointment. This document that I am about to read was signed three years after the appointment.

A It was written by Mrs. Sherman a fortnight before her death, and is addressed to Miss Dick.

"Frankie Darling, this is just a business letter and my last wish as regards my will. After much consideration and due thought for every one I should like the old arrangements made in 1947 and typed at Harveys as regarding my shares to still stand good but all to go to Pamela Frances Claydon. I wish £10 per week to be paid to Lucy and Claydon if still together, should he be living with any other woman the £10 to be paid to Lucy on the death of both to revert back to Pamela's shares, I know I can trust you and Evelyn [Colonel Pardington] to carry this out for me as this is my last and sincere wish for them for all their care and love for me. Minnie T. Sherman."

C If the matter stood there alone on these memoranda and this letter, it would, I think, be difficult (though the letter admittedly throws into some obscurity the precise wishes of Mrs. Sherman) to resist the conclusion that Mrs. Sherman intended and purposed that out of the subject-matter of the appointment very substantial benefits should go to the Claydons, and she expressed, at any rate in 1950, the clear view that she knew that Miss Dick and Colonel Pardington

D could be trusted to do what she wanted. There is, however, material pointing the other way, and it is this matter on which, for myself, I have found difficulty. A number of affidavits were filed by or on behalf of Miss Dick, and they include an affidavit by Miss Dick herself. There was no cross-examination on any of these affidavits. Some of the language used raises doubts in the mind of the reader whether what is said is consistent with any inference which can sensibly

E be drawn from the material I have already stated, but, after all, as regards Miss Dick's evidence, at the time of making the affidavit she was over eighty-one years old. It is possible that her recollection is not entirely accurate. After considerable references to her living with her sister and so on, Miss Dick says in para. 11:

"To the best of my recollection it was in or about the year 1940 that Mrs. Sherman first told me that she would like me to make some provision for Mr. and Mrs. Claydon in the event of her predeceasing me. This matter was discussed between us from time to time and Mrs. Sherman mentioned various weekly sums at different times, but she never mentioned a capital sum. I should in any event have wished to make provision for them as I thought that they had been very kind and helpful to Mrs. Sherman and I therefore gladly agreed to her suggestion. In making the suggestion, however, she emphasised on every occasion on which the subject arose that it was entirely a matter for me whether or not to agree to carry it out when the time came."

After stating that she had not seen any of the memoranda, particularly the last one, she goes on, in para. 13, notwithstanding her statement that she "gladly agreed" to the suggestions made:

"I do not feel even morally bound to carry out Mrs. Sherman's wishes and from our conversations on the subject of her wishes, I am quite certain that she would not have expected me to feel so bound."

Then she says that she does not propose, if she is successful in this matter, to carry out Mrs. Sherman's wishes in full, but proposes to make certain other dispositions. Mr. Claydon said at the end of his affidavit:

"(13) Some years before her death Mrs. Sherman told me that she proposed to make some arrangements for me by will, but emphasised that she was not in a position to make the greater part of those dispositions bindingly effective. She said that most of her property would pass to a member of her family, and it would depend entirely on him or her whether I received the provision which she hoped to make for me. (14) I cannot remember when Mrs. Sherman first mentioned the making of some provision on these lines, but believe that it was shortly before I joined the Royal Air Force [during the war] and that the statement was made in order to relieve my wife and myself of worry."

That is echoed by Mrs. Claydon, but she adds:

"Mrs. Sherman made to me statements on the lines of those referred to in para. 13 and para. 14 of the said affidavit. At Easter 1948 or 1949 she mentioned a sum of £800 per annum free of tax in this connection, but I cannot remember exactly what she said."

There was also (to complete this part of the matter) an affidavit by Mrs. England, who was a mutual friend, and she said, among other things, in reference to some conversation:

"Mrs Sherman added that, to some extent, the carrying out of these bequests would depend entirely on the goodwill of her family since (as she had in fact explained to me orally previously) she was, under her father's will, able to leave her money only to a member or members of her family."

I must say that I find it difficult to suppose (and I am not making any imputation whatever against the good faith of Miss Dick) that Mrs. Sherman could have made the sort of statement which, apparently, she did make to Mr. and Mrs. Claydon if she had never told Miss Dick about the provision suggested for capital transfer or the £800 per annum free of tax. But so it is, and Miss Dick has said, in plain terms on oath, that she is certain that Mrs. Sherman would not have expected her to feel under a binding moral obligation to give effect to what Mrs. Sherman had suggested.

I propose to refer to one other affidavit, that made by Colonel Pardington. It should be said (and this is proved) that Colonel Pardington was a natural alternative choice for Mrs. Sherman to make if her nearest sister, Miss Dick, should not survive as required, for, of the rest of the family, Colonel Pardington and his wife and children seem to have been closest to Mrs. Sherman. There is no suggestion in the evidence that Mrs. Sherman indulged in any discussions with Colonel Pardington in the least comparable with those which she had with Miss Dick. Colonel Pardington says:

"Some years ago . . . Mrs. Sherman . . . told me that she was thinking of appointing in my favour her share of the testator's estate and that she would like me to 'look after' Mr. and Mrs. Claydon. She did not mention the amounts of any payments that she would like me to make to them, but I understood that she was anxious that they should not be left destitute. I thought nothing more about the matter, and she did not mention it to me again, and it was not until after her death that I became aware of the contents of her will or the written wishes on the subject of benefactions to the Claydons which she left with her will."

He says that he also would make provision, but not to the extent that Mrs. Sherman had suggested.

After death duties have taken their toll, it appears that the amount left of the corpus of the share appointed is in the region of £35,000. An estimate has been made, which counsel have been willing to accept, that the capital sum required to produce £800 per annum free of income tax would be somewhere in the neighbourhood of £22,000 at four per cent. I do not wish to be

A thought to adhere closely to those figures, but I mention them because it is plain that the wishes of Mrs. Sherman did not merely involve making some eleemosynary payment out of income to old and faithful servants or ex-servants, but did involve (if given effect to) a transfer of a very substantial proportion of the capital of the fund appointed. Mrs. Sherman had obviously become very much attached to the Claydons. I have said that Mr. Claydon began serving her as a gardener-handyman, but the association became obviously closer and during the last two years of her life she (Mrs. Sherman) was living with the Claydons in the Claydons' house. I venture to repeat the reference to that part of the will including the gift of residue which showed a very strong desire on Mrs. Sherman's part to bestow benefits whenever and wherever possible, on the Claydons. I am not, of course, suggesting that there was any kind of impropriety in her wishing so to do.

B The question is, when all these matters are borne in mind: Is the right inference that what Mrs. Sherman intended to do, what her real, deliberate purpose was, what she wanted and set out by all means that were possible to achieve, was to benefit the Claydons via her relations, or was her purpose really to benefit her relations (Miss Dick or Colonel Pardington, as the case may be) subject only to her having indicated to them that she hoped (and, if you like, hoped with confidence) that they would do something for the Claydons on the lines she had suggested? I have come to the conclusion that this case falls within the former of the two alternatives. I have read these passages from the affidavits, and I think that counsel for Miss Dick was justified in saying that, if the real test is whether the case is proved to be in *pari materia* with *Re Crawshaw* (1), it may be that those attacking the validity of the appointment would not succeed. It may well be that it is not shown on the evidence that Miss Dick, still less Colonel Pardington, was, in the view of the appointor, Mrs. Sherman, subject to a moral suasion so strong that to them it would be irresistible, but, as I have said, I do not think that is an exhaustive formulation, short of a bargain (if, indeed, as JENKINS, L.J., pointed out, there really can be a bargain in these cases), of the circumstance where an exercise of the power is a fraud on it. I take as my test LORD PARKER's statement in *Vatcher v. Paull* (3) ([1915] A.C. 378), and I have only added for the purposes of this case that I am assuming the question is whether the intention, the purpose, to be sought is a deliberate intention, a deliberate attempt, to achieve a particular end.

F Against that view I think it might fairly be said that there are three formidable arguments. First, I think it is undoubtedly true (and counsel for Miss Dick rightly put this at the forefront of his case) that Miss Dick was the obvious and natural object of Mrs. Sherman's bounty in the exercise of this power. They were sisters, they had been closely associated and lived together for years, and, if Mrs. Sherman had to make provision in the event of Miss Dick not surviving to enjoy the portion, then equally Colonel Pardington was the natural and obvious alternative. In the course of the argument JENKINS, L.J., drew attention to the case where a man was found to leave property in his will to A. and B. with a statement that he trusted them to give effect to certain wishes which had already been expressed. Everybody knows that that is a way of achieving indirectly a gift to objects whom, for one reason or another, it is not desirable to mention on the face of the will. JENKINS, L.J., further made the forceful observation that, if this appointment had taken effect and Miss Dick had done what Mrs. Sherman wished and transferred £22,000 to Mr. Claydon, and she had been asked by a relative: "Why have you done that?", she would have to say something to this effect: "I have discussed this many times with my sister. She appointed this fund to me, but it was her intention, and she made that clear to me, that out of what I got I should make this transfer to Mr. Claydon, and in honour I could do no other." That is just the same sort of answer that

A. and B. would have given in the supposed case if a member of the family had asked what had become of the large sum of money as to which A. and B., apparently, were beneficiaries. But there is the distinction between the two cases that if one makes a gift to A. and B., they begin to look as though they have been selected as trustees by the fact that they are jointly named beneficiaries, whereas in the present case, the appointee was the obvious choice for Mrs. Sherman to make, so to speak, on her own merits.

What I have said about Colonel Pardington as the natural alternative leads me to the second point, which is, it seems to me, of great force also. We are not here dealing with an appointment only to Miss Dick. The last will provided for the alternative of Colonel Pardington taking the share, and it is obvious that many of the inferences about Miss Dick and what passed between them cannot apply with any force to Colonel Pardington, for there is no evidence whatever that he was ever party to any discussion about the Claydons. Indeed, there is no evidence of his being under any sort of moral obligation to do any particular thing for the Claydons apart from what he may have derived from reading the memoranda when he saw them for the first time after his aunt's death. Thirdly, there is the uncontradicted evidence of Miss Dick herself and the other witnesses which, in the absence of cross-examination, as I have said, must be accepted, and has been accepted by counsel, as truthful evidence.

Those three points, I think, are very formidable. Against them on the other side there are three points also. First, regard must, I think, be had to the persistence whereby Mrs. Sherman over a period of years made wills and contemporaneous memoranda setting out in precise form exactly what she intended, to the trouble she took to go to the solicitors and get advice, and to the long period of discussion of the matter with her sister, coupled, of course, with the obvious and growing attachment that she had for the Claydons and her attempts in other respects, wherever possible, to confer benefits on them. Secondly, and arising from the first, there is the part played in the matter by the solicitors, who obviously drafted these memoranda and advised her about them, and there is, indeed, a letter early in 1943 referred to in one of the exhibits from which it appears that Mrs. Sherman had particularly asked to be assured that she had succeeded in conferring on Miss Dick by her will the power to dispose of the corpus. What is the inference to be drawn from these facts and these consultations? If all that Mrs. Sherman was intending to achieve was to point out to her sister that she could not herself do what she would like for the Claydons and that she hoped and trusted that Miss Dick could do it for her, then what was the point of all this elaborate preparation of memoranda, and why was she so anxious to know that Miss Dick could transfer or transpose the capital? It seems to me that the inference inevitably is that what she was wanting to know was: "How can I most nearly achieve what you have told me is strictly impossible, viz., the use of this power of appointment to confer large benefits upon the Claydons?" Thirdly, there is the extent of the benefit. Reverting again to the example to which I have twice alluded, if the appointee is told: "Well, I hope and trust you will do what I feel under an obligation to do if I could for those who have served me: I leave it, of course, to you", one is thinking of benefactions which are of an altogether different order from those expressly mentioned in Mrs. Sherman's memoranda, which involve, as I have said, a capitalisation of £22,000—two-thirds of the whole fund.

Weighing the three points last mentioned (which seem to me to indicate a conclusion against the validity of the appointment) against the three former matters which tend in the other direction, I think that the learned judge was justified in allowing the latter to outweigh the former. I confess, finally, that I am not entirely uninfluenced by the fact that, if we were to hold in this case that what had happened here was an effective appointment which involved no fraud on the power, it would, I suppose, become a model in other cases. Wills would

be accompanied by statements of this kind, and, unless it were proved that the appointee was (within the language used in *Re Crawshaw* (1)) under a moral suasion so strong that in the opinion of the appointor it was irresistible, a person who had, by the bounty of another, a limited power to dispose of that other's property, could, by such device, contrive to defeat the intention of the original donor and secure the enjoyment of the donor's property, or a substantial part of it, by persons who were altogether outside the ambit of the intended benefaction. For these reasons, I conclude that this appeal fails and should be dismissed.

JENKINS, L.J.: I agree.

MORRIS, L.J.: I agree.

Appeal dismissed.

Solicitors: *Montagu's and Cox & Cardale*, agents for *Snell & Co.*, Tunbridge Wells (for the first defendant); *Hardcastle Sanders & Armitage* (for the plaintiff and the remaining defendants).

[*Reported by F. GUTTMAN, Esq., Barrister-at-Law.*]

C SHEPARD AND ANOTHER v. CARTWRIGHT AND ANOTHER.

[CHANCERY DIVISION (Harman, J.), January 12, 13, 14, 15, 16, 20, 21, February 10, 1953.]

Gift—Inter vivos—Advancement—Father and children—Evidence to rebut presumption of advancement—Subsequent acts or events—Allotments of shares in names of children—Shares subsequently sold and proceeds treated by father as his own moneys—Other provision made for children.

The testator had three children—P., born in 1901, W., born in 1906, and D., born in 1913. During a long period he used their names, without consulting them, to help his own business activities. In 1929 he decided to go into the business of speculative building, and he and one M. promoted five private companies, each having a capital of about £1,000, which they divided between their families. D. and W. did not know about the allotments made in their names. In 1934 the testator and M. promoted a public company to acquire all the shares of the five private companies for a sum of £700,000, partly in cash and partly in shares of the new company, half the consideration going to each of the two families. D. and W. signed the sale agreement, but they knew nothing about the transaction, as they were in the habit of signing anything on the testator's instructions without inquiry. The recitals to the sale agreement contained a statement that the members of M.'s family held their shares as nominees for him, but there was no similar recital in regard to the testator's family. The testator, having procured authorities from D. and W. to the public company to pay direct to him their shares of the cash proportion of the purchase consideration, placed the total sums received by him in a banking account in his own name and later transferred part to deposit accounts in the names of D. and W. He then sold the share consideration passing to D. and W. and credited the amounts received to their deposit accounts. Having procured from D. and W. authorities requesting the bank to honour withdrawals by him from their deposit accounts, by the end of 1935 he had withdrawn the whole of the sums to the credit of these accounts. In 1935 he promoted another private company, of which he had sole control. He distributed the shares of the company, which were paid for out of money drawn from W.'s deposit account, equally among the members of his family, viz., his wife (the children's stepmother), his eldest child, P., and D. and W. Further sums drawn from D.'s and W.'s deposit accounts were used to buy real or leasehold property in the company's name. Between 1935 and 1939 he caused entries to be made in the books of the company showing

D. and W. as creditors to the extent of some £47,000 and £50,000, respectively, on loan accounts. D. and W. knew of the loan accounts, but throughout the testator's lifetime they remained ignorant of the allotments of the shares to them in 1929, of the transactions in 1934, and of the deposit accounts. From time to time the testator purchased houses in the names of his children, and informed them, as soon as each was of age, that these purchases were gifts to them. By his will, made in 1946, the testator gave his residuary estate to his three children, and he died in 1949. D. and W. now claimed certain sums against the testator's estate on the ground that the allotments of shares in their names in 1929 must be regarded as advancements to them by the testator, and they contended that evidence of the events in and after 1934 was inadmissible to rebut the presumption of advancement.

HELD: the events of 1934 and 1935, viz., the dealings by the testator with the proceeds of the sale of the shares allotted to D. and W. in 1929, so far as they threw light on the state of the testator's mind at the time when the allotments were made, were part of the original transaction, being intimately connected with it, and, therefore, they were admissible as evidence on the question of advancement; on the facts, the allotments were merely provisional arrangements and not intended to remove the testator's freedom of action, the testator having, subsequently, provided for D. and W. by means of the loan accounts and the properties purchased in their names; and, therefore, the presumption that the allotments were advancements to D. and W. was rebutted.

AS TO PRESUMPTION OF ADVANCEMENT, see HALSBURY, Hailsham Edn., Vol. 17, p. 677, paras. 1402, 1403; and FOR CASES, see DIGEST, Vol. 25, pp. 510-513, Nos. 67-88.

Cases referred to:

- (1) *Dyer v. Dyer*, (1788), 2 Cox, Eq. Cas. 92; 30 E.R. 42; 25 Digest 511, 78.
- (2) *Finch v. Finch*, (1808), 15 Ves. 43; 33 E.R. 671; 25 Digest 511, 79.
- (3) *Devoy v. Devoy*, (1857), 3 Sm. & G. 403; 26 L.J.Ch. 290; 28 L.T.O.S. 336; 65 E.R. 713; 25 Digest 515, 111.
- (4) *Ex p. Cooper. Re Foster*, [1882] W.N. 96.
- (5) *Grey (Lord) v. Grey (Lady)*, (1677), 2 Swan. 594 (36 E.R. 742); 1 Cas. in Ch. 296 (22 E.R. 809); 25 Digest 511, 71.
- (6) *Marshal v. Crutwell*, (1875), L.R. 20 Eq. 328; 44 L.J.Ch. 504; 39 J.P. 775; 27 Digest, Replacement, 152, 1108.
- (7) *Re Gooch*, (1890), 62 L.T. 384; 25 Digest 516, 118.
- (8) *Bone v. Pollard*, (1857), 24 Beav. 283; 53 E.R. 367; 25 Digest 515, 113.
- (9) *Sidmouth v. Sidmouth*, (1840), 2 Beav. 447; 9 L.J.Ch. 282; 48 E.R. 1254; 25 Digest 512, 82.
- (10) *Christy v. Courtenay*, (1849), 13 Beav. 96; 51 E.R. 38; Digest Supp.
- (11) *Gascoigne v. Gascoigne*, [1918] 1 K.B. 223; 87 L.J.K.B. 333; 118 L.T. 347; 27 Digest, Replacement, 148, 1076.

ACTION by a son and daughter of the testator, Philip Edward Shephard, who died in 1949, against his executors for, inter alia, certain sums of money out of his estate, the claims being based on the presumption of advancement existing between a father and his children and said to arise out of gifts (viz., allotments of shares in companies) made to the plaintiffs in or about 1929. The allotments of the shares in the plaintiffs' names were unexplained and unaccompanied by contemporary evidence, and it was contended by the plaintiffs that evidence of subsequent events was inadmissible to rebut the presumption of advancement. By his will, made in 1946, the testator left his residuary estate to his three children. The plaintiffs' claim was opposed by the eldest child.

Sir Andrew Clark, Q.C., and *Victor Coen* for the plaintiffs, *Richard David Shephard* and *Winifred Maud Cartwright*.

Mulligan for the executors.

Sir Lynn Ungood-Thomas, Q.C., and *F. B. Alcock* for Philip Edward Shephard, junior, eldest son of the testator, who opposed the plaintiffs' claim.

Cur. adv. vult.

Feb. 10. **HARMAN, J.**, read the following judgment. Philip Edward

A Shephard, the father of the plaintiffs, was a man who, during the 1930's, made a great deal of money out of building and selling small houses. Indeed, in its peak year, 1933, one of the companies in which he was interested, and which had a nominal capital of £1,000, made a profit of upwards of £340,000. He died in 1949, and when he made his will in December, 1946, he evidently still passed for a rich man. He bequeathed specifically a number of properties and left annuities to the tune of £1,800 a year before bequeathing the residue to his

B three children. After his death, however, owing to the investigations of the defendant, Dunk, a chartered accountant, who had been connected with some of his business affairs and had made his income tax returns and was appointed an executor, his estate was sworn for probate purposes at £94,000 gross with a net estate of nil. This remarkable result is due to the claims of two of his children which are the subject of the present inquiry.

C In April, 1950, two of the executors, namely, Mr. Dunk and Joseph Osmond Cartwright, the testator's son-in-law and husband of one of the claimants, issued an originating summons asking a number of questions about which I need only say that they are couched in a form which is quite irregular. This application came before **DANCKWERTS, J.**, in chambers, and he refused to make any order on it except to forbid the executors to admit the children's claims.

D Thereafter, the present action was started by writ, two of the children being plaintiffs and two of the executors defendants. It was in form as defective as the former originating summons, and, though, in these days, points about form are out of fashion, I here register a protest against the growing practice of ignoring the proper way of bringing claims to trial. Claims of this sort, which would more than exhaust an estate, can only be adjudicated on in a

E creditors' administration suit unless the executors admit assets and submit to be personally liable. The present action was not entitled in the matter of the testator's estate, nor was administration asked for, nor did the defendants decline to admit assets, nor plead *plene administravit praeter*. Altogether, almost everything was wrong which could be wrong. In particular, it was proposed that these claims should be adjudicated on in the absence of the

F third child, who himself claimed to be a creditor of the estate and whose share of residue would be completely absorbed if the claims were successful. No doubt, executors properly represent an estate, but it cannot be right, in my judgment, that the only defendants in such a case as this should be, first, the husband of one of the claimants, and, secondly, the accountant whose researches were the origins of the claims and without whom it would never have occurred to the claimants that they had any claims against a father who had already treated

G them with great generosity. It seemed to me, however, that the matter could be put right by causing the writ and statement of claim to be amended and by making a general administration decree together with a number of special accounts and inquiries designed to investigate the claims made or pending. Such of them as relate to the plaintiffs I treated as having been adjourned to

H me before certificate under the usual power for that purpose. I also directed the decree to be served on the eldest son, Philip Edward Shephard junior, and he has attended the hearing by counsel in opposition to the claimants.

The claims made are similar and are of a remarkable character. They rest on what is called the presumption of advancement existing between a father and his children, and are said to arise out of gifts made to each child in 1929, or thereabouts, the making of which has only been disclosed by a recent search through the father's books and papers after his death. The nature of the alleged

gifts will appear when I recite the facts. Against them each claimant is willing to bring into account other sums or shares placed in his or her name from time to time, so that each claim is for the balance of a running account. I confess I have never seen the presumption of advancement called in to this particular service.

As to the facts, the testator, when he first appears on the scene, was an insurance agent employed by the Royal Exchange Insurance, but he ran in secret (because it was forbidden by his employers) another insurance business registered under the Registration of Business Names Act, 1916, in the name of "R. D. & P. E. Shephard". These were two of his children, Philip born in 1901 and David (one of the claimants) born in 1913. Also registered, apparently, as a partner in this business was his daughter Winifred (now Mrs. Cartwright, the other claimant), born in 1906. The testator, at one time or another, also started at least two other businesses, one Townsend and Page, a hairdressing shop at Dartford which stood in the name of his daughter, Winifred, and another, a furnishing business at Torquay registered as the property of David and one Grimes and subsequently converted into a limited company. This was carried on at 11, Lucius Street, Torquay, the property standing in David's name. The main importance of these facts is that the testator is shown to have, for a long time, made use of his children's names to help his own business activities. So far, at any rate, as the claimants were concerned, they were not consulted and knew nothing about them.

In 1929 the testator apparently decided to go into the business of speculative building. His associate was one Leo Mayer, an undischarged bankrupt. Between them they promoted five small private companies each having a capital of £1,000 or thereabouts, which the two promoters divided between themselves and their families. The allotments are set out in the joint affidavit of the executors filed on June 16, 1950, in support of the originating summons already mentioned, which was treated as evidence on the present inquiry. At this time Philip, the eldest son, was of age and assisted his father in business. Winifred was also of age, and David was an infant, though he had just left school and was employed in some capacity in the building business. Neither Winifred nor David knew anything about the allotments made in their names. By 1934 the venture had proved an immense success, and the testator and his partner Mayer determined to promote a public company to acquire their interests. As a result, there came into existence the Ideal Building and Land Development Co., Ltd., which, by an agreement of May 16, 1934, agreed to acquire all the shares in the five private companies for a sum of £700,000, of which £300,000 was to be satisfied in cash and £400,000 in shares, the latter being entirely attributable to the acquisition of the shares in New Ideal Homesteads, Ltd., which was the main house-building company. Half the consideration went to each family, with the result that there was payable, as the price of shares standing in Winifred's name, £26,737 10s. cash and forty thousand shares of £1 each, and, in David's name, £45,937 10s. cash and forty thousand like shares. David and Winifred both signed this agreement, David in addition witnessing Mayer's signature, but each of them denied all knowledge of its existence, saying that they were accustomed to sign many documents for the testator and were ready to sign anything he put before them without inquiry.

In connection with this transaction, the testator procured each of the claimants to sign a power of attorney covering the sale of the shares, and, in addition, an authority to the public company to pay direct to the testator the cash proportion of his half of the purchase consideration. The powers of attorney were not used, but the other documents were used to authorise the testator to receive £145,000 total cash consideration from the new company, which he did on May 25, 1934. The remaining £5,000 in cash was payable in respect of shares registered in the name of his wife, who apparently did not receive it, though

A that is outside the present inquiry. On the same day the testator paid a sum of £157,500 through the Leadenhall Street branch of Barclays Bank to the credit of his current account at the Beckenham branch, and, also on the same day, transferred £133,000 of that sum to a deposit account. On May 29, however, he re-transferred the money from the deposit account to his current account, and on that day opened a deposit account in the name of Winifred for £19,277 10s. and of David for £42,060 5s. Dealing first with David, it was pointed out that this credit to his deposit account was short by £3,877 5s. of the £45,937 10s. expressed to be due under the agreement of May 1, and it is suggested that this may be explained by a cheque for that amount drawn on May 28, 1934, in favour of "Shephard", the payee being unidentified, but not being David. Similarly, the amount paid to the credit of Winifred's deposit account was short by B £7,460 10s. of the cash expressed to be due to her under the sale agreement, and this is said to be accounted for by cheques amounting to that sum drawn by the testator in favour of two accounts at Lloyds Bank at Dartford. One of these was in Winifred's name and one in that of the business of Townsend and Page. Both accounts had been used for that business, and the payments only sufficed to clear off overdrafts and thus to close down the business.

C The testator now proceeded to sell the share consideration passing to the children. David's shares were sold first for a sum of roughly £88,000, and this amount was credited to his deposit account on June 15, 1934. Winifred's shares were sold in August for just under £60,000, and this sum is credited to her deposit account on Aug. 2, 1934. At some time or other after the deposit accounts were created and before the beginning of 1935, the testator procured from D each of the two claimants a further authority requesting the bank to honour the testator's signature for withdrawals from the deposit accounts. By these means, the whole of the sums to the credit of the deposit accounts were withdrawn by the end of 1935 and employed by the testator for his own purposes. It is out of these transactions that the claims arise.

E In 1935 the testator promoted a new private company called "Philip Edward Shephard Estates, Ltd." [referred to hereafter as the estates company], of which he had sole control, and most of the money withdrawn from the claimants' deposit accounts went to buy real or leasehold property in this company's name. In 1935 and 1936, the testator caused entries to be made in the books of this company showing Winifred a creditor to the extent of some £50,000 on loan F account, and she remains in that position vis-à-vis the company and offers to give credit for those sums against her claims. Similarly, David was credited between 1935 and 1939 with rather over £47,000 against the estates company, and he is willing to bring in this amount. His case, however, is further complicated notably by dealings in the shares of a company, Woodside Park Garden Suburb, Ltd. In March, 1935, about £47,000 was drawn from David's deposit G account and credited to Philip, who used the money in the purchase of 880 shares in this company at £45 a share. These were first held in the name of Philip, apparently as the testator's nominee. Of them five hundred and eighty were subsequently transferred by Philip to the testator and three hundred were transferred gratuitously to David, representing a cost of £13,500, which he offers to bring into account. In addition, each claimant offers to bring into H account £250, the price of shares of that nominal amount in the estates company, the whole of the capital in which (amounting to £1,000) was paid for, in effect, out of moneys standing to the credit of Winifred's deposit account. The remaining shares were registered as to two hundred and fifty in Philip's name, as to two hundred in the testator's name, and as to fifty in that of his wife. £20,000, drawn out of David's deposit account in March, 1935, was deposited by the testator with the Eastbourne Mutual Building Society in four sums of £5,000, one in his own name and one in the name of each child, including Philip. These three latter sums were repaid in 1936 and credited to the children in

their accounts with the estates company. £750 out of David's deposit account was used to buy shares in his name in the furnishing business earlier mentioned and which had now been incorporated. This venture was a failure. Finally, £430 was paid to David himself in connection with a small business in which the testator had set him up.

The resulting claim of Winifred is £36,000 odd. This involves treating the original allotments of the shares in the private companies as advancements and showing the testator as discharging himself except for the sums used for Townsend and Page by the creation of her deposit account. Thereafter, appropriations out of the deposit account are debited to the testator who, on the other hand, is credited with the loan account created with the estates company and with the two hundred and fifty estates company shares. David's claim, based on similar lines, amounts to over £72,000, and the two suffice more than to exhaust the estate, with the result that the claimants would divide it between them to the detriment of the annuitants and of their elder brother and with the added convenience of paying nothing to the Crown by way of estate duty.

Each of the claimants swore an affidavit in support of the originating summons, and these must be characterised as very uncandid documents. Each starts with a categorical statement which begs the whole question, namely, that prior to 1934 the testator made various gifts of shares to the deponent. The general tenor of the executors' evidence is followed, and no one would guess that neither of these children had any knowledge whatever of the transactions up to the end of 1934 until after their father's death. During the hearing before me each claimant went into the witness box and testified to a complete state of ignorance about the whole matter. Each of them did, however, disclose the fact, which nowhere appears in the filed evidence, that the testator from time to time purchased houses in the name of each child, and that, at any rate from the time when the child was twenty-one, he or she was informed of these purchases and told that they were gifts. Winifred said that she had never received the rents of the houses in her name during the testator's lifetime and did not ask for them. She said that she thought they were presents to come to her eventually. In fact, however, she does appear to have had the benefit of the rents, at any rate after the estates company was formed in 1935, they being credited to her loan account. She said that she was quite unaware that Mr. Dunk was preparing income tax returns on her behalf, and it appears to be the fact that he never consulted her on these matters, but acted on the testator's instructions. The testator seems to have secured her signature to the returns without telling her what they were. David's position was rather different. He was employed by New Ideal Homesteads, Ltd., on the road-making side, and drew a salary accordingly. He knew of the existence of the companies, but not that his name was registered as a shareholder. He remembered his father talking of "selling his business for a great deal of money". In 1935 the testator formed a small company, Richard Shephard, Ltd., for David, and the £430 paid out of his deposit account to him was connected with the affairs of this company. He says that his father put in £3,000 or £4,000 on loan account but withdrew his claim when the business was sold in 1943. A typical instance of their relations is that in 1936 the testator paid David £5,000 to buy a property at Battle, which he did, but it was conveyed into the name of the estates company, which later sold it to Winifred. David observed that the testator had thought of giving him this property, but had changed his mind. David knew that he was a shareholder in the estates company and supposed that his father had given him the shares. He also knew about the loan account in 1936 or 1937, and observed that he did not feel the money was really his. He was also a director from 1936 of Woodside Park Garden Suburb, Ltd., and knew of the shares in his name and did not inquire how they had been paid for.

A There is one further transaction with which I must deal, which appears to be of a different nature to the rest. It appears that in 1936, the testator being in need of cash, withdrew £10,000 from the funds of the Woodside Park company. This he used for his own purposes, but debited it against David, and when asked by Mr. Dunk what the transaction represented replied that it was "David's capital withdrawn from the company". Mr. Dunk, as auditor, interpreted this obscure statement as meaning that £10,000 had been lent to David by the company and entered his name as a debtor to that extent. He said that he supposed that David had had the money. When, therefore, the company went into voluntary liquidation, as it did in 1938, and the assets began to be realised (a process which is still going on) money fell to be paid to the contributors, they being by this time only the testator and David. As David was shown as a large debtor, no money was paid to him, but rather over £8,000 was paid to the testator. This fact was known to David, who was himself one of the liquidators, and he year by year passed the distribution accounts after explanations by Mr. Dunk as to why he was not receiving any part of the money distributed. This seems an extraordinary piece of acquiescence on David's part, but when asked about it he said he supposed that all the money in the company was his father's and, therefore, saw no reason to question the payments. He now claims that these payments should be re-adjusted, and it is agreed that, if the distributions had been made on the footing that the testator, and not David, was the debtor for £10,000, the £8,065 so far distributed should not have been allocated in whole to the testator, but should have been allocated as to £6,347 to David and £1,718 to the testator. In my judgment, there is no answer to this claim, and this adjustment must be made and further distributions carried out on a like footing. It was said that David's claim in this respect was barred by his acquiescence, but, in my judgment, he did not know enough of the facts to debar him in law.

E Apart from this apparently isolated transaction, the claims obviously require the most careful scrutiny. No inkling of the transactions before 1935 apparently reached the claimants during the father's lifetime, though both of them have always been directors of the estates company and have known of their loan accounts there. If, however, the original allotments of shares in their names with the private companies are to be treated as advancements to them so that they became once and for all the beneficial owners of those shares, the rest of the claims follow logically. It is said that the allotments, being unexplained and unaccompanied by contemporary evidence, must be taken to be advancements and that no evidence of the events in and subsequent to 1934 is admissible. This is tantamount to asking the court to decide the matter blindfold, and I am unwilling to take this course unless compelled to it by authority.

F When, then, is the presumption of advancement? It is merely, as is explained by EYRE, C.B., in his judgment in *Dyer v. Dyer* (1), a circumstance of evidence which may be used to rebut the contrary principle under which money or stocks or property placed by A. without consideration in the name of B. are held in the absence of other evidence to belong to A. by way of resulting trust. EYRE, C.B., expressed himself as follows (2 Cox, Eq. Cas. 93):

H "The clear result of all the cases, without a single exception, is, that the trust of a legal estate, whether freehold, copyhold, or leasehold; whether taken in the names of the purchasers and others jointly, or in the names of others without that of the purchaser; whether in one name or several; whether jointly or successive, results*to the man who advances the purchase-money. This is a general proposition supported by all the cases, and there is nothing to contradict it; and it goes on a strict analogy to the rule of the common law, that where a feoffment is made without consideration, the use results to the feoffor. It is the established doctrine of a court of equity, that this resulting trust may be rebutted by circumstances in

evidence. The cases go one step further, and prove that the circumstances of one or more of the nominees, being a child or children of the purchaser, is to operate by rebutting the resulting trust; and it has been determined in so many cases that the nominee being a child shall have such operation as a circumstance of evidence, that we should be disturbing land-marks if we suffered either of these propositions to be called in question, namely, that such circumstance shall rebut the resulting trust, and that it shall do so as a circumstance of evidence. I think it would have been a more simple doctrine, if the children had been considered as purchasers for a valuable consideration. Natural love and affection raised a use at common law; surely then it will rebut a trust resulting to the father. This way of considering it would have shut out all the circumstances of evidence which have found their way into many of the cases, and would have prevented some very nice distinctions, and not very easy to be understood. Considering it as a circumstance of evidence, there must be of course evidence admitted on the other side. Thus it was resolved into a question of intent, which was getting into a very wide sea, without very certain guides".

Where the relationship between the person who provides the property and him (or her) in whose name it is placed is that of father and child, that circumstance will lead the court, in the absence of all other evidence, to assume that an advancement was intended. But both the doctrine of resulting trust and its converse are only expedients designed to get at the truth where there is no other way of doing so, and presumptions of this sort are rather like the burden of proof in any ordinary cause which ceases to have any great importance where both sides can appear and adduce evidence.

In *Finch v. Finch* (2) LORD ELDON, L.C., said (15 Ves. 50):

"I remember the case of *Dyer v. Dyer* (1); which was very fully considered; and the court meant to establish this principle; viz. admitting the clear rule, that, where A. purchases in the name of B., A. paying the consideration, B. is a trustee, notwithstanding the Statute of Frauds (stat. 29 Ch. II, c. 3), that rule does not obtain, where the purchase is in the name of a son: that purchase is an advancement *prima facie*; and in this sense; that this principle of law and presumption is not to be frittered away by nice refinements."

It is, I think, one thing to read a warning against nice refinements, but quite another to detect what is nice in the many different circumstances that arise. For myself, I should not be inclined to consider the evidence so strong in the case of a speculator engaged in making his own and his family's fortune as in that of a man of great property under the old dispensation "advancing" his several children in the way then customary. The difficulty, of course, is that the alleged donor is dead. If he were alive, he could go into the witness box and tell the court what his intention was in 1929 or 1934: see *Devoy v. Devoy* (3), where SIR JOHN STUART, V.-C., said (3 Sm. & G. 405):

"The only question is whether the evidence of the father is admissible. The transfer by the father into the names of himself, and his wife and child, jointly, of a sum of stock, raises a presumption that he intended it as an advancement. That presumption may be rebutted by evidence. But in order to rebut it the evidence must show the real nature of the transaction. Here the evidence shows that the father intended to confer only a qualified interest and not to make an absolute gift. From the state of his circumstances at the time of the transfer he thought he might be able to afford this sum of stock as separated from the rest of his property, so as to secure it for the benefit of himself and wife and child. But he considered it prudent to preserve a dominion over it for himself, if his circumstances should make it necessary for him to resort to it. It has been said that the statement now made, at the end of nine years after the transfer,

A is a mere parol declaration of his intention at that time, and therefore not sufficient to rebut that presumption, which, according to the doctrine of the court, would arise from the nature of the transaction as it appeared, without explanation. In support of that argument it has been said that if the father had died before he gave evidence of the nature of the transaction no record would have been preserved of the transaction, and the court must then have given effect to it as an advancement to the child. The circumstance that if the father had died the evidence would have been lost cannot in the slightest degree affect the truth of the case where the evidence is not lost. The only question now is whether the court can disregard the evidence of the father altogether, as if there had been no record of it at all. Where the conduct of the father only raises a presumption, and the question is as to the amount of evidence necessary to rebut the presumption, it is too much to say that the evidence upon oath of the actor, although subject to the qualification with which it must be received as that of an interested witness, is to be wholly rejected. If it be admissible at all, it rebuts the presumption."

B
C Therefore, if it be left there, there would be no need to have recourse to any presumption, and this is well stated in *Ex p. Cooper. Re Foster* (4), which deals with advances by a father to a son. The facts are not stated, but LINDLEY, L.J., said ([1882] W.N. 96):

"When the parties to such a transaction are alive, and give evidence, there is no occasion to resort to any presumption; the question is one of fact."

D It is clear enough that records of oral declarations subsequently made by the deceased father tending to negative a gift are not admissible in evidence, and the reasons for this are obvious, being (i) that such statements are mere hearsay, and (ii) that the father cannot be cross-examined on them. They are, therefore, inadmissible under the ordinary rules of evidence. There are similar objections to written statements of subsequent date, though, perhaps, they could now be admitted under the Evidence Act, 1938, a consideration not present in the reported cases. It does not seem to me that the same objection applies to subsequent events, as, for instance, the way in which the shares and their proceeds were dealt with in 1934 and 1935. These, so far as they throw light on what the testator's state of mind was when the allotments were made, are, in my judgment, to be treated as part and parcel of the original transaction because intimately connected with it and, therefore, admissible. It is clear from *Lord Grey v. Lady Grey* (5) that subsequent acts or events are admissible. In that case LORD NOTTINGHAM, L.C., decided that the fact that the son had allowed his father to continue to take the rents and manage the property for the rest of his life ought not to rebut the presumption because of the filial duty owed by a son to his father, but he did not suggest that the father's subsequent "perception of profits" and the other acts of the father were not circumstances admissible in evidence.

G *Marshal v. Crutwell* (6) is another instance. SIR GEORGE JESSEL, M.R., in his judgment, put it in this way (L.R. 20 Eq. 329):

H "As I understand it, the law is this: The mere circumstance that the name of a child or a wife is inserted on the occasion of a purchase of stock is not sufficient to rebut a resulting trust in favour of the purchaser if the surrounding circumstances lead to the conclusion that a trust was intended. Although a purchase in the name of a wife or a child, if altogether unexplained, will be deemed a gift, yet you may take surrounding circumstances into consideration, so as to say that it is a trust, not a gift. So in the case of a stranger, you may take surrounding circumstances into consideration, so as to say that a purchase in his name is a gift, not a trust."

He then proceeded to review the facts, and I find the words, "What afterwards

occurred was this" (ibid., 330), and a reference to payment of subsequent sums. The Master of the Rolls then treated himself as a jurymen "taking into view all the circumstances", and that included subsequent circumstances, as the report shows. In *Re Gooch* (7) KAY, J., seemed to go further in taking notice of subsequent written statements of the father. I feel some doubt about that case. *Bone v. Pollard* (8) is another authority for considering the subsequent mode of dealing with a fund when deciding a question of advancement. I think that statements such as those to be found in *Sidmouth v. Sidmouth* (9), that only contemporary acts of the father are admissible, are too widely stated if by "acts" it be meant to include circumstances. I observe that in *Christy v. Courtenay* (10) LORD LANGDALE, M.R., who also decided *Sidmouth v. Sidmouth* (9) said (13 Beav. 99) that the evidence must consist "mainly, if not exclusively," of contemporary circumstances. It seems to me, therefore, that I am at liberty to look at the picture as a whole and to come to a conclusion on a consideration of all the circumstances. A

The claimants, however, on the assumption that subsequent events might be held to be admissible, relied, not only on the original allotments, but in addition on certain circumstances. (i) Immediately before the shares in New Ideal Homesteads, Ltd. were sold to the public company, it suited the testator and his partner, Mayer, to declare a dividend at the rate of £25 10s. a share free of tax. This was the only dividend declared by any of these companies. This, so far as the testator was concerned, was money which he required to repay a debt which he owed to the company, and he received half of this dividend on the footing that he was the owner of half of the shares in the company, three hundred of which were registered in his children's names. He repaid it at once to the company and so discharged his indebtedness. When, however, in February, 1936, inquiries were made of Mr. Dunk by the revenue authorities about the right to take this dividend and he applied to the testator for information, he was told that each of the children had "a beneficial interest in the one dividend paid". The testator's motive in saying this was obvious. Add this dividend to his income, and nearly all of it would be payable by way of surtax, but in his children's hands only a small claim resulted. Nevertheless, this is no doubt a quasi admission by the testator and one which, it may be, could not be impugned by a beneficiary under his will on the ground that it was made in order to defraud the revenue: see *Gascoigne v. Gascoigne* (11). It seems to me, however, that the principle of this case does not preclude another creditor, as Philip Shephard affects to be, from making this answer. No claim to this dividend appears in the statement of claim, nor is it mentioned in the evidence filed on the originating summons. This I do not understand, for, though it relates to income and not to capital, very large claims for interest have been included. Indeed, as first postulated, compound interest was demanded. Even the claim to simple interest ignores the elementary rule that, in calculating debts against an insolvent estate, interest is ignored. (ii) Mr. Dunk testified that at the time of the sale to the public company the testator told him that he had received the whole purchase money and put it on a deposit account with a view to re-investment, and that he, Dunk, then suggested to the testator that, as, to his knowledge, some of the shares in the private companies had stood in the children's names, deposit accounts should be created in their names also. To this advice Mr. Dunk attributes the fact that the testator did create deposit accounts in the children's names for the bulk of the proceeds of these sales, so far as they represented shares in their names. I cannot think that there is any great weight in this consideration in view of the fact that the testator at the same time procured from each of the claimants the authorities which enabled him to treat the accounts as his own. (iii) In the recitals to the sale agreement occurs a statement that members of Mayer's family held their shares as nominees for him, no similar recital being included to deal with the Shephard family. I am asked to infer from this an acknowledgment by the testator that B C D E F G H

he had no interest in the claimants' shares. I do not think this inference can be drawn, though the omission is a circumstance of evidence tending against the testator and to be taken into account. (iv) Money from Winifred's deposit account was used, as already mentioned, to pay the debts of Townsend and Page. This is only an inference drawn by Mr. Dunk from the equality of the figures. Anyhow, Winifred never claimed that she was anything but a nominee so far as this business was concerned. A like consideration applies to the money from David's deposit account used to finance or buy shares in the furniture business.

Neither of the claimants was ever told anything of the transactions of 1934, and they remained, throughout the testator's life, ignorant of the existence of the original allotments, of the sale agreement, and of the deposit accounts. The testator did, on the other hand, acquire a number of house properties in the names of each of the claimants, and he told them about these as soon as they were of age, or as soon as the properties were bought, and indicated that these were intended to be provisions for them. Each child knew he or she had provision made for him or her in this form and also knew about the loan accounts in the estates company. It is obvious that, after the estates company came into existence and loan accounts were created as they were, the testator cannot have intended that his children should be allowed, by raking back into his past transactions, to prefer further claims against him. Each had been provided with some £50,000, and one can suppose that, if in his lifetime a child had suggested that he or she was his father's creditor, a very different will would have been left. This does not, of course, prove that the testator had not originally the intention of making a gift, but it seems to me that it makes it unlikely that he intended to commit himself at a time when his fortune was not made and his future was wholly nebulous. It was not until 1934 that he was in a position to make substantial gifts to anyone, and the transactions of that year speak loudly against any intention to advance, for instance: (i) The whole of the estates company's shares were paid for out of Winifred's deposit account. These were distributed among the family, including some to her step-mother and to her elder brother. I cannot believe that, if the testator had thought that the money in this deposit account was hers, he could have felt free to use it in this way. (ii) The transaction in regard to the Woodside Park company is another of the same kind. The testator cannot be supposed to have used £37,000 which he supposed to be David's money in buying shares in this company in the name of Philip and for himself.

Considering the evidence as a whole, and doing my best to weigh the circumstances on both sides, I feel obliged to come to the conclusion that the testator did not in the earlier allotments of shares, any more than in the transactions with the businesses, intend to commit himself irrevocably by way of out and out gifts. I take the view, as, indeed, SIR JOHN STUART, V.-C., did in *Devoy v. Devoy* (3), that these were only provisional arrangements not intended to remove his freedom of action, and I find no principle of law which prevents me from giving effect to that view. When the loan accounts in the estates company were created, the position was very different. Here the testator intended provision for the claimants, and he told them so, just as he did in the cases of the houses bought for them. If this be right, the claimants retain what they have, but cannot by appealing to earlier events ask for more. On the view that I take, the questions raised on the executors' plea of the Limitation Acts, 1623 and 1939, do not arise, and I need not embark on it except to say that I do not see how, if I had taken a different view, the Acts would, having regard to the claimants' ignorance, have afforded a defence.

Judgment accordingly.

Solicitors: *Douglas & Co.* (for the plaintiffs); *MacDonnell* (for the executors); *Sidney Pearlman* (for P. E. Shephard).

[*Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.*]

SWALLOW AND PEARSON (a firm) v. MIDDLESEX COUNTY COUNCIL.

[QUEEN'S BENCH DIVISION (Parker, J.), February 10, 1953.]

Town and Country Planning—Enforcement of planning control—Enforcement notice—Invalid notice—Application by occupier for continuance of user and appeal to the Minister of Town and Country Planning—Estoppel from denying invalidity—Town and Country Planning Act, 1947 (c. 51), s. 16 (1), s. 23 (1).

The plaintiffs, building contractors, used some land at the rear of their premises for light industrial purposes, and the defendants, the local planning authority, served on them an enforcement notice under s. 23 (1) and s. 75 (1) of the Town and Country Planning Act, 1947, to discontinue the use of the premises for industrial purposes within thirty days of service of the notice. The notice was invalid because it failed to lay down the period after which it was to take effect: *Burgess v. Jarvis* ([1952] 1 All E.R. 592), and *Mead v. Plumtree* ([1952] 2 All E.R. 723); but the defendants contended that the plaintiffs were estopped from denying the defendants' right to proceed on the notice and from impugning its validity since, after having been served with it, they had applied for planning permission under s. 23 (3) (a) of the Act, and had thereby elected to treat it as a valid notice.

HELD: the plaintiffs were not estopped from denying the validity of the notice.

FOR THE TOWN AND COUNTRY PLANNING ACT, 1947, s. 23 (1) and s. 75 (1), see HALSBURY'S STATUTES, Second Edn., Vol. 25, pp. 525 and 583.

Cases referred to:

- (1) *Burgess v. Jarvis*, [1952] 1 All E.R. 592; [1952] 2 Q.B. 41; 116 J.P. 161.
- (2) *Mead v. Plumtree*, [1952] 2 All E.R. 723; 116 J.P. 589; *sub nom. Mead v. Chelmsford R.D.C.*, [1953] 1 Q.B. 32.
- (3) *Davis (W.) (Spitalfields), Ltd. v. Huntley*, [1947] 1 All E.R. 246; *on appeal*, [1947] 2 All E.R. 371 n.; 31 Digest, Replacement, 496, 6219.

POINTS OF LAW set down for decision under R.S.C., Ord. 25, r. 2, in an action for (i) a declaration that the plaintiffs be entitled to use certain land for light industrial purposes notwithstanding the service of a document purporting to be an enforcement notice under s. 23 (1) and s. 75 (1) of the Town and Country Planning Act, 1947; (ii) a declaration that the document be held to be wholly ineffective; (iii) an injunction restraining the defendants from prohibiting or interfering with the plaintiffs' user of the land.

The plaintiffs, who were building contractors, were proprietors of land at the rear of their premises at Wood Green, Middlesex. They had used this land for light industrial purposes since they acquired the property in 1946. On May 17, 1949, the defendants, the local town planning authority, served an enforcement notice on the plaintiffs under s. 23 (1) and s. 75 (1) of the Town and Country Planning Act, 1947, to discontinue the use of the premises for industrial purposes within thirty days of service of the notice, on the grounds that the plaintiffs had been using the property concerned in contravention of previous planning control. The notice was accompanied by a document entitled: "Notes on ss. 23 and 24 of the Town and Country Planning Act, 1947". On May 19 the plaintiffs applied, under s. 23 (3) (a) of the Act, to the defendants for permission to continue to use the land, and, on permission being refused, appealed under s. 16 (1) of the Act to the Minister of Town and Country Planning (now the Minister of Housing and Local Government) who dismissed the appeal. The plaintiffs issued a writ claiming, *inter alia*, a declaration that they were entitled to use the land at the rear of their

premises for light industrial purposes and were so entitled notwithstanding the service of the document purporting to be an enforcement notice, and a declaration that the document was not an enforcement notice and was wholly ineffective. It was pleaded in defence that the plaintiffs were estopped from denying the defendants' right to proceed on the notice, from impugning its validity, and from alleging that their use of the property was otherwise than unlawful. On Nov. 10, 1952, the master ordered that the following points of law be set down for hearing and disposed of before the trial of the issues of fact in the action: (i) Was the notice a valid enforcement notice? (ii) If it was not, were the plaintiffs estopped from disputing its validity?

N. N. McKinnon and J. D. James for the plaintiffs.

Squibb for the defendants.

PARKER, J.: These proceedings are brought by the plaintiffs claiming, among other things, a declaration that they are entitled to use their premises for light industrial purposes and for a declaration that a document purporting to be an enforcement notice served on them on May 17, 1949, by the local town planning authority under the Town and Country Planning Act, 1947, s. 23 (1) and s. 75 (1), is invalid. Pursuant to an order made by a master on Nov. 10, 1952, two points of law are referred to me for decision. The first is whether that document of May 17, 1949, is a valid enforcement notice, and the second is, if it is not, whether the plaintiffs in these proceedings are estopped from disputing its validity.

The document in question, in the light of the recent decisions of *Burgess v. Jarvis* (1) and *Mead v. Plumtree* (2), is clearly invalid. Those two decisions make it quite clear that s. 23 of the Town and Country Planning Act, 1947, on its true construction, requires two periods to be set out in the notice—one a period, pursuant to s. 23 (2), for the doing of the work or the discontinuance of the use or the restoration of the land, or whatever the matter required to be done consists of, and the other a period under sub-s. (3), which is the period after the expiration of which the notice itself is to take effect. This document, which is in a form, I think, probably used by numbers of local authorities before the decision in *Burgess v. Jarvis* (1), is clearly invalid as failing to lay down the period after which the enforcement notice is to take effect. Counsel for the defendants has argued that in this particular case that defect is overcome by certain notes which are attached to the notice and to which on the face of the notice attention is drawn in these words:

“Your attention is particularly drawn to the notes accompanying this notice as to the rights of the person upon whom a notice is served.”

It is true that those notes, which set out and to some extent paraphrase sections of the Act, do draw the attention of the addressee of the document to his rights in regard to appeals and such matters, but nowhere do they say within what period those rights accrue to him. Incidentally, it is to be observed in passing that even the notes themselves are not accurate because on the facts of this case s. 75 (5) applies in the place of s. 23 (4) (a). Accordingly, I answer the first question by holding that the enforcement notice is invalid.

As regards the second point, whether the plaintiffs are estopped from disputing its validity, counsel for the defendants, on whom the burden rests, draws attention to the fact that only two days later, on May 19, 1949, the plaintiffs, as they were entitled to do under s. 23 (3) (a) of the Act, applied to the local planning authority for permission to continue the use, and on July 13, 1949, that application was refused. Not content with that, they then appealed to the Minister, under s. 16 (1) of the Act, from the decision of the local planning authority, and, finally, on Mar. 8, 1950, that appeal was refused. It is pointed out by counsel for the defendants, and it is, undoubtedly, true,

that those applications and appeals were on the basis that this document of May 17, 1949, was a valid enforcement notice. He, accordingly, argues that, having treated that document as a good notice, the plaintiffs are estopped from denying its invalidity. He further points out that, so far as the pleadings are concerned, the plaintiffs did not take the point affirmatively that the notice was a bad notice until the amendment of the pleadings on Apr. 25, 1952, whereas under s. 75 (1), proviso, the time for serving an enforcement notice in such a case as this expired three years after the appointed day, namely, on July 1, 1951. In that connection counsel for the defendants referred me to *W. Davis (Spitalfields), Ltd. v. Huntley* (3), where it was held that a tenant, having applied for a new lease under the Landlord and Tenant Act, 1927, s. 5 (1), on the basis of his existing lease having been determined, could not thereafter as against the landlord set up that a notice given to him by the landlord was invalid and had not terminated the lease. I am not quite clear how far that kind of principle applies when one is considering something which is prescribed by Act of Parliament. There is no doubt that a man is entitled to waive or to agree to waive the advantage of a law or rule made solely for his benefit and protection. It is equally clear that no person can waive a provision or a requirement of the law which is not solely for his benefit, but is for the public benefit. In my view, however, when this case is examined it appears that the plaintiffs have not waived some provision inserted solely for their benefit. It is said that they are estopped from denying that a particular document is valid. This enforcement notice is one which Parliament has said must be in a particular form, and when it is in that particular form its non-observance is a criminal offence not only on the part of the person on whom it is served, but, in some cases, on others. I do not think any amount of so-called waiver or approbation can make a document such as this, which is patently and wholly invalid, into a valid document with the consequences that would follow. In those circumstances I hold that the plaintiffs are not estopped.

Judgment for the plaintiffs.

Solicitors: *Craigen, Hicks & Co.* (for the plaintiffs); *C. W. Radcliffe* (for the defendants).

[Reported by G. A. KIDNER, ESQ., *Barrister-at-Law.*]

LITTLEWOOD v. GEORGE WIMPEY AND CO., LTD. BRITISH OVERSEAS AIRWAYS CORPORATION (second defendants and third parties).

[QUEEN'S BENCH DIVISION (Parker, J.), January 26, 27, 28, 29, 1953.]

Public Authority—Limitation of action—British Overseas Airways Corporation—Performance of public duties—Control of finances by government—Limitation Act, 1939 (c. 21), s. 21 (1).

Tort—Joint tortfeasors—Contribution—Action against two defendants—Action against second defendant not commenced within statutory period—First defendant's right to contribution from second defendant—Law Reform (Married Women and Tortfeasors) Act, 1935 (c. 30), s. 6 (1) (c).

On July 28, 1949, the plaintiff, while employed by the British Overseas Airways Corporation was engaged in emptying waste oil from barrels into a tank, with another servant of the corporation, to do which it was necessary for him to be raised some eight feet into the air while standing on the fork of a fork lift truck. While he was so standing a lorry driven by a servant of the first defendants collided with the fork, and the plaintiff fell to the ground and was injured. In an action for damages for negligence against the first defendants and for negligence and/or breach of statutory duty against the corporation, the judge found that the first defendants' servant had been negligent and that the corporation were in breach of their statutory duty to provide a safe system of work. The writ against both the first defendants and the corporation was issued on Apr. 26, 1951, and a third-party notice was issued against the corporation on June 8, 1951.

HELD: (i) in the circumstances, and with special regard to the provisions of the Civil Aviation Act, 1946, relating to the entrusting of the corporation with duties in the public interest which, it was contemplated, should be performed by the corporation irrespective of whether they made a loss or a profit, and to the control by the Minister of Civil Aviation of the finances of the corporation and to the making good by the Exchequer of any loss they might suffer, the corporation were a public authority within the scope of s. 21 (1) of the Limitation Act, 1939; the work on which the plaintiff was engaged was incidental to and necessary for the performance by the corporation of their public duty, although the oil at some future time was to be sold by the corporation to a contractor; and, therefore, the action not having been commenced within one year from the date on which the cause of action accrued, the corporation were entitled to the protection of s. 21 (1).

Bradford Corpn. v. Myers ([1916] 1 A.C. 242), distinguished.

Observations of VISCOUNT SIMON, L.C., VISCOUNT MAUGHAM, and LORD PORTER in *Griffiths v. Smith* ([1941] 1 All E.R. 71, 76, 89), and of LORD TUCKER in *Firestone Tire & Rubber Co. (S.S.), Ltd. v. Singapore Harbour Board* ([1952] 2 All E.R. 222, 223), applied.

(ii) as the corporation had been sued to judgment and held not liable, the first defendants could not recover from it contribution under s. 6 (1) (c) of the Law Reform (Married Women and Tortfeasors) Act, 1935.

Merlihan v. A. C. Pope, Ltd. (Pagnello, Third Party) ([1945] 2 All E.R. 449), doubted.

AS TO PROTECTION OF PUBLIC AUTHORITIES, see HALSBURY, Hailsham Edn., Vol. 26, pp. 288-304, paras. 607-630; and FOR CASES, see DIGEST, Vol. 38, pp. 119-130, Nos. 859-955.

FOR THE LIMITATION ACT, 1939, s. 21 (1), see HALSBURY'S STATUTES, Second Edn., Vol. 13, p. 1180, and FOR THE LAW REFORM (MARRIED WOMEN AND TORTFEASORS) ACT, 1935, s. 6 (1), see *ibid.*, Vol. 25, p. 359.

Cases referred to:

- (1) *Swain v. Southern Ry. Co.*, [1939] 2 All E.R. 794; [1939] 2 K.B. 560; 108 L.J.K.B. 827; 160 L.T. 606; Digest Supp.
- (2) *A.-G. v. Margate Pier & Harbour Co. of Proprietors*, [1900] 1 Ch. 749; 69 L.J.Ch. 331; 82 L.T. 448; 64 J.P. 405; 38 Digest 102, 734.
- (3) *Griffiths v. Smith*, [1941] 1 All E.R. 66; [1941] A.C. 170; 110 L.J.K.B. 156; 164 L.T. 386; 105 J.P. 63; 2nd Digest Supp.
- (4) *Bradford Corpn. v. Myers*, [1916] 1 A.C. 242; 85 L.J.K.B. 146; 114 L.T. 83; 80 J.P. 121; 38 Digest 110, 784.
- (5) *The Johannesburg*, [1907] P. 65; 76 L.J.P. 67; 96 L.T. 464; 38 Digest 103, 738.
- (6) *The Ydun*, [1899] P. 236; 81 L.T. 10; *affd.* C.A., [1899] P. 342; 38 Digest 102, 732.
- (7) *Lyles v. Southend-on-Sea Corpn.*, [1905] 2 K.B. 1; 74 L.J.K.B. 484; 92 L.T. 568; 69 J.P. 193; 38 Digest 102, 733.
- (8) *Firestone Tire & Rubber Co. (S.S.), Ltd. v. Singapore Harbour Board*, [1952] 2 All E.R. 219; [1952] A.C. 452.
- (9) *Edwards v. Metropolitan Water Board*, [1922] 1 K.B. 291; 91 L.J.K.B. 210; 126 L.T. 300; 86 J.P. 33; 38 Digest 111, 795.
- (10) *Merlihan v. Pope (A. C.), Ltd. (Pagnello, Third Party)*, [1945] 2 All E.R. 449; [1946] K.B. 166; 115 L.J.K.B. 90; 173 L.T. 257; 109 J.P. 231; 2nd Digest Supp.
- (11) *Hordern-Richmond, Ltd. v. Duncan*, [1947] 1 All E.R. 427; [1947] K.B. 545; [1947] L.J.R. 1024; 176 L.T. 332; 2nd Digest Supp.
- (12) *Collinge v. Heywood*, (1839), 9 Ad. & El. 633; 8 L.J.Q.B. 98; 112 E.R. 1352; 32 Digest 335, 192.
- (13) *M'Gillivray v. Hope*, [1935] A.C. 1; 104 L.J.P.C. 11; 151 L.T. 482; 27 B.W.C.C. 348; Digest Supp.
- (14) *Magor & St. Mellons Rural District Council v. Newport Corpn.*, [1951] 2 All E.R. 839; [1952] A.C. 189; 115 J.P. 613; 2nd Digest Supp.

ACTION tried by PARKER, J., without a jury.

The plaintiff was an aircraft cleaner working at London airport and was employed by the British Overseas Airways Corporation (second defendants and third parties). On July 28, 1949, the plaintiff, with a man called Hubbard, was instructed to move a number of twenty gallon drums of waste oil and empty them into a tank. To do this they loaded six drums on a trailer, attached the trailer to a fork lift truck, and towed it to a position close to the tank, which was situated at the side of a concrete road. The trailer was then detached, Hubbard placed the fork of the truck in a position close to the trailer, and the plaintiff loaded two barrels on to the fork. The plaintiff then got on to the fork himself placing one foot on each prong and gripping the rims of the nearest barrel. Hubbard raised the fork with the plaintiff standing on it eight feet into the air, manoeuvred the truck so as to avoid the trailer, drove along the road for about twenty-five feet, and turned at right angles, continuing till the fork was over an aperture in the top of the tank. The plaintiff, still standing on the fork, then rolled the drums over so that the bung was over the aperture in the tank, opened the bung, and let the oil drain into the tank. This having been done once with two drums, the plaintiff loaded another two and was again raised some eight feet into the air. Hubbard turned the truck into the road to pass the trailer when he saw approaching at some distance, a lorry, which belonged to the first defendants, George Wimpey & Co., Ltd., and was driven by one of their servants, and to make sure that the lorry had enough room to pass he reversed the truck. The lorry, however, in passing, struck the fork which was projecting into the road at an angle of about forty-five degrees, and the plaintiff was shaken off the fork, fell on to the concrete road, and was injured.

In an action by the plaintiff against the defendants for negligence and/or breach of statutory duty the judge found that the first defendants' lorry driver was grossly negligent, that neither Hubbard nor the plaintiff was negligent, that the fork lift truck was unsuitable for the work of emptying the barrels, and that, in failing to give the plaintiff any instructions as to how to empty the barrels and in failing to provide a ladder to the tank, the second defendants were in breach of their statutory duty to provide the plaintiff with a safe system of work. The writ in the action was issued on Apr. 26, 1951, against both defendants, and a third-party notice was issued against the second defendants on June 8, 1951.

Beney, Q.C., and *M. R. Hoare* for the plaintiff.

Diplock, Q.C., and *S. Rees* for the first defendants.

Melford Stevenson, Q.C., and *Scarman* for the corporation.

PARKER, J., stated the facts and continued: The corporation, however, rely on s. 21 (1) of the Limitation Act, 1939. That section, which replaced s. 1 (a) of the Public Authorities Protection Act, 1893, provides that:

"No action shall be brought against any person for any act done in pursuance, or execution, or intended execution of any Act of Parliament, or of any public duty or authority, or in respect of any neglect or default in the execution of any such Act, duty or authority, unless it is commenced before the expiration of one year from the date on which the cause of action accrued."

If that section applies the claim against the corporation is clearly barred. It has long been held that before a person, to use a neutral term, can claim the benefit of the section, he must show that he is a public authority because, although the words are: "No action shall be brought against any person . . .", it has always been construed as meaning any person in the position of a public authority. Secondly, it must be proved that, assuming he is a public authority, the neglect or default complained of was the neglect or default in the execution of a public duty or authority.

As regards the question whether the corporation is a public authority, the matter is not easy because no court advisedly has attempted to lay down any test or definition of what is and what is not a public authority. Certain things are clear. It is clearly not enough that it is a body created by statute required to do things for the public benefit, for example, a railway company. Equally it is clear that a commercial company, albeit set up by a statute, which is entitled to trade for the benefit of its incorporators, is not a public authority: see in this connection *Swain v. Southern Ry. Co.* (1) and *A.-G. v. Margate Pier & Harbour Co. of Proprietors* (2). At the same time the fact that a company is entitled to make a profit for itself does not prevent it from being a public authority. In *Griffiths v. Smith* (3) LORD PORTER says ([1941] 1 All E.R. 89):

"In the first place, though the word 'person' is used, not every person is protected. It is a 'Public Authorities Protection Act' and not a 'Persons Protection Act', and, therefore, the body to be protected must be a public authority."

He refers to *Bradford Corpn. v. Myers* (4) and *The Johannesburg* (5), and goes on (ibid.):

"What, then, is a public authority? As SIR GORELL BARNES, P., says in *The Johannesburg* (5) the phrase is not confined to municipal corporations. There are many other bodies which perform statutory duties and exercise public functions, and examples of such bodies are given by him at p. 79. The distinction which he draws is between a body carrying out transactions for private profit and those working for the benefit of the public. Profit they may undoubtedly make for the public benefit . . ."

He refers to *The Ydun* (6) and *Lyles v. Southend-on-Sea Corpn.* (7) and adds:

"but they must not be a trading corporation making profits for their corporators (*A.-G. v. Margate Pier & Harbour Co. of Proprietors* (2))."

It seems to me that there are a number of matters which I must consider in determining whether the corporation is or is not a public authority. I must consider the duties imposed as opposed to the powers given. I must consider the degree, if any, of public control, and I must consider to whose benefit any profit earned is going to accrue. The corporation was set up by the British Overseas Airways Act, 1939, and under that Act it took over the undertakings and assets of, undoubtedly, trading companies. The constitution of the corporation was laid down in that Act of 1939. I do not think it is necessary for me to refer to it. It is sufficient to say that it was a corporation that consisted of certain members not exceeding nine in number and was not a company with shareholders in the ordinary way. Under the Civil Aviation Act, 1946, two new corporations, British European Airways and British South American Airways, were formed, but the Act, in effect, deals with the three corporations and covers the powers and duties of B.O.A.C. which had been formed under the Act of 1939. By s. 2 (1):

"Each of the three corporations [i.e., the two new corporations and B.O.A.C.] shall, subject to the provisions of this Act, have power to provide air transport services and to carry out all other forms of aerial work, and may provide such services and carry out such work, whether on charter terms or otherwise, in any part of the world; and it shall be the duty of each of the said corporations to exercise those powers so as to secure that the air services which they may provide are developed to the best advantage, and, in particular, to exercise those powers, so as to secure that the services provided by the corporation are provided at reasonable charges."

By s. 2 (3) the Minister of Civil Aviation is given power to "define the powers conferred upon the corporation". Turning to the financial arrangements, it is true that there are borrowing powers, and that, by s. 7 (2), the corporations were empowered to create stock. By s. 17 and s. 18 the Minister, and, through the Minister, Parliament, is given the control of the company's revenue. By s. 17 the corporation is to establish a reserve fund and the Minister has power to give to the corporation directions on

"... any matter relating to the establishment or management of the said fund, the carrying of sums to the credit thereof, or the application thereof, notwithstanding that the directions may be of a specific character."

By s. 18 (1) it is provided that

"Any excess of the revenues of any of the three corporations for any financial year over the total sums properly chargeable by the corporation to revenue account for that year, including in such sums (without prejudice to the generality of that expression) sums credited under the last preceding section to the reserve fund of the corporation, shall be applied by the corporation in such manner as the Minister, with the approval of the Treasury and after consultation with the chairman of the corporation, may direct."

Provision is then made that, if there is any excess of revenue, it is to be used to repay Exchequer grants. There, as it seems to me, the Minister has the absolute say regarding what is to be done with any surplus revenue and how it is to be applied in the public interest.

There are a number of other financial provisions. There are elaborate provisions in s. 11 to s. 16 for Exchequer grants and, in effect, for the Exchequer bearing any losses incurred by the corporation. Under s. 21 and s. 22, the

Minister is again given elaborate powers with regard to accounts and audit and obtaining periodical returns and being enabled to see the programme of the corporation. It seems to me to be clear that the intention of this Act is to set up a body which is entrusted with certain duties in the public interest. It is a company which the legislature intends should perform those public duties irrespective of whether it makes a loss or a profit, and it is the intention that any loss should be made good by the Exchequer and that any revenues should be dealt with as the Minister thinks fit. In all the circumstances I feel that under this Act the corporation is constituted a public authority.

It is only right to say that an argument was addressed to me based on contemporary legislation. It has certainly been the tendency of the legislature of more recent years to make it clear whether a body which is set up is or is not intended to be a public authority, and I was referred to the fact that under the London Passenger Transport Act, 1933, it is expressly provided that the board shall be a public authority. Reference has also been made to the Coal Industry Nationalisation Act, 1946, which was going through Parliament at about the same time as the Civil Aviation Act, 1946, to the Transport Act, 1947, the Electricity Act, 1947, the Gas Act, 1948, and the Iron and Steel Act, 1949—Acts which all set up bodies, and in all of which an express provision was inserted to the effect that s. 21 (1) of the Limitation Act, 1939, was not to apply, but, that the ordinary limit of six years under the Act was to be reduced to three years. It is said in those cases that Parliament made it clear that those bodies were public authorities and would have attracted the provisions of the Limitation Act, 1939, s. 21 (1), had they not been expressly excluded. It is observed that, although this Act was passed more or less contemporaneously with the Acts I have mentioned, there is no similar provision in this Act. I do not think, however, that I can attach such weight to that argument as would prevent me from construing the effect of the Civil Aviation Act, 1946, as I have done.

That, however, does not conclude the matter because there remains the difficult question, which arises in all these cases, whether, assuming that the defendants concerned are a public authority, they can claim the protection of the section because it is not every act which a public authority does as a result of its statutory powers which enables it to obtain protection. The act complained of must be done in pursuance or execution of the public duty of the authority. There is a great deal of authority on this matter, but I only propose to refer to a few cases. The matter was put as clearly as it can be put in *Griffiths v. Smith* (3) where VISCOUNT SIMON, L.C., said ([1941] 1 All E.R. 71):

“ There is, however, a second question connected with the construction of the Act on which it is difficult to reach precision. Assuming that the ‘ person ’ is a public authority in the sense required, what kind of action by the public authority is to be regarded as satisfying the conditions of the section that the act must be ‘ done in pursuance, or execution, or intended execution of any Act of Parliament or any public duty or authority,’ or that the neglect or default must be ‘ in the execution of any such Act, duty, or authority ’ ? In one sense everything which is done by a public authority within the limits of their statutory powers might be regarded as done in execution of the statute. Even if a public corporation exist independently of statute, all their actions within their powers might perhaps be regarded as done in execution of their public authority. However, this House has decided in *Bradford Corpn. v. Myers* (4) that the statute ought not to be given so wide a construction. LORD BUCKMASTER, L.C., said, at p. 247: ‘ . . . it is not because the act out of which an action arises is within their power that a public authority enjoy the benefit

of the statute. It is because the act is one which is either an act in direct execution of a statute, or in the discharge of a public duty, or the exercise of a public authority'."

VISCOUNT MAUGHAM in his speech in the same case, said (*ibid.*, 75):

"My Lords, the decision may be more easily understood if it is realised that, if the argument for the corporation had prevailed, it would seem to follow that the Act would apply for the benefit of every public authority if it could be shown that the act done or intended to be done was intra vires the authority. Thus, every contract entered into for the purpose of carrying out any such act, however unwise and whatever the neglect or default of the public authority in carrying out the contract, would have the protection of the Act of 1893. Moreover, such a view would have involved the overruling of a number of decisions, including earlier cases of high authority decided before the passing of the Act of 1893 relating to similar conditions contained in other Acts of Parliament . . . My Lords, since the decision of this House in *Bradford Corpn. v. Myers* (4), and the tacit or express approval of the cases to which I have referred, it has been impossible to doubt (if it was doubtful before) that it is not essential that a public authority seeking to rely on the Act of 1893 must show that the particular act or default in question was done or committed in discharge, or attempted discharge, of a positive duty imposed on the public authority. It is sufficient to establish that the act was in substance done in the course of exercising for the benefit of the public an authority or a power conferred on the public authority not being a mere incidental power, such as a power to carry on a trade."

LORD PORTER in his speech in the same case points to the difficulties which sometimes arise and says, as indeed is true, that there is no absolute test that can be applied.

In the latest case on this matter—*Firestone Tire & Rubber Co. (S.S.), Ltd. v. Singapore Harbour Board* (8)—LORD TUCKER, in giving the advice of the Judicial Committee, sets out the considerations to be applied. He says ([1952] 2 All E.R. 222):

"In this state of affairs it will not, perhaps, cause surprise if their Lordships do not attempt to accomplish what the noble Lords [in *Griffiths v. Smith* (3)] found well-nigh impossible, but content themselves with examining the two cases cited with a view to extracting therefrom certain matters and considerations that are relevant to, though not necessarily always decisive of, this issue . . ."

The two cases referred to were *Griffiths v. Smith* (3) and *Bradford Corpn. v. Myers* (4). LORD TUCKER set out the considerations in this way (*ibid.*):

"(i) It is essential to the protection afforded by the statute that the act or default in question should be in the discharge of a public duty or the exercise of a public authority. This assumes that there are duties and authorities which are not public: see per LORD BUCKMASTER, L.C., in the *Bradford Corpn.* case (4). (ii) In deciding whether the duty or authority has this public quality it is sometimes relevant to consider whether it arises out of or is imposed by a contract voluntarily entered into by the public authority with an individual with whom it is under no obligation to contract. (iii) The mere fact, however, that in the discharge of its duty or the exercise of its authority the public authority may have made a contract does not of itself deprive the duty or authority of its public quality. The existence or absence of a contract is not a decisive test . . ."

See, he says, LORD SHAW OF DUNFERMLINE in *Bradford Corpn. v. Myers* (4). Finally,

“(iv) Effect must be given to the word ‘authority’. This excludes the test of obligatory as opposed to permissive powers . . .”

A Applying those considerations, it is argued here that the neglect complained of was neglect, not in the execution of a public duty or authority, but in the neglect in doing something purely incidental thereto. In dealing with that contention, I think one must be clear in one's own mind what is meant by the word “incidental”. I think it is clear that a public authority is not deprived of the benefit of the section because the act complained of was not done, as one might say, in the direct execution of a public authority or duty. The benefit, I think, is available if they are doing anything which is necessarily part of the performance of their duty, albeit, maybe, trivial or incidental in that sense.

B In *Edwards v. Metropolitan Water Board* (9) the position was considered of a water board whose direct duty, of course, was to supply water. An accident occurred while a lorry was returning after carrying pipes for repair to the pipe system. *BANKES, L.J.*, said ([1922] 1 K.B. 300):

C “Mr. Shakespeare endeavoured to bring this case within *Bradford Corpn. v. Myers* (4). I think it is clear from that case that a public body does not necessarily enjoy the protection of the statute merely because it is acting under a leave or licence conferred upon it or under a permission granted to it by an Act of Parliament. To entitle it to protection it is necessary that it should be acting in pursuance or execution or intended execution of an Act of Parliament or of a public duty or authority. In my view it does not help much to say that the act must be in ‘direct’ execution of the Act of Parliament or public duty, because that word itself requires explanation. The question in this case is whether the act of sending this lorry on its journey was an act done in pursuance or execution or intended execution of the statutes which impose upon the respondents their duties, or in execution of a public duty. The main duty of the respondents is to supply water for the public living and carrying on business within their area; but there are many duties incidental to that main duty, and one of these is a duty to keep and maintain their pipes in proper working condition.”

F I think *LORD TUCKER* had that use of the word “incidental” in mind when, in *Firestone Tire & Rubber Co. (S.S.), Ltd. v. Singapore Harbour Board* (8) ([1952] 2 All E.R. 223), having referred to the passage which I have read from the speech of *LORD MAUGHAM* in *Griffiths v. Smith* (3), he spoke of “a mere incidental power, such as a power to carry on a trade.” *LORD TUCKER* said:

“The word ‘incidental’ is here used in the sense of ‘subsidiary’. It has in these cases sometimes been used as equivalent to ‘necessarily incidental to’.”

G Then he says that to avoid confusion he prefers to use the word “subsidiary”.

H In the present case, I am satisfied that as part of their public duty B.O.A.C. had to drain oil out of engine sumps of aircraft into containers. It is clearly impractical for them to have an unlimited supply of empty containers available, and it was part of their duty and a performance of their duty to dispose of the waste oil and empty the receptacles and have them available. To that extent what they were doing was incidental to and necessarily part of the performance of their public duty, but it is argued forcibly by counsel for the plaintiff that that was the position in *Bradford Corpn. v. Myers* (4) in 1916, because there he says the corporation were disposing of their coke which was produced in the manufacture of gas. In that case, the disposal of the coke under that contract was held to be purely subsidiary and done merely in the performance of the corporation's powers and not incidental to their public duty as gas undertakers. So, here it is said that this accident occurred while

the oil was being delivered into the waste tank of a contractor who was going to clear it and pay for the waste oil. I am not satisfied that that is correct. The whole basis of *Bradford Corpn. v. Myers* (4), as I understand it, is that the act there was done purely in the course of implementing a specific contract. There was no evidence of the type which I have had in this case, that what was being done at Bradford was being done to free the premises of the corporation of coke, and that, unless their premises were freed of coke, they would not be able to carry on their public duty as gas undertakers. Indeed, it seems to me that, if there had been evidence to that effect in that case and the argument had been put on that basis, there might have been a different result. Indeed, it is to be observed that in *Edwards v. Metropolitan Water Board* (9) BANKES, L.J., says ([1922] 1 K.B. 301):

“Mr. Shakespeare contended that if in *Bradford Corpn. v. Myers* (4) the corporation had been moving coke from their gas works in order to get rid of it, and so remove an impediment in the way of executing their statutory duty of supplying gas, the decision of the House of Lords must still have been for the plaintiff. There I join issue. In my view if the corporation had been moving the coke in order to clear their gas works that they might better fulfil their statutory duty the decision of the House of Lords would have been the other way.

In the present case I am satisfied that at the material time these drums were being emptied to enable oil to be drained into the empty drums from aircraft coming in that day. That was the evidence of Hubbard. Looked at in that way what he and the plaintiff were doing was clearly being done in the execution of the corporation's public duty or authority. In my view, the act does not cease to be done in the performance of that public duty or authority merely because the oil at some later stage will be taken over or taken away by a contractor who is going to pay for it. I do not know whether delivery in the tank was delivery to the contractor, whether the discharge into the tank was being done by virtue of a specific contract, or whether a contract would be entered into thereafter when the tank was full. It seems to me that on the facts of this case these two men were emptying these drums so as to have empty receptacles available for draining oil from incoming aircraft. Accordingly, I hold that the corporation can claim the benefit of s. 21 (1) of the Limitation Act, 1939, and, accordingly, the plaintiff's claim succeeds against the first defendants, Messrs. Wimpey, and fails as against the second defendants, the corporation. My judgment as to damages will be given at a later stage.

I can deal shortly with the third-party proceedings. Counsel for the first defendants says that he is entitled to recover contribution from the corporation under s. 6 (1) (c) of the Law Reform (Married Women and Tortfeasors) Act, 1935. He is, however, again met by a plea of s. 21 (1) of the Limitation Act, 1939, and by the argument that in any event the corporation is not such a tortfeasor as the first defendants, by virtue of s. 6 (1) (c) of the Act, can recover against. I think it is clear that before the first defendants can succeed as against the corporation they must show (i) that the corporation is a tortfeasor against whom they are entitled to recover under that section, and (ii) that the cause of action or the claim against the corporation is brought within one year of the cause of action arising against the corporation. The first difficulty in the way of counsel for the first defendants is a decision of BIRKETT, J., in *Merlihan v. A. C. Pope, Ltd. (Pagnello, Third Party)* (10) because in that case, which is somewhat similar to this, BIRKETT, J., held that the cause of action to be considered was the cause of action arising on the original accident. It was argued that where a person is claiming contribution under s. 6 (1) (c) the cause of action does not arise until judgment has been given against him so that he has become liable to the injured person. BIRKETT, J., in that case said ([1945] 2 All E.R. 451):

"The conclusion to which I have come is that it is not competent for the defendants to claim contribution from the third party . . . I put it expressly on the ground that the third party was protected by the Limitation Act, 1939, that the cause of action was in fact upon Mar. 15, 1943 . . ."

It is to be observed that in a later case, *Hordern-Richmond, Ltd. v. Duncan* (11), CASSELS, J., having analysed the position, said ([1947] 1 All E.R. 430):

"I find it difficult to say that I should have arrived at the same conclusion as BIRKETT, J., arrived at on similar facts. I take the view that the Limitation Act only starts to run in favour of a third party when the defendant . . . has been found to be liable for damages."

Counsel for the first defendants urges that the decision of BIRKETT, J., is wrong and that the time does not begin to run until this court has held that the first defendants are liable to the plaintiff. In support of that he refers to two cases, *Collinge v. Heywood* (12), which decides that in the case of a contract to indemnify the cause of action does not arise until payment, and he refers to *M'Gillivray v. Hope* (13), which dealt with contributions under the Workmen's Compensation Act, 1925, to be made by the previous employers of a man to whom the last employer was bound by the statute to pay compensation. In that case the appeal was from the Court of Session, and LORD TOMLIN in his speech says ([1935] A.C. 9):

"I have no doubt upon the true construction of cl. 9 of the scheme that the last employer is the only person who is under liability to the workman for the compensation; and that the provision whereby the last employer is able to recover something in respect of the compensation from previous employers is for the benefit and protection of the last employer, and not for the benefit of the workman. I am also of opinion that the words 'such contributions as in default of agreement may be determined by arbitration' do not mean 'contributions' in the strict sense of that word, that is to say 'sums provided to make up the amount payable to the workman', but mean such sums by way pro tanto of indemnity to the last employer for what he has paid for compensation as in default of agreement may be determined by arbitration. Further, under the English law, where one who is liable to pay a sum of money to another is entitled against a third party to be indemnified in whole or in part against what he has so to pay, he cannot recover on the indemnity against this third party where he himself has made no payment in respect of his own liability . . ."

Neither of those two cases was referred to in *Merlihan v. Pope* (10).

I share with CASSELS, J., doubts concerning the decision in *Merlihan v. Pope* (10). Certainly, if I were approaching this matter apart from authority, I should take the same view as CASSELS, J. Even so there is a further difficulty which faces counsel for the first defendants because he has got to show that the corporation is a tortfeasor who is or would if sued have been liable in respect of the damage. It is clear that where the word "liable" occurs in s. 6 (1) (c) of the Law Reform (Married Women and Tortfeasors) Act, 1935—it means "held liable" and a person cannot be held liable without being successfully sued to judgment. It seems to me that the ordinary meaning of the words here is that, if the other tortfeasor has been successfully sued to judgment, contribution can be obtained from him, and that recovery can also be made against him if he has not been sued, but, if he had been sued to judgment, he would have been held liable. The distinction which is made, it seems to me, in that paragraph, is between the tortfeasor who has been sued to judgment and the tortfeasor who has not been sued at all, or not been sued to judgment. Counsel for the first defendants pointed out, quite rightly, the absurd and

arbitrary results which follow in the case of a person protected as against the injured party by the Public Authorities Protection Act, 1893, and s. 21 (1) of the Limitation Act, 1939. He also quite rightly points out that s. 6 (1) (c) deals, and is intended to deal, only with the position as between the joint tortfeasors, and that it would be ridiculous if one tortfeasor's right of recovery against another depended on the whim of the plaintiff as to when he brought the action, whether he allowed his case to be dismissed for want of prosecution, or whether, indeed, he entered into a bargain with one of the other tortfeasors not to proceed against him. He would have me read the section in effect as giving him a right to recover against any tortfeasor who is at fault—a tortfeasor who has been held liable by being sued to judgment and also a tortfeasor who, although held not liable when sued to judgment, would have been held liable if the action had been brought at the time when the cause of action arose.

I find it impossible to read the provision in that way. It seems to me to be clear, and to draw a distinction between somebody who has been sued to judgment and somebody who has not, and that it is merely amplifying the words to read them as if they were "from any other tortfeasor who is sued to judgment and held liable, or, if not sued to judgment, would, if so sued, have been held liable". The distinction is between a person who has been sued to judgment and a person who has not been so sued. The result on that construction produces absurdities, and there is little doubt that the legislature had not got in mind the point that might arise under the Public Authorities Protection Act, 1893. It would, however, be wrong—for it is no part of the duty of this court—for me to supply gaps in legislation. In *Magor & St. Mellons Rural District Council v. Newport Corpn.* (14) LORD SIMONDS ([1951] 2 All E.R. 841) made it clear that in the construction of a statute the duty of the court is to interpret the words that the legislature has used and it has no power to fill in any gaps disclosed. I feel that the wording here is so clear that, despite the results to which counsel for the first defendants has referred, I am constrained to adhere to the plain construction of the section and not to supply gaps in it. For these reasons I think that his claim to recover contribution against the corporation fails, though not for the reason given by BIRKETT, J., in *Merlihan v. Pope* (10). If I were wrong on that, I would apportion the blame as to two-thirds to Wimpey's and as to one-third to the corporation.

Judgment for the plaintiff.

Solicitors: *Owen White & Catlin* (for the plaintiff); *Stanley & Co.* (for the first defendants); *J. H. Milner & Son* (for the corporation).

[Reported by MICHAEL MALONEY, Esq., Barrister-at-Law.]

R. v. INDUSTRIAL DISPUTES TRIBUNAL.

Ex parte KIGASS, LTD.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Lynskey and Pearson, J.J.),
February 3, 4, 1953.]

Master and Servant—Trade dispute—Award directed to take effect from before date of dispute—Certiorari—Jurisdiction—Dispute in Scotland—Employer's registered office and award in England—Industrial Disputes Order, 1951 (S.I., 1951, No. 1376), art. 10.

The applicant company, aircraft engineers, owned and occupied a factory in Scotland, but their registered office was in England. On Jan. 18, 1952, on the application of the Amalgamated Engineering Union, acting on behalf of their members, the Industrial Disputes Tribunal made an award granting an increase of wages to women workers in the engineering industry of 10s. 1d. per week of forty-four hours, with proportionate increases for those under eighteen years of age, operative as from the first full pay period following Nov. 23, 1951. At the date of the award the women employees in the applicants' factory were not members of the union, but by Feb. 11, 1952, some of them had become members. The district secretary of the union then approached the applicants on their behalf, but the company declined to pay the increase. On May 3, 1952, the union reported to the Minister of Labour and National Service that a difference had arisen between the applicants and their female employees over this increase of wages, and the Minister referred the matter to the Industrial Disputes Tribunal. On July 8, 1952, the tribunal made an award in favour of the employees and directed that the increased wages should be paid as from Nov. 23, 1951. On a motion for an order of certiorari to bring up the award to be quashed,

HELD: (i) as the applicant company had their registered office in England and the tribunal had sat in England the court could hear and determine the motion, though, the whole subject-matter of the dispute having arisen in Scotland, it would have been preferable that the proceeding should have been taken in the Scottish, and not in the English, courts.

(ii) the earliest date on which the dispute arose was on Jan. 18 or Feb. 11, 1952; under art. 10 of the Industrial Disputes Order, 1951, the tribunal had no power to direct that the award should be effective before that date; and, therefore, the award was bad and an order for certiorari must go to bring it up to be quashed.

FOR THE INDUSTRIAL DISPUTES ORDER, 1951, art. 10, see HALSBURY'S STATUTORY INSTRUMENTS, Vol. 7, p. 169.

MOTION for order of certiorari.

The facts appear in the headnote.

C. Lawson for the applicants.

Sir Frank Soskice, Q.C., and *John Thompson* for the Amalgamated Engineering Union.

The Solicitor-General (Sir Reginald Manningham-Buller, Q.C.) and *S. B. R. Cooke* for the Minister of Labour and National Service.

LORD GODDARD, C.J.: Counsel for the applicants moves for an order of certiorari to bring up and quash an award of the Industrial Disputes Tribunal dated July 8, 1952, which purported to be an award following on the reference of a dispute to the Minister of Labour and National Service, in which the parties were the applicants and certain workers of the Amalgamated Engineering Union in the applicants' employment. This court heard counsel on, and considered, the question whether it would be right for it to deal with the matter or whether it ought to have gone to the Court of Session. We came to the

conclusion that, although it would, no doubt, be within the competence of the Court of Session to hear the motion, yet, as the company had their registered office in this country and the tribunal sat in this country, there would be no objection in point of law or point of comity in this court hearing and determining this motion. At the same time, speaking for myself, I cannot help thinking that it would have been much better, the whole subject-matter of the dispute having arisen in Scotland, that the proceeding should have been taken in the Scottish, and not the English, courts.

The application was originally made simply on the ground that no dispute existed between the applicants and the workers. On that point the court, for reasons I will give in a moment, determines that a dispute clearly did arise. At a very late stage, counsel for the applicants sought, and obtained, leave to put forward another ground for quashing the order, namely, that the dispute did not exist until at the earliest the end of January, 1952, whereas the award purports to date back to a date in November, 1951. The court thinks that that point is clearly in favour of the applicants.

In January, 1952, the Industrial Disputes Tribunal had heard another case which affected the same class of workers (women workers in the engineering industry) as these, and had given an increase of wages of 10s. 1d. per week of forty-four hours with proportionate increases for those under eighteen years of age. At that time, the workers employed by the applicants were not members of the union. The union, of course, desire to see that all employers are paying the same rates of wages, and they managed to persuade certain of the women employees of the applicants to join the union. The real complaint that is made here by counsel for the applicants is that, as he puts it, the union "budded into" the affairs of the applicant company and persuaded the workers to become members of the union and then to put forward a claim for an increase of 10s. 1d. a week, which they had not thought of putting forward before. The applicants claim that they were paying a higher rate of wages than other employers, but that is not a matter with which we have anything to do. The fact is that certain of their women employees had, by Feb. 11, 1952, become members of the union, and the district secretary then approached the applicants on their behalf.

The order which sets up the Industrial Disputes Tribunal is the Industrial Disputes Order, 1951, in art. 1 of which it is provided:

"Where a dispute exists in a trade or industry or section of trade or industry or in an undertaking and that dispute is reported to the Minister in accordance with this order by—(i) an organisation of employers, on behalf of employers who are parties to the dispute; (ii) an employer, where the dispute is between that employer and workers in the employment of that employer; or (iii) a trade union, on behalf of workers who are parties to the dispute . . .",

the Minister can refer the matter to the tribunal. There is no question here but that on May 3 the trade union did report to the Minister that a difference had arisen between the applicants and their female employees. Having read the affidavits filed on behalf of the applicants as well as those filed on behalf of the union, it appears to the court that it is indisputable that a difference had arisen. There was this claim being made on behalf of some of the workers for 10s. 1d. a week extra on the wages they were already receiving, and it is clear that the applicants were saying that they declined to pay that increase. Therefore, the Minister obviously had power to refer this matter to the tribunal, and the first ground which counsel for the applicants put forward is unsound.

The second point that was taken was that the award made by the tribunal was *ultra vires* because they purported to date it back to a date earlier than the date at which the dispute had arisen. Article 10 of the order provides:

"Where an award on a dispute or issue has been made by the tribunal

then as from the date of the award or from such other date, not being earlier than the date on which the dispute or issue to which the award relates first arose, as the tribunal may direct, it shall be an implied term of the contract between the employer and workers to whom the award applies that the terms and conditions of employment to be observed under the contract shall be in accordance with the award until varied by agreement between the parties or by a subsequent award of the tribunal . . .”

A The tribunal set out in their award the reference to them of the dispute, and the description of it is this:

“The dispute arises out of a claim made by the said workers for an increase of 10s. 1d. to female workers (eighteen years and over) with a proportionate increase for those under eighteen years of age, operative as from the first full pay period following Nov. 23, 1951, as provided for in the Industrial Disputes Tribunal Award No. 88”;

B which is the award to which I have already referred. It is obvious that there was no dispute between the applicants and their employees on Nov. 23, 1951. No dispute seems to have arisen till Feb. 11, 1952 (certainly not till after Jan. 25). The workers did not become trade unionists, and the trade union was not acting on their behalf till Feb. 11.

C The tribunal made an award stating that they found in favour of the claim and that the applicants had to pay these wages as from Nov. 23, 1951. We can only read that as meaning that the wages were to be increased as from Nov. 23, 1951. The tribunal had no jurisdiction to award that. The earliest date from which they could have awarded the increased rate of wages would have been from the date when the dispute arose. It was for the tribunal, no doubt, to determine that date and to have awarded from that date, and they should have so awarded. In these circumstances, as we cannot amend it, the award is bad, and an order of certiorari must go and it must be quashed.

LYNSKEY, J.: I agree.

E PEARSON, J.: I agree. I do not think it is necessary to decide at what date the dispute arose. Different views might be taken whether the dispute which took place after the intervention of the union official was the same dispute as the one which had been going on before, but what is quite plain on the face of the award and the evidence given by affidavit is that the dispute in question could not have been in existence before Jan. 25, 1952, but must have begun after that date. I say that because the origin of the dispute was that workers in the employment of the applicants asked that they should have the advantage conferred on other workers by the award No. 88, and that award was issued on Jan. 18, 1952.

G The other point is that it was contended by counsel for the union that the award did not contain any direction ante-dating its effect to some time in November, 1951. It is perfectly true that the award does not contain any words such as “we hereby direct”, but I think that there is an implied direction by necessary implication that the award shall operate as from the first full pay period following Nov. 23, 1951.

Order of certiorari.

H Solicitors: *Simon, Haynes, Barlas & Cassels* (for the applicants); *W. H. Thompson* (for the union); *Solicitor, Ministry of Labour and National Service* (for the Minister).

[Reported by G. A. KIDNER, ESQ., *Barrister-at-Law.*]

BULLARD v. CROYDON HOSPITAL GROUP MANAGEMENT COMMITTEE AND ANOTHER.

[QUEEN'S BENCH DIVISION (Parker, J.), February 11, 12, 1953.]

Hospital—Negligence—Liability of hospital group management committee—National Health Service Act, 1946 (c. 81), s. 72.

An infant died of peritonitis following an operation in a hospital. In an action by her father, as administrator of her estate, claiming damages on the ground that her death was due to the negligence of the hospital group management committee and the surgical registrar of the hospital, the committee contended that an action did not lie against them by reason of the National Health Service Act, 1946, s. 72, which provided that a hospital management committee should be included among the authorities referred to in s. 265 of the Public Health Act, 1875, which provides: "No matter or thing done . . . by any [specified authority], and no matter or thing done by any member of any such authority or by any officer of such authority or other person whomsoever acting under the direction of such authority, shall, if the matter or thing were done . . . bona fide for the purpose of executing . . . [the National Health Service Act, 1946], subject them or any of them personally to any action liability claim or demand whatsoever . . ."

HELD: the first defendants were not absolved from liability under s. 72 and s. 265 of the respective Acts.

FOR THE NATIONAL HEALTH SERVICE ACT, 1946, s. 72, see HALSBURY'S STATUTES, Second Edn., Vol. 15, p. 400; and FOR THE PUBLIC HEALTH ACT, 1875, s. 265, see *ibid.*, Vol. 19, p. 95.

Cases referred to:

- (1) *Arthy v. Coleman*, (1857), 30 L.T.O.S. 101; 38 Digest 104, 746.
- (2) *Newton v. Ellis*, (1855), 5 E. & B. 115; 24 L.J.Q.B. 337; 25 L.T.O.S. 140; 19 J.P. 805; 119 E.R. 424; 38 Digest 104, 745.
- (3) *Southampton & Itchin Floating Bridge & Roads Co. v. Southampton Local Board of Health*, (1858), 8 E. & B. 801; 28 L.J.Q.B. 41; 120 E.R. 298; *sub nom. Itchin Bridge Co. v. Southampton Local Board of Health*, 30 L.T.O.S. 256; 38 Digest 19, 102.
- (4) *Davis's Tutor v. Glasgow Victoria Hospitals*, 1950 S.C. 382; 2nd Digest Supp.

POINT OF LAW set down for decision under R.S.C., Ord. 25, r. 2, in an action for damages for negligence.

On Jan. 25, 1952, an infant was taken by ambulance to the Mayday Hospital, Croydon. On Jan. 30 she died of peritonitis, following an operation for appendicitis. Her father, as administrator of her estate, brought an action for the benefit of her estate against the Croydon Hospital Group Management Committee and the surgical registrar of the hospital, whom he alleged had been responsible for the treatment of the infant while she was in hospital. In para. 3 of their defence the committee claimed the protection of s. 72 of the National Health Service Act, 1946, and by an order dated Jan. 22, 1953, the master ordered that this plea be heard and disposed of forthwith and before the trial of the issues of fact in the action.

Buckee for the plaintiff.

M. R. Hoare for the first defendants, the management committee.

The second defendant (the surgical registrar) did not appear.

PARKER, J., stated the facts and continued: Section 72 of the National Health Service Act, 1946, provides as follows:

"Section 265 of the Public Health Act, 1875 (which relates to the protection of members and officers of certain authorities) shall have effect

as if there were included among the authorities therein referred to a regional hospital board, the board of governors of a teaching hospital, a hospital management committee, a local health authority and an executive council, and as if any reference in that section to the Public Health Act, 1875, included a reference to this Act."

Section 265 of the Public Health Act, 1875, provides:

A "No matter or thing done, and no contract entered into by any local authority or joint board or port sanitary authority, and no matter or thing done by any member of any such authority or by any officer of such authority, or other person whomsoever acting under the direction of such authority, shall, if the matter or thing were done or the contract were entered into bona fide for the purpose of executing this Act, subject them or any of them personally to any action liability claim or demand whatsoever; and any expense incurred by any such authority member officer or other person acting as last aforesaid shall be borne and repaid out of the fund or rate applicable by such authority to the general purposes of this Act . . ."

B There follows a proviso enabling that amount to be surcharged. It is, accordingly, argued on behalf of the first defendants that, omitting irrelevant words, this provision, as applied to them, reads as follows:

C "No matter or thing done . . . by any . . . hospital management committee . . . shall, if the matter or thing were done . . . bona fide for the purpose of executing . . . the National Health Service Act, 1946, subject them . . . personally to any action."

D It is said that those words are plain and say clearly that this committee cannot be sued. In that connection it is pointed out that "person" is defined in s. 4 of the Act of 1875 as including "any body of persons, whether corporate or unincorporate".

E This is a novel point. Heretofore it has been a common practice—and has been understood to be the right practice—in such cases to sue the hospital management committee rather than the Minister of Health, on whose behalf, I suppose, the management committee act. I should say at the outset that, if the contention raised by the first defendants is right, it produces an extremely odd result having regard to s. 13 of the National Health Service Act, 1946, because, by sub-s. (1) of that section, it is provided that a hospital management committee shall,

F "notwithstanding that they may be exercising functions on behalf of the regional hospital board, be entitled to enforce any rights acquired, and shall be liable in respect of any liabilities incurred (including liabilities in tort), in the exercise of those functions . . ."

G It would be very curious if the effect of s. 72 was, in effect, to say that, notwithstanding what s. 13 (1) had provided in plain words, the management committee could not be sued. It is only right to say, however, that on the argument of counsel for the first defendants those two sections are not wholly irreconcilable, because s. 265 of the Public Health Act only applies to cases where the authority has acted bona fide in the execution of the Act, and, accordingly, there would still be room for s. 13 (1) to operate in, what, no doubt, is the exceptional case, of a management board acting mala fide.

H Section 265 of the Act of 1875 was preceded by s. 264 which clearly provided that it was possible to sue a local authority. By s. 264, which was repealed and replaced by the Public Authorities Protection Act, 1893, s. 1 (a), it was provided that a writ or process should not be issued and served on any local authority, or any member, for anything done, or intended to be done, or omitted to be done, under the provisions of the Act until notice had been given, and that

any action would have to be commenced within six months of notice of the cause of action. It is also relevant to point out that in s. 308 provision is made for compensation to be paid to persons who are injured or damaged by, in effect, the exercise by the local authority of its statutory powers.

I get some help by considering the Public Health Act, 1848, which the Public Health Act, 1875, repealed and replaced. The equivalent sections of that Act were: s. 139, which dealt with the notice before action and the limitation of the action; s. 140, which was in very similar words to s. 265; and s. 144, dealing with compensation and equivalent to s. 308. Under the Act of 1848 there were a number, albeit not a large number, of decisions. Counsel for the plaintiff has referred me, among others, to *Arthy v. Coleman* (1), which was an action tried by WILLES, J., in Essex. There, a contractor employed by a board of health had been negligent in digging a hole and leaving it unlighted. He was clearly acting under the direction of the Board of Health and he sought to rely on s. 140 of the Act of 1848. WILLES, J., directed the jury in these terms (30 L.T.O.S. 101):

“Upon this point the learned judge told the jury that in order to avail himself of this defence the defendant must satisfy them that he had executed the work bona fide under his employment, and not with recklessness or carelessness.”

There was then a motion to the Court of Queen's Bench for a new trial, and LORD CAMPBELL, C.J., dealt first with the questions of negligence and contributory negligence and went on (*ibid.*):

“The next question then is, against whom the action should be brought? The defendant was employed by the board of health to do a particular act, viz., to dig a hole for a well. The defendant might have done that with his own hands, but he employed two servants to do it. They dug the hole in the highway. What they did he did; what they omitted to do, he omitted to do. They allowed the hole to remain during the night without a light to warn people of the danger. That was negligence in them, and it was also negligence in him, and unless some statute absolved him, he is liable for the consequences. It is said that the Health of Towns Act* absolved him. It would be very strange indeed if there was such an enactment, viz., that persons guilty of negligence, whereby their fellow-subjects suffered grievous injury, shall be indemnified, and that others who are in no way culpable, and know nothing of the act, and on whom no obligation to guard against it rested, shall be liable, and shall be called upon to compensate the injured party. There is no such enactment in the Health of Towns Act, and no authority for any such position in the cases cited. The maxim respondeat superior does not absolve the inferior, if by his negligence a loss has been sustained. Where there is no negligence in the party who acts in obedience to the instructions of the board of health, he is not liable; but if in doing the act he is guilty of negligence, whereby loss and damage are occasioned to another, he is personally liable. The case of *Newton v. Ellis* (2) is no authority for the argument that the party who is guilty of the negligence shall not be answerable. That case only decided that the party liable was entitled to notice of action.”

Arthy v. Coleman (1) is authority, at least, for this, that a person is not absolved under s. 140 of the Act of 1848—and if a person is not absolved, presumably the authority itself is not absolved—merely because he has acted bona fide. If one accepts the direction of WILLES, J., which was approved in the Court of Queen's Bench, the act must be done, not only bona fide, but “done without recklessness or carelessness”. In a later case in 1858, *Southampton & Itchin Floating Bridge & Roads Co. v. Southampton Local Board of Health* (3), the plaintiffs (the company) sought to hold the local board of health for

* This was another name for the Public Health Act, 1848.

Southampton liable in negligence in the construction and maintenance of a sewer, and a number of points were taken on behalf of the local board of health including the point that the action did not lie by reason of s. 140 of the Act of 1848. It is to be observed that in the argument for the local board the first point taken was that they were wrongly sued and that they ought to have been sued by their clerk, and then the second point was taken in this way (8 E. & B. 805):

- A "Secondly, though the defendants be sued by a sufficient description, yet no such action as this is lies against a local board of health at all. The ground of complaint alleged in the declaration must be either that an act has been done which is wholly beyond the statute, or that an act has been done under the statute. If it be an act wholly beyond the statute, as an injury done by the defendants or ordered to be done *mala fide*, those persons who did it or ordered it to be done should have been sued individually. If it be within the statute, that is, an act *bona fide* intended to be properly done under the powers of the statute, but so improperly done as wrongfully to injure the plaintiffs, the only legal remedy of the plaintiffs is to obtain full compensation under s. 144 . . . For, if such an injury be done as is last described, it is expressly declared by s. 140 that no action shall be maintainable against the local board or any individual of it, for any act done *bona fide* for the purpose of executing the Act."

Then CROMPTON, J., read the terms of s. 140 and said (*ibid.*, 806):

- D "Does that protect the local board from being liable to be sued as a board for negligence, though committed in the doing of some *bona fide* act? Does it say more than that no member of the board shall in such case be personally liable?"

Pausing there, it is to be observed that there is adumbrated an interpretation of s. 265 of the Act of 1875, which is, in effect, that what s. 265 is doing is to exclude the personal liability of any members. Later, WIGHTMAN, J., interposed with reference to s. 144 (the compensation section) and said (*ibid.*, 807):

- E "Does s. 144 apply to the case of an act which, though it be done under the statute, is negligently done; or does it apply only to acts rightfully and rightly done under the statute, but to the injury of certain individuals?"

- F For the plaintiffs it was argued (*ibid.*, 810) that s. 140 only exempted members of the board from personal liability. When one comes to the judgment, LORD CAMPBELL, C.J., did not expressly deal with s. 140 at all. He said that the liability of the board must depend on the statute creating it, and continued (*ibid.*, 812):

- G "Looking to the statute in question, it seems to me that the local board of health thereby created is therein considered to be liable for a wrong such as is charged in this declaration",

and that is negligence. Then he goes on:

"I am clearly of opinion that such a wrong is not within the compensation clause, s. 144."

WIGHTMAN, J., said (*ibid.*, 813):

- H "It is said, on behalf of the defendants, that no such action lies in such case against the board, but should be brought, if against any one, against the individuals who ordered that particular work. The decision depends upon the construction of the statute. Assume work injurious to an individual to be done by an agent of the board by order of the board, and the jury to find that the work was ordered and done *bona fide* in execution of the Act, then by s. 140 the agent is not to be personally liable, nor are the

members of the board to be individually liable; and, if an action be brought either against the agent or any member of the board individually, his expenses are to be paid out of the rates: then the ratepayers are ultimately liable. It does not seem to be a greater hardship on them to say that an action may be brought against the board, and that the damages may be paid out of the general rate."

At the end of his judgment, he said (*ibid.*, 814):

"These enactments seem to assume that an action for a wrong may be brought against a local board of health, and that the local board of health may plead to such action. Then this declaration is *prima facie* sufficient, and must be answered by plea. It is unnecessary to decide now what fund, if any, is liable to pay the damages."

"These enactments" included, amongst others, s. 139 of the Act of 1848. CROMPTON, J., said (*ibid.*):

"Looking at the whole of the statute, it seems to me that it contemplates that actions of this nature may be maintained against a local board of health."

It is true that that decision is, to some extent, inconsistent with *Arthy v. Coleman* (1) (which, incidentally, was not referred to, although LORD CAMPBELL, C.J., had sat in the court in *Arthy v. Coleman* (1)) because the judgment in the *Southampton* case (3) does not proceed on the basis that you must read, after the words "bona fide", "and without negligence", but they are reading s. 140 of the Act of 1848 as if it were a section absolving members of local authorities from personal liability. At any rate, whatever the true construction of s. 265 of the Act of 1875, both those cases to which I have referred are authority for saying that the persons referred to (including the local authority itself)—and here the hospital management committee—can be sued in negligence.

I do not know that it is for me to endeavour to interpret s. 265 of the Act of 1875, but it does seem to me that the true view may well be that one must read "and without negligence" after "bona fide", that s. 265 must be linked up with the compensation section (s. 308), and that the effect of those two sections is that where an act is done in pursuance of statutory powers and is done bona fide—and, I would add, without negligence—then no person whose property may be injured or damaged can bring a suit, but he must depend on the compensation to be awarded under the provisions of s. 308. It is sufficient for me in this case to say that I am not satisfied that s. 72 of the National Health Service Act, 1946, incorporating, as it does, s. 265 of the Act of 1875, absolves the defendants from liability.

I should say that I have been referred to a case in the Court of Session, *Davis's Tutor v. Glasgow Victoria Hospitals* (4). It is a decision which, of course, is not binding on me, but it deserves the greatest respect. It is to be observed there that LORD STRACHAN was driven to the conclusion, very reluctantly, on the statutes relating to Scotland, that the board of management of the hospital there concerned, despite the equivalent in Scotland to s. 13 of the National Health Service Act, 1946, could not be sued. I have looked at that case with some care, and I think it is sufficient for me to say that the wording of s. 166 of the Public Health (Scotland) Act, 1897 (which was the statute incorporated there), was somewhat different, but, quite apart from that, I feel unable to follow the decision in that case. Finally, I should mention that s. 72 of the National Health Service Act, 1946, in incorporating s. 265 of the Public Health Act, 1875, recites in brackets these words: "which relates to the protection of members and officers of certain authorities", and counsel for the first defendants, quite rightly, contends that a recital in an Act of Parliament is not conclusive. I only mention that because it is, perhaps, significant that the equivalent legislation in Scotland—the National Health Service (Scotland) Act, 1947, s. 70—in incorporating s. 166

of the Public Health (Scotland) Act, 1897, recites the latter Act in these terms: "which relates to the protection of local authorities and their officers", clearly a very significant change of words. I do not, however, think that any argument can be based on that. For these reasons I decide this issue in favour of the plaintiff.

Order accordingly.

Solicitors: *Frank Simmonds, Parker & Hammond*, agents for *Percy Holt & Nowers*, Croydon (for the plaintiff); *Cunliffe & Airy*, agents for *Peard & Son*, A Croydon (for the first defendants); *Hempsons* (for the second defendant).

[*Reported by G. A. KIDNER, Esq., Barrister-at-Law.*]

WISEMAN v. WISEMAN.

B [COURT OF APPEAL (Somervell, Denning and Hodson, L.JJ.), January 12, 13, 14, 15, 16, February 10, 1953.]

Divorce—Decree absolute—Setting aside—Order for substituted service—No "sufficient or candid" disclosure by petitioner—No knowledge by respondent of hearing of petition—Appeal against decree absolute—Re-marriage of petitioner—Birth of child—Effect on child's legitimacy of decree absolute being set aside—Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 31 (1) (e).

On Aug. 13, 1948, the husband filed a petition for divorce against his wife on the ground of her desertion. She was then abroad, and on Nov. 19, 1948, the husband, after insufficient steps had been taken to discover the whereabouts of the wife, obtained an order for substituted service of the petition by advertisement in a provincial evening newspaper. The advertisement never came to the wife's notice, and she knew nothing of the petition, which was undefended. On Mar. 2, 1949, the husband obtained a decree nisi against her, and on Apr. 14, 1949, that decree was made absolute. On Apr. 20, 1949, he married another woman and a child was born of this second marriage. Over a year later the wife heard of the divorce proceedings, and she then applied for leave to appeal out of time against the decree absolute, for that decree to be set aside, and for a new trial.

HELD: the failure of the husband (though he was not guilty of fraud) to make "a sufficient or candid" disclosure in his application for the order for substituted service rendered that order voidable and it would be set aside: observation of LORD WRIGHT in *Lazard Bros. & Co. v. Midland Bank, Ltd.* ([1933] A.C. 307), applied; the fact of the husband's re-marriage and the birth of a child of that re-marriage was not an absolute bar to the power of the court to set aside the decree absolute: *McPherson v. McPherson* ([1936] A.C. 177), distinguished; and, the wife having been divorced without any knowledge of the proceedings against her and so not having had any opportunity to appeal from the decree nisi within s. 31 (1) (e) of the Supreme Court of Judicature (Consolidation) Act, 1925, the decree absolute would be set aside and there would be an order for a new trial.

Per DENNING, L.J.: by setting aside the decree absolute the second marriage became automatically void, but such avoidance did not relate back so as to render illegitimate the child of the second marriage.

AS TO APPEAL FROM DECREE ABSOLUTE, see HALSBURY, Hailsham Edn., Vol. 10, p. 776, para. 1226.

Cases referred to:

(1) *Woolfenden v. Woolfenden*, [1947] 2 All E.R. 653; [1948] P. 27; [1948] L.J.R. 622; 27 Digest, Replacement, 686, 6564.

- (2) *Craig v. Kanssen*, [1943] 1 All E.R. 108; [1943] 1 K.B. 256; 112 L.J.K.B. 228; 168 L.T. 38; 2nd Digest Supp.
- (3) *Lazard Bros. & Co. v. Midland Bank, Ltd.*, [1933] A.C. 289; 102 L.J.K.B. 191; 148 L.T. 242; Digest Supp.
- (4) *Everitt v. Everitt*, [1948] 2 All E.R. 545; 27 Digest, Replacement, 593, 5547.
- (5) *McPherson v. McPherson*, [1936] A.C. 177; 105 L.J.P.C. 41; 154 L.T. 221; 27 Digest, Replacement, 593, 2099.
- (6) *De Reneville v. De Reneville*, [1948] 1 All E.R. 56; [1948] P. 100; [1948] L.J.R. 1761; 2nd Digest Supp.
- (7) *Marsh v. Marsh*, [1945] A.C. 271; 114 L.J.P.C. 89; 2nd Digest Supp.
- (8) *Elliott v. Boynton*, [1924] 1 Ch. 236; 93 L.J.Ch. 122; 130 L.T. 497; 31 Digest, Replacement, 623, 7371.
- (9) *Fowke v. Fowke*, [1938] 2 All E.R. 638; [1938] Ch. 774; 107 L.J.Ch. 350; 159 L.T. 8; 27 Digest, Replacement, 219, 1740.
- (10) *Adams v. Adams*, [1941] 1 All E.R. 334; [1941] 1 K.B. 536; 110 L.J.K.B. 241; 165 L.T. 15; 27 Digest, Replacement, 219, 1741.
- (11) *L. v. L.*, [1949] 1 All E.R. 141; [1949] L.J.R. 275; *sub nom. R.E.L. (otherwise R.) v. E.L.*, [1949] P. 211; 27 Digest, Replacement, 273, 2191.
- (12) *Fry v. Moore*, (1889), 23 Q.B.D. 395; 58 L.J.Q.B. 382; 61 L.T. 545; 16 Digest 124, 224.

MOTION by a respondent wife for extension of time to appeal against an order of His Honour JUDGE PRATT, sitting as a special commissioner, on Mar. 2, 1949, whereby he granted a decree nisi which was made absolute on Apr. 14, 1949, and if that application were granted for an order that the decree absolute, the decree nisi and the order for substituted service, granted on Nov. 19, 1948, be set aside and for a new trial.

The hearing of the motion was treated as the hearing of the appeal.

Moylan and *Wigram* for the respondent wife, Mrs. Ivy Elizabeth Wiseman.

D. M. Scott for the petitioner husband, Dr. Wiseman.

H. E. Park for the second wife, Mrs. Eileen Phelps Wiseman.

Cur. adv. vult.

Feb. 10. The following judgments were read.

SOMERVELL, L.J.: This is a motion by a respondent wife for extension of time to appeal against a decree absolute, and, if that is granted, for an order that the decree absolute and decree nisi be set aside and for a new trial.

The first point which the respondent wife, whom I will refer to as Mrs. Wiseman, has established is that she had no knowledge or suspicion of the divorce proceedings until some months after the decree absolute. There was some lapse of time after she knew before application was made to the court. That was considered on an earlier occasion and we regarded the lapse of time as satisfactorily explained. It follows from what I have said that there was no personal service. An order for substituted service was made by publication in the "Nottingham Evening News". This was done, but no knowledge of this reached Mrs. Wiseman. Mrs. Wiseman attacks this order as one which would never have been made if the facts, as known to or assumed by the petitioner husband, Dr. Wiseman, had been disclosed to the court. If, as submitted, this order was a nullity, the subsequent proceedings based on it would, I think, be of no effect. If it is not a nullity, it is submitted that it is voidable, and that, having regard to all the circumstances, the decrees should be set aside.

The parties were married on Sept. 6, 1924. Four sons were born—in 1925, 1928, 1933, and 1937 respectively. In 1941 Dr. Wiseman was working for a Dr. Davis in Totnes, the family living in a furnished house at Dartington. In 1942 Mrs. Wiseman and the children went to live at 6 Dendy Road, Paignton,

while Dr. Wiseman lived in Dr. Davis' house at Totnes. That work came to an end and he went to 6 Dendy Road, having for the moment no work. In May, 1943, he bought a practice in Exmouth and went to live in his predecessor's house with his predecessor's family who were, no doubt, looking for somewhere to move to. In January, 1944, the predecessor's family left. Mrs. Wiseman never went to join her husband at Exmouth. In Dr. Wiseman's petition he alleged that she refused to do so in March, 1944, and this amounted to desertion by her. She says that, if she had known of the proceedings, she would have desired to submit to the court that she was not in desertion and was justified in not going to Exmouth. That was an issue which we clearly could not try. The sons were at Dartington Hall School and Dr. Wiseman, since, at any rate, about this time, never paid anything for their schooling or maintenance. That has been done by Mrs. Wiseman, who, in May, 1945, undertook work abroad. I will set out her movements.

From May to July, 1945, she was in Normandy. From July, 1945, to December, 1946, she was in Athens, where she had a post in the United Nations Relief and Rehabilitation Administration. That work came to an end, and from January, 1947, to October, 1947, her base was Salonika. She had a post in the United Nations Balkan Commission and at times visited different Balkan countries, but letters were forwarded. Since then she has worked for the World Health Organisation in Geneva, her official address being Palais des Nations, Geneva. She at first lived outside Geneva in Switzerland and then at Ferney Voltaire in France. Over the whole period she visited England at rare intervals. The petition is dated Aug. 13, 1948, and at that time she had been in Geneva some months. There was no difficulty at any time in communicating with her. The headmaster of Dartington Hall School was in constant communication with her and would have forwarded any communication to her, though he would probably have asked her permission to give her address if it had been asked for. Dr. Wiseman assumed rightly that the authorities at the school would be in communication with her. He said he rang up the headmaster's secretary and asked for the address, which she refused. Her evidence was that she would not have given a parent's address on the telephone, but would have told the inquirer to write to the headmaster. A letter posted to Mrs. Wiseman's last known address, Dendy Road, would have been forwarded to her. Dr. Wiseman called at the house and saw the sub-tenant, but there was some dispute as to what took place. It was not the sub-tenant who was forwarding letters, but the wife's married sister, at whose home in Nottingham Dr. Wiseman had stayed, was in touch with her and letters were forwarded. He said at some date he telephoned to this lady, but spoke to the nephew who did not know his aunt's address. He took no further steps.

When the matrimonial dispute arose in 1944 there was correspondence between solicitors, Mrs. Wiseman employing Messrs. Alny & Thomas, who were in touch with her throughout. Dr. Wiseman knew that when they were together she had an account with the Midland Bank, Birmingham. She continued to bank there and communications would presumably have been forwarded. Dr. Wiseman knew that the sons or some of them were going to stay with their mother at Geneva. He said he asked Jeremy, who gave evidence, for her address. Jeremy disputed this. The obvious course was to ask the boy if he would take or forward a letter. He said he would have done so. Other ways were suggested, but these are sufficient. After the petition was filed a copy, with other proper documents, was sent to Mrs. Wiseman, care of the United Nations Commission, Athens. Dr. Wiseman said that a Mr. Phillips told him that this address had been given him by Dartington Hall School. Mr. Phillips was not called and this seems extremely unlikely if the inquiry was made at any relevant date. In May, 1948, the headmaster was writing to Mrs. Wiseman to her official address at Geneva. She had not been

in Athens since December, 1946. The envelope was returned from Athens, marked "parti", and no further inquiries appear to have been made. If it was thought that the address had been given by the school the obvious course was to write and ask for the new address. No request to forward the document was ever made to the school, the solicitors, the wife's sister, her brother-in-law, or any of the sons. What, then, was relied on in the affidavit sworn by Mr. Dyke, Dr. Wiseman's solicitor, in support of the application for the order for substituted service? The affidavit is entirely hearsay. Some letters were exhibited indicating what on the face of them were extremely perfunctory inquiries in Nottingham in December, 1947, with an article which had appeared about her in a newspaper. It is fair to Mrs. Wiseman to say that she took strong exception to the tone and character of that article. It indicated she had been in France, Athens, and Salonika. It did not refer to Geneva where she had just started or was about to start work. There was then a reference without a date to an inquiry from the eldest son. It was, in fact, made in June, 1947. He did not then know his mother's whereabouts, but he was in touch with her shortly after and stayed with her in 1948 in Switzerland. Then there is para. 5 of Mr. Dyke's affidavit:

"According to my instructions the petitioner knows of no means whereby the present address of the said respondent may be ascertained, but I verily believe that an advertisement circulating in Nottingham will bring these proceedings to her notice."

The only ground (suggested) for so presuming was that her sister and her father lived there. It seems incredible that, their addresses being known, the direct method of informing them was not adopted as against the chance of their reading this particular announcement in this particular evening paper. At any rate, a marked copy of the paper might have been sent. Mr. Dyke said in the course of his evidence that inquiries from a solicitor sometimes prevent information being given. This may be so in some cases. Here what was required was the co-operation of those known to be in touch with Mrs. Wiseman in order that she might know of proceedings against her so that she might, if so minded, defend them. It is plain on the evidence that this co-operation would have been forthcoming. It is one thing to ask for an address for an undisclosed purpose. It is another to ask that a party against whom proceedings are being taken should be informed of them. If the court had been told the facts as known or assumed, in particular of those known to be in communication with her, I am satisfied the order could never have been made.

The publication having been made, the case came on as an undefended case and the decree was made on Mar. 2, 1949. It was made absolute on Apr. 14, and on Apr. 20, the petitioner married a Miss Thomas. A child was born a year later. Under the directions which we gave, the second Mrs. Wiseman was made a party and a guardian ad litem was appointed for the child. Mrs. Wiseman alleged that the order for substituted service had been obtained by the fraud of Dr. Wiseman, by fraudulent concealment of relevant facts. I am not surprised this was alleged, but, having heard Dr. Wiseman and his solicitor, Mr. Dyke, that allegation, in my opinion, failed. It is, however, in my view, established that methods of communication which were reasonably obvious could have been and were not either used or brought to the knowledge of the court. This should have been done. I do not think the order was a nullity, as would be, for example, an order made without jurisdiction: *Woolfenden v. Woolfenden* (1); *Craig v. Kanssen* (2). The latter case was concerned with a failure to serve. The order, for reasons which do not, I think, apply here, was held to be a nullity, but the following statement by LORD GREENE, M.R. ([1943] 1 All E.R. 113) is relevant:

"In my opinion, it is beyond question that failure to serve process where service of process is required, is a failure which goes to the root of our

conceptions of the proper procedure in litigation. Apart from proper ex parte proceedings, the idea that an order can validly be made against a man who has had no notification of any intention to apply for it . . . has never been adopted in this country."

For reasons which I have given, I do not think the ex parte proceedings here were "proper", and this view is, I think, in accordance with what was laid down in the House of Lords in *Lazard Bros. & Co. v. Midland Bank, Ltd.* (3).

A There, as here, the parties were acquitted of bad faith, but the court had been misinformed as to the real position. It was held that the obligations which rest on those seeking an ex parte order were not fulfilled. The order in *Lazard's* case (3) was for service out of the jurisdiction. LORD WRIGHT said ([1933] A.C. 307):

B "The court has discretion to set aside an order made ex parte when the applicant has failed to make sufficient or candid disclosure."

A judgment had been obtained in default of appearance and garnishee proceedings based on it. There were other grounds on which the judgment and garnishee proceedings were set aside, but it is clear that the House regarded the impropriety in the obtaining of the order as a sufficient ground for their conclusion.

C The procedure for an appeal from a decree absolute was considered and laid down in *Everitt v. Everitt* (4) and has been followed in this case. Section 31 (1) of the Supreme Court of Judicature (Consolidation) Act, 1925, reads as follows:

D "No appeal shall lie . . . (e) from an order absolute for the dissolution or nullity of marriage in favour of any party who having had time and opportunity to appeal from the decree nisi on which the order was founded, has not appealed from that decree."

In *Everitt's* case (4) it was held, as I hold here, that the party who decided to appeal had not had time and opportunity to appeal from the decree nisi, and had, therefore, a right of appeal to this court. The ground was that the petition E had never been served. This court held that the right to appeal existed wherever the party seeking to appeal could satisfy the court that the statutory condition was fulfilled in that he or she had not had time or opportunity to appeal from the decree nisi. Apart from the re-marriage and birth of the child I would have had no doubt that leave to appeal out of time should be given, that the decrees should be set aside, and Mrs. Wiseman given an opportunity of putting F her case before the court.

It is submitted, in the first place, that in a decision of the Judicial Committee it is laid down that re-marriage is an absolute bar to the relief sought in these proceedings. That case, *McPherson v. McPherson* (5), fell to be decided under the law of Alberta which was in essentials that contained in the Matrimonial Causes Act, 1857. In that case the petition was presented by the husband. G The wife had due notice, but made no answer, and a decree nisi was pronounced which was later made absolute. The right of appeal was not limited as it is now in this country by the section just cited. Section 57 of the Act reads as follows:

H "When the time hereby limited for appealing against any decree dissolving a marriage shall have expired, and no appeal shall have been presented against such decree, or when any such appeal shall have been dismissed, or when in the result of any appeal any marriage shall be declared to be dissolved, but not sooner, it shall be lawful for the respective parties thereto to marry again, as if the prior marriage had been dissolved by death . . ."

Some time after the period for appeal had expired the husband re-married. The wife then commenced an action against her former husband to set aside

the decrees on the ground that he had committed perjury and, if they were set aside, for restitution of conjugal rights. She later alleged that the trial of the divorce action was a nullity, not being a trial in open court. It was with this latter point only that the Judicial Committee were concerned. The Judicial Committee held that the decrees were voidable, but not void. Apart from the alleged exclusion of the public, the proceedings were regular, and the wife, if so minded, could have put in an answer and defended. There was, as LORD BLANESBURGH said ([1936] A.C. 204), a serious trial free from any other defect in procedure. I will set out the passage relied on: A

"In the present case it was open to the Attorney-General of the Province, or the King's Proctor on his behalf, had he in the public interest thought fit to move by way of appeal, or before time for appeal had expired to move the trial judge himself to discharge the impugned orders on the ground that the trial, from which both resulted, had not been held in open court. In other words, the public through the Attorney-General had the fullest right of intervention. But any such intervention had to be made before time for appeal had expired, or before the rights of third parties had intervened. Just as a contract to take shares in a company induced by fraud, and being voidable only, may be set aside before winding-up commenced but not later, after the rights of the company's creditors have intervened—so here, the order absolute cannot be touched after the time for appeal therefrom has passed, and a new status has been acquired, or in this case, after the respondent, having re-married, is entitled, as is also his wife, to the protection afforded by s. 57 of the Matrimonial Causes Act, 1857. It follows in their Lordships' judgment that the appeal fails: the order absolute, although originally voidable, having become unassailable by the time the appellant's claim was made." B C D

There seem to me to be three grounds for rejecting the submission made on behalf of Dr. Wiseman and the second Mrs. Wiseman that this decision concludes the matter. In the first place, the Judicial Committee were dealing with an action to set aside a judgment and not with an appeal against that judgment. Prima facie a judgment can only be set aside in an action if the plaintiff shows that it was obtained by fraud. He certainly cannot by action get it set aside by showing simply that it was erroneous. On an appeal that, of course, is precisely what he can do. It would, therefore, I think, be quite wrong to treat what was said in that case as applicable in an appeal. Secondly, the equivalent of s. 57 under our law is s. 184 (1) of the Judicature Act of 1925: E

"As soon as any decree for divorce is made absolute, either of the parties to the marriage may, if there is no right of appeal against the decree absolute, marry again as if the prior marriage had been dissolved by death or, if there is such a right of appeal, may so marry again, if no appeal is presented against the decree, as soon as the time for appealing has expired, or, if an appeal is so presented, as soon as the appeal has been dismissed." F

In the present case there was a right of appeal, and those words clearly refer to the right impliedly conferred by s. 31 (1) (e). G

One fact which may have some effect on one's consideration for Dr. Wiseman is that when he obtained his decree nisi he never informed either his eldest son, who was of age, or his wife's sister. If he had done so, it is reasonably plain that the wife would have been informed and would have consulted her solicitors and applied in time. In the second place, I think the word "unassailable" should be construed in its context. The context was in relation to an irregularity which did not affect the wife's rights. She had no merits. The irregularity was a matter of public concern and no grounds were put forward as to why the Attorney-General or King's Proctor or the wife herself should not have moved in time. I think, therefore, on any view the words used should not be treated as necessarily applicable to other types H

of irregularity. If, however, I am right in my first point, this does not arise. I think, therefore, we have jurisdiction and the question, a difficult one, is how it should be exercised.

Whatever we do, the status of one or other of the ladies will be affected in a manner repugnant to the law. Mrs. Wiseman, the respondent, if the decree stands, has had her status and the financial rights of herself and her children affected by proceedings of which she had no knowledge. On the other hand, **A** the second Mrs. Wiseman has gone through a form of marriage and lived with and borne a child to a man whom she believed to be free to marry without any possibility of subsequent proceedings. I am led to the conclusion that the decrees should be set aside and a new trial ordered by the importance which, I think, should be attached, particularly in divorce proceedings, to effective service which will, and does, in fact, bring the matter to the knowledge of **B** the respondent. Here there was, for reasons which I have given, no difficulty in so doing. If difficulties were imagined which did not exist, obvious steps which could have been taken would have established their non-existence. Very relevant facts were, albeit by inadvertence, not disclosed to the court. I would, therefore, allow the application. Counsel for the respondent to the motion submitted that Mrs. Wiseman should be put on terms to cross-petition. **C** I do not think that would be right. I can only hope that, notwithstanding views which I understand she holds about divorce, she will see the propriety, in the circumstances which have arisen, of taking this course.

D **DENNING, L.J.:** In this case the husband filed a petition for divorce against his wife on the ground of her desertion. She was in Europe at the time, and the petition was not served personally on her. The husband's solicitor applied for an order for substituted service on her and this was granted. In accordance with the order the wife was served by advertisement in a Nottingham evening newspaper, but this advertisement never came to her notice and she knew nothing of the petition. In complete ignorance of what was afoot, the wife did not defend the case and the husband obtained a decree nisi against her, and subsequently a decree absolute. **E** A week later, he married another woman and a child has been born of this second union. It was more than a year after the divorce that the wife got to know of it. She thereupon took steps as soon as she could to have it set aside. She has applied to this court for leave to appeal against the decree absolute, and we have heard evidence on both sides. This has shown that the husband and his solicitor failed in their **F** duty to the court when they applied for and obtained the order for substituted service. They were not in the least fraudulent, but they did not take any one of the many simple steps which would have enabled the petition to reach the wife. They did not make that full and frank disclosure to the court which is incumbent on any person who applies for an order in the absence of the other side.

G The first question is whether this failure on their part makes the proceedings thereafter in the divorce suit absolutely void or only voidable. The distinction between a transaction which is void and one that is only voidable, as I understand it, is this. If a transaction is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. A good instance **H** is a bigamous marriage. But if a transaction is only voidable then it is not automatically void. Something must be done to avoid it. There must be an order of the court setting it aside or some other act recognised by the law as sufficient for the purpose. And being only voidable, the court has a discretion whether to set it aside or not, and may always impose terms as a condition of setting it aside. It will usually refuse to set it aside where there has been a waiver by the party concerned or where third parties have acquired rights

or interests in the belief that the transaction was good, though this is not an invariable rule. A good instance of a voidable transaction is a marriage which is voidable for wilful refusal to consummate it: see *De Reneville v. De Reneville* (6). It has been said that one test of the distinction between void and voidable is to inquire whether the transaction has caused a failure of natural justice: see *Marsh v. Marsh* (7); but I confess that I cannot follow this. If the defect is such as to make the transaction absolutely void, then void it is, no matter whether it causes a failure of natural justice or not. But if the effect of the defect is only to make the transaction voidable, then natural justice may well be taken into account by the court in deciding whether it will in its discretion set the transaction aside or not, but it does not make the transaction automatically void. In the present case I do not think that the failure of the husband and his solicitor to do their duty made the proceedings absolutely void. Suppose, for instance, that the wife had seen the advertisement at the time and entered an appearance, the defect would have been waived and no court would set the proceedings aside. That shows that the order for substituted service was only voidable, but not void. So also the proceedings which followed it down to and including the decree absolute are only voidable and not void.

The second question is: What is the effect of this voidability? Will the court set aside the decree absolute? In justice to the first wife, it should do so. She has been divorced without any knowledge of the proceedings against her at all. It was not her fault that she did not know of it. It was the fault of her husband or his solicitor. And when she did know of it she immediately took steps to set it aside. I feel, no doubt, that if the interests of third parties had not intervened the court would unhesitatingly have set the decree aside and allowed her to come in and defend the proceedings. But what is the effect of the re-marriage and the birth of the young child? That is a serious matter for the court to take into consideration, but it is not an absolute bar to the court's power to set the decree aside. If the Privy Council in *McPherson v. McPherson* (5) thought it was a complete bar, I cannot agree with them. It would be a bad thing if a husband could abuse the process of the court and yet keep the benefit of it by the simple expedient of marrying again. Take this very case. One or other of the two women must suffer injustice. One or other must find herself single when she thought she was married. Each of them has an equal claim to the sympathy of the court. But the husband has no such claim. It is he or his solicitor who has caused all the trouble. The nearest approach to justice which we can do is, I think, this. Set the decree absolute aside and let the first wife come in to defend herself. That does justice to her. If on the re-trial, the husband gets a divorce from the first wife he can re-marry the second wife and that will do justice to those two. If, however, he does not get a divorce, so much the worse for him. He deserves his fate. The second wife will then most unfortunately suffer, but every woman, when she marries, takes her husband on trust to some extent. If she marries a man who describes himself as a bachelor, she takes him on trust that he is not a married man. If she marries a man who says he has divorced his wife, she takes him on trust that he has obtained the divorce properly. If her trust turns out to be misplaced, it is a misfortune which many women have suffered before her, but it is not unjust.

I do not forget the child of the second union. I do not think it should suffer. Once the decree absolute is set aside, the second marriage will automatically become void as from that moment, but, as at present advised, I do not think that this avoidance will relate back so as to render the child illegitimate. The child was legitimate when born, and the doctrine of relation back has never been applied so as to render unlawful that which was originally lawful, e.g., *Elliott v. Boynton* (8) ([1924] 1 Ch. 251). Thus, when a marriage which is voidable is avoided, the avoidance as a rule only speaks from its date. It does not

relate back to the beginning: *Fowke v. Fowke* (9); *Adams v. Adams* (10). It was suggested in the artificial insemination case, *L. v. L.* (11), that the child of a voidable marriage may, on its avoidance, become illegitimate. That is not good law as it has since been overruled by s. 4 of the Law Reform (Miscellaneous Provisions) Act, 1949. In my opinion, therefore, we ought to extend the time for appealing from decree absolute and treat this application as the hearing of the appeal. The order for substituted service should be set aside and all proceedings subsequent to it. The first wife should be let in to defend and directions given for the necessary interlocutory steps.

HODSON, L.J.: The appellant, who is the first wife of the petitioner, seeks leave to appeal from a decree absolute of divorce in April, 1949, notwithstanding that she did not appeal from the decree nisi. She relies on the provisions of the Supreme Court of Judicature (Consolidation) Act, 1925, s. 31 (1):

“No appeal shall lie . . . (e) from an order absolute for the dissolution or nullity of marriage in favour of any party who having had time and opportunity to appeal from the decree nisi on which the order was founded, has not appealed from that decree.”

Having heard the evidence called in the court on behalf of the parties, it is clear that the petition on which the husband obtained a decree of divorce was never brought to the attention of the wife until long after the decree absolute had been pronounced and he had re-married. It was not served on her and an order for substituted service was obtained in circumstances which, to say the least, were thoroughly unsatisfactory. The wife was a person whose address could at any time have been ascertained, but no serious attempt was made by the petitioner or anyone on his behalf to do so. All the obvious lines of inquiry in cases of this nature were open. She had relations whose whereabouts were known to the husband and who were in regular touch with her. Her children by her husband were, to his knowledge, being maintained by her and educated at a school in England, the identity of which he knew. These children were, to his knowledge, in touch with their mother. She had employed solicitors since the separation of the parties and had never, so far as the husband knew, withdrawn the instructions given to them. She had, to her husband's knowledge, a banking account at all material times until the separation. These lines of inquiry were either not pursued at all or only in the most perfunctory manner. The order itself directing an advertisement in a newspaper which the relatives might see rather than a communication to the relatives themselves had nothing to recommend it. Accepting the husband's evidence that it never occurred to him to write to his wife herself, or to her bankers, and that for some reason or other he got it into his head that his wife was trying to keep out of the way and that none of the children or her relatives were disposed to help him, and that he disclosed all material sources of inquiry except the bank to his solicitors, I cannot find any ground for convicting the husband of fraud.

I am of opinion, however, that this is a case in which, according to the established principles governing ex parte orders, the court is entitled to say that the information laid before it was wholly insufficient to justify an order for substituted service being made. This is not to say that in such circumstances an order for substituted service is to be treated as a nullity. I think it is clear from the authorities that, although an order for substituted service may be irregular and accordingly voidable, yet a defendant may so act thereafter as to waive the irregularity: *Fry v. Moore* (12). In that case the defendant, having first taken steps in the action to obtain an order for a statement of claim, applied to set aside the writ and was held to have waived the irregularity of service. I do not think any question of waiver can be said to arise here. The wife, as soon as she learned of the decree, entered an appearance with a view to getting rid of the decree which she has always maintained was

pronounced against her contrary to the justice of the case. The order in this case was, I think, voidable and in the absence of waiver the question is whether it should be avoided.

If it could be shown that the defence put forward by the wife was derisory, the order should not be avoided, but I do not think this can possibly be said here. The wife had maintained through her solicitors, long before the divorce proceedings, a state of facts which, if true, would be a good defence to these proceedings and it is the duty of the court to allow her to put forward her defence, even though this involves allowing her appeal against the decree nisi and decree absolute which have been pronounced, unless there is some valid reason to the contrary. It is said that there is such reason even if the wife had no time or opportunity for appeal, because the husband has re-married and a second marriage entered into after decree absolute is unassailable. *McPherson v. McPherson* (5) is relied on as persuasive authority for this proposition. I think that this case is distinguishable. *McPherson's* case (5) was one in which a wife who had not defended a divorce suit brought proceedings for restitution of conjugal rights against her former husband alleging that the decree he obtained against her was a nullity. The ground relied on was that the hearing was irregular in that it was not in public. The Judicial Committee held that it was not void for that reason, only voidable, but that in the words of the judgment "it was unassailable", the husband having re-married. If the Judicial Committee had had to consider a different question, namely, a right to appeal from a decree absolute by the appellant on the ground that she had not had time or opportunity to appeal from the decree nisi, I have no doubt that the conclusion would have been the same, since she had been properly served with the petition and had taken no steps, so far as the report shows, to ascertain any irregularity in the hearing of the suit until long after the time for appeal had expired although she had only herself to blame for her ignorance.

I do not think it follows, however, that the same conclusion would have been reached if the facts had been that the proceedings had never been brought to the notice of the appellant as in the case which we are now considering. In such a case I cannot see why the mere fact of the re-marriage can be a decisive factor, although it is, no doubt, an important matter to take into account in considering whether, in the exercise of its discretion, the court should set aside voidable proceedings. It is true that the second wife is not to blame for the situation in which she finds herself, but I do not think that the analogy of cases decided in contract is helpful, and, accordingly, I think she must, therefore, take the husband who claims to be divorced as she finds him with the necessary consequences which follow if the divorce decree is subsequently avoided. Were it otherwise a spouse could always prevent the opposite party who had had no time or opportunity for appealing from a decree absolute from availing himself or herself of the provisions of s. 31 by re-marrying on the day following the decree. In my judgment, the appellant should be given leave to appeal from the decrees in this case and the order for substituted service and the decrees nisi and absolute should be set aside. The case must go back for re-trial without further service of the petition and the respondent to the petition must have time for filing her answer to the petition. *Appeal allowed.*

Solicitors: *Walter, Burgis & Co.* (for the respondent wife); *Crawley & de Reya*, agents for *J. C. M. Dyke, McLusky & Braddell*, Exmouth (for the petitioner husband); *Sharpe, Pritchard & Co.*, agents for *Nicholls & Nicholls*, Exmouth (for the second wife).

[Reported by MISS PHILIPPA PRICE, Barrister-at-Law.]

DAVIDSON v. DAVIDSON.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Collingwood and Karminski, J.),
January 29, 1953.]

Justices—Husband and wife—Persistent cruelty—Sodomy with wife—Form of justices' finding—Need of corroboration of charge—Acquiescence by wife.

A On Aug. 20, 1952, the wife issued a summons against the husband under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1949, charging him with persistent cruelty to her. At the hearing before the justices on Sept. 16, 1952, the wife alleged that the husband had committed acts of sodomy on her, to which she had at first consented because he persuaded her that such acts were a form of normal intercourse. There was no corroboration of these allegations, which the husband denied, and B he further denied an allegation in cross-examination, not spoken to by the wife, that he had sought sexual intercourse per oram. The justices found that "there had been abnormal sexual practices" and that the husband had been guilty of persistent cruelty.

C HELD: (i) acts amounting to unnatural sexual practices or sexual perversion were of great gravity, and where justices found charges of them proved they should state with precision and clarity the nature of the acts and not employ such a phrase as "abnormal practices".

(ii) the justices appeared to have failed to direct themselves as to the desirability, though not the necessity, of corroboration in cases of this kind, and also to have failed to consider the question of acquiescence by the wife; and, therefore, there should be a re-trial.

D *Statham v. Statham* ([1929] P. 131) and *D.B. v. W.B.* ([1935] P. 80), applied.

Per curiam: on the question of acquiescence, the assent of a wife, especially a young wife, could not be true assent if the acts were forced on her, either literally in the physical sense, or by fraudulent persuasion that such conduct was one of the normal incidents of married life and thus was unobjectionable.

E AS TO PERSISTENT CRUELTY, see HALSBURY, Hailsham Edn., Vol. 10, p. 838, para. 1339; and FOR CASES, see DIGEST, Replacement Vol. 27, pp. 699-701, Nos. 6692-6702.

Cases referred to:

F (1) *Statham v. Statham*, [1929] P. 131; 98 L.J.P. 113; 140 L.T. 292; 27 Digest, Replacement, 294, 2394.

(2) *D.B. v. W.B.*, [1935] P. 80; *sub nom. B. v. B.*, 104 L.J.P. 25; 152 L.T. 419; 99 J.P. 162; 27 Digest, Replacement, 697, 6664.

APPEAL by the husband against the decision of North Aylesford justices, sitting at Chatham, Kent, on Sept. 16, 1952, whereby they found him guilty of persistent cruelty to the wife.

G The parties were married in 1949, the husband being then twenty-two years of age and the wife eighteen. A child was born in the late summer of 1949. The parties lived together until the summer of 1952, and on Aug. 20, 1952, the wife issued the summons in the present proceedings. At the hearing before the justices the wife gave evidence, *inter alia*, that the husband had committed on her a number of acts of sodomy, to which she had at first consented because H he had persuaded her that such acts were a normal form of sexual intercourse, and that when she discovered that such conduct was not normal she refused to allow him to continue it. There was no corroboration of the wife's allegation. The husband denied having committed any act of sodomy, and, in cross-examination, he denied an allegation—which had not been spoken to by the wife—that on one or more than one occasion he had sought sexual intercourse per oram.

The justices found that there had been "abnormal sexual practices", which had ceased some few months before the final break-up, and that the charge of persistent cruelty was proved, and the husband now appealed.

Crispin for the husband.

Stranger-Jones for the wife.

KARMINSKI, J., stated the facts and continued: The justices found, and it is a most important finding, that

"There had been abnormal sexual practices, although these had ceased some few months before the final break-up."

I emphasise the phrase "abnormal sexual practices", and I will content myself with observing only that, if justices are finding something of this nature, they should say what precisely they have found in clear terms. Sodomy, of course, is a matrimonial as well as a criminal offence, and it is a very serious offence. If the justices were finding other sexual practices, it was, I think, desirable that they should have stated the precise nature of the offences which they found. In this case that has some special significance, because of the question put to the husband in cross-examination on sexual intercourse per oram. We were invited to say by counsel for the wife that the finding of abnormal practices meant sodomy and nothing else, but I am quite unable to accept that argument. If they were finding sodomy they should have said so.

We are told that the justices had their attention drawn to *Statham v. Statham* (1), where it was pointed out that it was necessary for a jury to be directed, or a court to direct itself, on the desirability, though not the necessity, of corroboration in cases of this kind. If the justices were so warned it is, I think, a matter of great regret that they did not refer to the question of corroboration in their reasons. It is, of course, always open to any court to find a charge of this kind proved without corroboration, but it must first warn itself of the dangers of so doing. In *D.B. v. W.B.* (2), which was decided some years after *Statham v. Statham* (1), the principles to be applied in cases of sodomy and sexual perversion were fully argued by experienced counsel, and SIR BOYD MERRIMAN, P., dealt with the matter, if I may respectfully say so, in the clearest possible terms, in these words ([1935] P. 83):

"The court demands that when a matrimonial offence, whatever it is, is charged, if possible the evidence of the spouse making the charge should be corroborated, and not least with regard to matters of the sort charged in this case, about which, if there was not a reasonably strict rule in this respect, one spouse would be so easily at the mercy of the other in relation to things which from their nature must happen in private. But when that has been said it is admitted that the necessity for corroboration is not an absolute rule of law. Justices should direct themselves, just as a judge should direct a jury, that it is safer to have corroboration, if possible; but when that warning has been given and given in the fullest form, then there is no rule of law which prevents the tribunal finding the matter proved in the absence of corroboration."

The matter before the justices, and before this court in *D.B. v. W.B.* (2), were allegations of perverted sexual intercourse, and that direction I must follow. I am far from satisfied that the justices, if their attention was called to *Statham v. Statham* (1), either understood that decision or directed themselves properly according to it. It is clear in this case, as so often happens in cases either of sodomy or perversion, that there can be no corroboration, but it must also be remembered that no charge can be more easily made by a wife or is more difficult for a husband to answer.

Even if the justices did direct themselves properly as to the desirability of corroboration and were right in finding sodomy after a proper direction to

themselves, they do not seem to have considered at all the question, which must arise in charges of this kind, of acquiescence by the wife, and as SIR BOYD MERRIMAN, P., pointed out in *D.B. v. W.B.* (2) (*ibid.*, 84), referring to *Statham v. Statham* (1):

- A “If the conduct charged against the husband is a thing which could prima facie only have happened with the assent of the wife there must be some corroboration; and she ought not to be able to come to the court to complain of something to which she herself has consented. Whichever way it is put, it is plain that the closest scrutiny ought to be given by justices to an allegation of cruelty which at the end of it all is based upon filthy acts of this sort which cannot have occurred without at least the assent of the wife.”
- B It is true that the assent of a wife, especially a young wife, cannot be a true assent if the acts are forced on her, either literally in the physical sense, or by some fraudulent persuasion that such conduct was only one of the normal incidents of married life and thus was unobjectionable. But that aspect of acquiescence, which, in my view, is vital in these cases, does not seem to have been considered by the justices at all. At any rate, the matter is not mentioned
- C in their findings.
- I have gone into the questions of corroboration and acquiescence in the hope that it may be of some assistance to the justices who will have to re-try this matter. These cases are inevitably difficult, whether for justices or for higher tribunals, and I have referred to *Statham v. Statham* (1) and *D.B. v. W.B.* (2) in the hope that the justices' attention may be called to the requisites
- D to be proved and to the dangers to be avoided in cases of this kind. I have no doubt whatsoever that the trial by the justices which resulted in this order was completely unsatisfactory, and, in my view, there must be a new trial before a fresh panel of justices.

COLLINGWOOD, J.: I agree.

- E Order accordingly.
- Solicitors: *Gregory, Rowcliffe & Co.*, agents for *Wood, McLellan & Williams*, Chatham (for the husband); *T. Boyd Whyte*, Gillingham (for the wife).

[Reported by A. T. HOOLAHAN, Esq., Barrister-at-Law.]

PRACTICE NOTE.**KING v. T. AND W. FARMIOLE, LTD.**

[QUEEN'S BENCH DIVISION (Gerrard, J.), February 5, 1953.]

Legal Aid—Assisted person unsuccessful litigant—Application by opponent for costs—No notice of issue of civil aid certificate served—Legal Aid (General) Regulations, 1950 (S.I., 1950, No. 1359), reg. 15 (2).

In an action for negligence by a plaintiff, in respect of whom a civil aid certificate had been issued, judgment was given for the defendants. The plaintiff's solicitors had failed to serve on the defendants Form VI as required by reg. 15 (2) of the Legal Aid (General) Regulations, 1950. On an application by the defendants for an order as to costs as though the plaintiff was not a legally assisted person,

HELD: the plaintiff was a legally assisted person within the definition in reg. 1 (3) of the regulations of 1950, and, consequently, his liability as to costs was to be determined by s. 2 (2) (e) of the Legal Aid and Advice Act, 1949; reg. 15 (2) was merely part of the machinery for administering the Act and non-compliance with reg. 15 (2) did not invalidate the plaintiff's rights as a legally assisted person; and, therefore, the plaintiff was liable for only a limited sum for costs.

FOR THE LEGAL AID AND ADVICE ACT, 1949, s. 2 (2) (e), see HALSBURY'S STATUTES, Second Edn., Vol. 18, p. 535.

FOR THE LEGAL AID (GENERAL) REGULATIONS, 1950, see HALSBURY'S STATUTORY INSTRUMENTS, Vol. 5, p. 202.

APPLICATION as to costs, under the Legal Aid and Advice Act, 1949, and the Legal Aid (General) Regulations, 1950.

Chedlow for the plaintiff.

John Thompson for the defendants.

GERRARD, J.: Regulation 2 (1) of the Legal Aid (General) Regulations, 1950, says:

"Legal aid shall be available to any person to whom a certificate has been issued in accordance with these regulations."

Under reg. 15 (2) the plaintiff's solicitors are required to serve Form VI on the defendants. That is the form which is missing in this case. But there is no sanction in the regulations, and, looking at reg. 15 as a whole, it appears to me that the real object of the notice is to enable an opposing party who is not legally assisted to put in an affidavit, or a statement, in the registry or court office, of his means so that he may say to the assisted person in effect: "I am not very well off either, and this is evidence of my means which you can inquire into beforehand with a view to its being investigated at the hearing". That being so, I do not see how a failure to give notice, which seems to be part of the machinery for operating an inquiry under the Legal Aid and Advice Act, 1949, s. 2 (2) (e), can invalidate the plaintiff's entitlement to legal aid, though it may entitle counsel for the defendant at some stage to say: "I have had no notice of the issue of a civil aid certificate and I wish to put forward evidence with regard to my client's means. I have not already done so because I have not had notice, and equally I wish to cross-examine the plaintiff with regard to his means." [After discussion of the plaintiff's means, His LORDSHIP made an order for costs against the plaintiff, but under the Legal Aid and Advice Act, 1949, s. 2 (2) (e), limited his liability under the order to £15. He further ordered that both parties' costs should be taxed in the normal way as between solicitor and client under reg. 18 (3) of the Legal Aid (General) Regulations, 1950.]

Solicitors: *J. R. Spencer Young* (for the plaintiff); *Blount, Petre & Co.* (for the defendants).

M.M.

Re F. G. (FILMS), LTD.

[CHANCERY DIVISION (Vaisey, J.), February 12, 18, 1953.]

Cinematograph—Film—British film—Making by British company—Company incorporated in England—Nominee of foreign company—Cinematograph Films Act, 1938 (c. 17), s. 25 (1), s. 44 (1).

For a cinematograph film to be made by a British company, within s. 25 (1) of the Cinematograph Films Act, 1938, and so to be deemed to be a British film under that sub-section the company must establish themselves as the sole makers of the film. To do this they must show that they have actually and substantially “undertaken” the arrangements necessary for the making of the film, and have not acted merely as nominees or agents of a foreign company. Where, therefore, a company had a capital of £100, no premises except their registered office, and no staff,

HELD: they could not be regarded as the “makers” of a film which a foreign company had financed to the extent of £80,000, and, therefore, the film was not to be deemed to be a British film.

FOR THE CINEMATOGRAPH FILMS ACT, 1938, s. 23, s. 24, s. 25 (1), see HALSBURY’S STATUTES, Second Edn., Vol. 25, pp. 91-93; and FOR THE CINEMATOGRAPH FILMS ACT, 1948, see *ibid.*, p. 111 et seq.

ADJOURNED SUMMONS for a declaration that (i) the applicants, F. G. (Films), Ltd., were the makers of the film called “Monsoon” within the meaning of the Cinematograph Films Acts, 1938 and 1948; (ii) the applicants throughout the time that the said film was being made were a British company within the meaning of the said Acts; (iii) the makers of the said film were throughout the time during which the said film was being made a British company within the meaning of the said Acts.

Cyril Salmon, Q.C., and C. H. Duveen for the applicants.

The Solicitor-General (Sir Reginald Manningham-Buller, Q.C.) and Denys B. Buckley for the Board of Trade.

Cur. adv. vult.

Feb. 18. VAISEY, J., read the following judgment. Section 22 of the Cinematograph Films Act, 1938, prohibits the distribution or exhibition of unregistered cinematograph films, and by s. 23 of the Act the Board of Trade is charged with the duty of registering such films. The register is to be so kept as to record in relation to each film a number of specified particulars, including the fact that it is, as the case may be, either a British film or a foreign film. In s. 25 (1) of the Act we find that a film is to be deemed to be a British film if, and only if (omitting immaterial words)

“(a) the maker of the film was, throughout the time during which the film was being made, either a British subject or a British company, and (b) the studio, if any, used in making the film was within [Her] Majesty’s dominions, and (c) not less than the requisite amount of labour costs represents payments paid or payable in respect of the labour or services of British subjects or persons domiciled in some part of [Her] Majesty’s dominions.”

This application relates to a film entitled “Monsoon”, and the applicants, F. G. (Films), Ltd., are seeking declarations (a) that they, the applicants, were the makers of the said film within the meaning of the said Act and of an amending Act of 1948, to which no further reference need be made in this judgment; (b) that throughout the time that the said film was being made they were a British company within the meaning of the said Act; and (c) that the maker of the said film was throughout the time during which it was being made a British company, meaning, that is to say, the applicants. The

respondents to the summons, the Board of Trade, admits that the applicants are a British company as defined in the Act, being a company incorporated in England and having the majority of its directors British subjects. The facts are that the applicants were incorporated on May 29, 1951, under the Companies Act, 1948, and have three directors, namely, a Mr. Forrest Judd, who is an American citizen, and a Mr. Edwin Arthur Davis and a Miss Marjorie Sutherland, who are both British subjects. It is further admitted that the studio used in making the film was within Her Majesty's dominions, that is to say, in India. There is also no question but that the statutory requirement concerning labour costs has been fulfilled. A

The sole question, therefore, which I have to decide is whether the applicants were the makers of the film. This is what they claim to be, but the respondent has decided that they were not, and has, on that ground, refused to register the film "Monsoon" as a British film. The applicants, being aggrieved by that decision, are, in accordance with s. 31 of the Act, making the present application to the court. In substance, I am asked to reverse the respondent's decision and to say that "Monsoon" is a British film under the Act. B

In s. 44 of the Act the expression "maker" is defined as meaning, in relation to the film,

"the person by whom the arrangements necessary for the making of the film are undertaken." C

This is, perhaps, a strange collocation of words which might in other circumstances give rise to some difficulty of interpretation. "Undertake" means, I think, "be responsible for", especially in the financial sense, but also generally. So far as the present case is concerned, I think that it plainly suggests the following problem: Was it the applicants alone who undertook the arrangements necessary for the making of the film, or did they do so in co-operation with some other person, firm or company, reading as including the plural number (in accordance with the Interpretation Act, 1889) the words "maker", "British subject" and "British company" in s. 25 and the words "maker" and "person" in the definition? Here the applicants can only succeed if they establish themselves as the sole statutory makers of the film for, if they were (as may well be the case) one of several makers, the other "maker" or "makers" certainly cannot, in the circumstances of this case, be brought within the description of "British subject" or "British company". Their claim is to be, or to have been, the sole exclusive maker of the film. D

The applicants have a capital of £100, divided into one hundred shares of £1 each, ninety of which were held by the said Mr. Forrest Judd and the remaining ten by the said Mr. Davis. The third director has no shareholding. I now understand that they have no place of business apart from their registered office, and they did not employ any staff. It seems to me to be contrary, not only to all sense and reason, but to the proved and admitted facts of the case, to say or to believe that this insignificant company undertook in any real sense of that word the arrangements for the making of this film. I think that its participation in any such undertaking was so small as to be practically negligible, and that it acted, in so far as it acted at all in the matter, merely as the nominee of and agent for an American company called Film Group Incorporated, which seems (among other things) to have financed the making of the film to the extent of at least £80,000 under the auspices and direction of the same Mr. Judd, who happened to be its president. The suggestion that this American company and Mr. Judd were merely agents for the applicants is, to my mind, inconsistent with and contradicted by the evidence, and a mere travesty of the facts, as I understand and hold them to be. The applicants' intervention in the matter was purely colourable. They were brought into existence for the sole purpose of being put forward as having undertaken the very elaborate arrangements necessary for the making of this film and of E F G H

enabling it thereby to qualify as a British film. The attempt has failed, and the respondent's decision not to register "Monsoon" as a British film was, in my judgment, plainly right.

Declaration accordingly.

Solicitors: *Edwin A. Davis* (for the applicants); *Solicitor, Board of Trade.*
[Reported by *MISS PHILIPPA PRICE, Barrister-at-Law.*]

A

KING v. PHILLIPS.

[COURT OF APPEAL (Singleton, Denning and Hodson, L.JJ.), January 23, February 16, 1953.]

Damages—Mental shock—Accident to child—Mother hearing scream and seeing something of accident while seventy to eighty yards away.

B

A taxi-driver backed his taxicab negligently and without looking where he was going, and ran into a child who was on a tricycle immediately behind him, slightly injuring him. The child's mother, who was in her house seventy or eighty yards away, heard him scream, and, looking out of a window, saw the cab back into the tricycle, but she could not see the child. In an action by her for damages for the shock thus suffered by her,

C

HELD (per SINGLETON and HODSON, L.JJ.): the test of negligence vis-à-vis the mother was whether the taxi-driver could reasonably have foreseen the risk of damage to her; in the circumstances the taxi-driver could not reasonably have contemplated that, if he backed his taxicab without looking where he was going, he might cause to the mother the injury complained of; and, therefore, he owed her no duty of care and her claim should be dismissed.

D

Hay (or Bourhill) v. Young ([1942] 2 All E.R. 396), applied.

Hambrook v. Stokes Brothers ([1925] 1 K.B. 141), distinguished.

E

Per DENNING, L.J.: there was a duty of care owed by the taxi-driver, not only to the boy, but also to the mother; the driver was in breach of that duty, but in the circumstances the shock suffered by the mother could not reasonably have been foreseen by the driver; it was, therefore, too remote as a head of damage and the claim should be dismissed.

Decision of McNAIR, J. ([1952] 2 All E.R. 459), affirmed.

F

AS TO THE DUTY TO TAKE CARE, see HALSBURY, Hailsham Edn., Vol. 23, pp. 568-587, paras. 823-840; and FOR CASES, see DIGEST, Vol. 36, pp. 12-21, Nos. 33-101, and Digest Supps.

AS TO REMOTENESS OF DAMAGE, see HALSBURY, Hailsham Edn., Vol. 10, pp. 103-109, paras. 130-136; and FOR CASES, see DIGEST, Vol. 17, pp. 117-120, Nos. 267-289.

G

Cases referred to:

(1) *Hay (or Bourhill) v. Young*, [1942] 2 All E.R. 396; [1943] A.C. 92; 111 L.J.P.C. 97; 167 L.T. 261; 2nd Digest Supp.

(2) *Owens v. Liverpool Corpn.*, [1938] 4 All E.R. 727; [1939] 1 K.B. 394; 108 L.J.K.B. 155; 160 L.T. 8; Digest Supp.

(3) *Hambrook v. Stokes Brothers*, [1925] 1 K.B. 141; 94 L.J.K.B. 435; 132 L.T. 707; 36 Digest 123, 819.

H

(4) *Re Polemis & Furness, Withy & Co.*, [1921] 3 K.B. 560; *sub nom. Polemis & Furness, Withy & Co.*, 90 L.J.K.B. 1353; 126 L.T. 154; 36 Digest 29, 151.

(5) *Chester v. Waverley Municipal Council*, (1939), 62 C.L.R. 1; 39 S.R.N.S.W. 173; 56 N.S.W.W.N. 94; Digest Supp.

(6) *Smith v. Johnson & Co.*, (1897), cited in, [1897] 2 Q.B. p. 61; 66 L.J.Q.B. p. 496; 76 L.T. p. 494; 36 Digest 124, 820.

(7) *Wilkinson v. Downton*, [1897] 2 Q.B. 57; 66 L.J.Q.B. 493; 76 L.T. 493; 17 Digest 100, 150.

APPEAL by the plaintiff from a decision of McNAIR, J., dated July 16, 1952, reported [1952] 2 All E.R. 459.

In an action for damages for negligence by the boy for personal injuries and by his mother for shock caused by her hearing the boy's scream and seeing his peril, McNAIR, J., gave judgment for the boy for £15 and dismissed the mother's claim on the ground that her injury could not have been reasonably anticipated. The boy appealed against the amount of damages awarded, but his appeal was dismissed and this report deals solely with the appeal by the mother.

F. G. Paterson for the plaintiff.

Wiggins for the defendant.

Cur. adv. vult.

Feb. 16. The following judgments were read.

SINGLETON, L.J.: On Aug. 2, 1951, a boy was on his tricycle in Birstall Road, Tottenham, about the point where Birstall Road joins Greenfield Road. A taxicab, which was driven by a servant of the defendant, called at a house in Greenfield Road, and, having picked up the fare, was in the act of being backed by the driver into Birstall Road so that he might return towards Seven Sisters Road when he heard a call. It appeared that his taxicab had struck the boy's tricycle. The boy was slightly hurt, and the tricycle was damaged. The boy ran back towards his home, No. 12, Birstall Road, which is about six houses up on the right hand side of the road from Greenfield Road and some seventy or eighty yards away from the site of the accident. The boy's mother was at an upstairs window in that house. She heard a scream, she looked down the road and saw the taxicab backing on to the tricycle, and then she saw the tricycle under the taxicab. She could not see the boy. She ran downstairs and into the road, where she met the boy running towards her and took him inside. As a result of what she heard and saw she suffered trembling fits, and became distressed and tearful. She consulted her doctor on Aug. 17, and she continued to be attended by him until November. McNAIR, J., was satisfied that her condition as spoken to by the doctor was directly caused by what she heard and saw at the time of the accident, and, subject to liability, he assessed the damages in her case at the sum of £100. The learned judge decided further that there was no liability on the defendant in respect of her claim, and gave judgment for the defendant. Against that judgment the mother appeals to this court.

It is clear that a person who sustains damage from nervous shock has a right of action against one whose negligence caused the shock. An allegation of negligence postulates a breach by the defendant of a duty owed by him to the plaintiff. In the civil law there is no such thing as negligence in the air; liability only arises where there is a duty to take care and where failure in that duty has caused damage. McNAIR, J., delivered a considered judgment in favour of the owner of the taxicab. In so deciding he followed the decision of the House of Lords in *Hay (or Bourhill) v. Young* (1), in which it was held (i) that the duty of a motor cyclist on the public road to other persons using it was to drive with such reasonable care as would avoid the risk of injury (including injury by shock although no direct impact occurred) to such persons as he could reasonably foresee might be injured by his failure to exercise that care; and (ii) that the pursuer in that case was not within the area of potential danger arising as the result of the defender's negligence, and, accordingly, he owed no duty to her and was not guilty of negligence in relation to her. I do not see that McNAIR, J., could have come to any other conclusion, having regard to what was said in that case. The view of each of the learned law lords was that on the facts no duty was owed to the pursuer by the motor cyclist

who collided with a motor van. At the time of the collision the pursuer was on the off-side of a tramcar which the motor cyclist had passed on its near side. The point of impact was some forty-five to fifty feet beyond her and the tramcar was between her and the vehicles which came into collision. It was clear that the motor cyclist was at fault and that in relation to the driver of the motor van he was guilty of negligence, but it was held that he owed no duty to the pursuer, and that, consequently, vis-à-vis her he was not negligent. The test was put by LORD RUSSELL OF KILLOWEN in this way ([1942] 2 All E.R. 401):

“Can it be said that John Young could reasonably have anticipated that a person, situated as was the pursuer, would be affected by his proceeding towards Colinton at the speed at which he was travelling?”

And by LORD MACMILLAN (*ibid.*, 403):

“But can it be said that he ought further to have foreseen that his excessive speed, involving the possibility of collision with another vehicle, might cause injury by shock to the pursuer?”

LORD MACMILLAN was of opinion that the motor cyclist, Young, was under no duty to the pursuer to foresee that his negligence in driving at an excessive speed, and, consequently, colliding with a motor car, might result in injury to her, for such a result could not reasonably and probably be anticipated, and, thus, he was not guilty of negligence in a question with the pursuer. LORD WRIGHT said that the pursuer was completely outside the range of the collision, and added (*ibid.*, 406):

“I cannot accept that John Young could reasonably have foreseen, or, more correctly, the reasonable hypothetical observer could reasonably have foreseen, the likelihood that anyone placed as the [pursuer] was, could be affected in the manner in which she was.”

LORD PORTER said (*ibid.*, 410):

“In order, however, to establish a duty towards herself, the pursuer must show that the cyclist should reasonably have foreseen emotional injury to her as a result of his negligent driving, and, as I have indicated, I do not think she has done so.”

The pursuer in that case was not very far from the scene of the accident, and one would have thought that the motor cyclist owed her a duty and would have been responsible to her in damages if, as the result of the collision with the motor car, there had been an explosion which caused bodily injury to her, but LORD THANKERTON said (*ibid.*, 400):

“At the time of the collision with the motor he was well past the tramcar and the [pursuer] was not within the range of his vision, let alone that the tramcar obstructed any view of her. The risk of the bicycle ricochetting and hitting the [pursuer], or of flying glass hitting her, in her position at the time, was so remote, in my opinion, that the cyclist could not reasonably be held bound to have contemplated it . . .”

LORD THANKERTON was, of course, dealing with a claim in respect of nervous shock, and his observation on this point must be limited to the case with which he was dealing. As I have said, the view of all their Lordships in that case was that the motor cyclist owed no duty to the pursuer, and that, consequently, he was not guilty of any negligence in relation to her, so that she could not recover damages for the shock which she had sustained.

If there was no duty owed to the pursuer in *Hay (or Bourhill) v. Young* (1), I cannot see how there was any owed by the taxi-driver to the plaintiff, Mrs. King, on the facts of this case. In *Bourhill's* case (1) LORD RUSSELL OF KILLOWEN (*ibid.*, 402), and LORD MACMILLAN (*ibid.*, 403), adopted the words of LORD JAMIESON:

“No doubt the duty of a driver is to use proper care not to cause injury

to persons on the highway or in premises adjoining the highway, but it appears to me that his duty is limited to persons so placed that they may reasonably be expected to be injured by the omission to take such care."

LORD MACMILLAN added (*ibid.*):

"The duty to take care is the duty to avoid doing or omitting to do anything the doing or omitting to do which may have as its reasonable and probable consequence injury to others and the duty is owed to those to whom injury may reasonably and probably be anticipated if the duty is not observed."

Can it be said that the driver (or any driver in the world) could reasonably or probably anticipate that injury, either physical or from shock, would be caused to the mother who was in No. 12 Birstall Road when he caused his taxicab to move backwards a short distance from Greenfield Road without looking to see if anyone was immediately behind? There can surely be only one answer to that question. The driver owed a duty to the boy, but he knew nothing of the mother; she was not on the highway; he could not know that she was at the window, nor was there any reason why he should anticipate that she would see his taxicab at all; he was not intending to go into Birstall Road except for the purpose of turning. I cannot see that the fact that she saw the tricycle under the taxicab enables one to distinguish this case from *Hay (or Bourhill) v. Young* (1).

It would appear that in that case the judgment of the Court of Appeal in *Owens v. Liverpool Corpn.* (2) was not looked on favourably: see LORD THANKERTON ([1942] 2 All E.R. 400); though I confess I should have thought that, if the driver of a tramcar negligently drove his tramcar against a hearse and overturned the coffin therein, he would be under a duty towards those in a coach which immediately followed the hearse. LORD WRIGHT said (*ibid.*, 406):

"The lawyer likes to draw fixed and definite lines and is apt to ask where the thing is to stop. I should reply it should stop where in the particular case the good sense of the jury, or of the judge, decides. I should myself be disposed, as at present advised, to say that it should have stopped short of judgment for the plaintiff in *Owens v. Liverpool Corpn.* (2)."

LORD WRIGHT was there considering a case in which the deputy presiding judge had found the facts in favour of the plaintiffs [funeral mourners in a coach following the hearse], but had held, following earlier authority, that they could not recover as they themselves were not in danger of personal injury. The Court of Appeal held that he was wrong and that the plaintiffs were entitled to judgment. Counsel for the defendant corporation had advanced the argument that no duty was owed by the tramcar driver to the passengers in the coach, but this point was not dealt with in the judgment of the court which was given by MACKINNON, L.J.

The decision of this court in *Hambrook v. Stokes Brothers* (3) was not directly overruled by the House of Lords in *Hay (or Bourhill) v. Young* (1)—indeed it could not be, for in *Hambrook's* case (3) there was an admission of negligence which pre-supposed the existence of a duty towards the plaintiff. ATKIN, L.J., however, dealt with the case apart from the question of pleading, and his judgment, if I may humbly say so, commends itself to me. At the same time he was dealing with a case which on its facts is far removed from the case now under appeal. In that case the plaintiff, who died from shock some time later, was on the highway—a narrow road—and not far from the scene of an accident to one of her children.

The decision of the House of Lords shows that the test is whether the driver could reasonably have foreseen any damage to the plaintiff. Unless he could, it was said, no duty was owed to her, and, consequently, there was no negligence

vis-à-vis the plaintiff. I find it difficult to draw a distinction between damage from physical injury and damage from shock; prima facie one would think that, if a driver should reasonably have foreseen either and damage from the one or from the other resulted, the plaintiff would be entitled to succeed. It is, however, unnecessary to consider this somewhat academic point for the purposes of this appeal for, on the finding of McNAIR, J., no reasonable driver (or no hypothetical bystander) would have anticipated damage of any kind to Mrs. King, and that is a finding of fact with which this court ought not to interfere. Moreover, it is in accord with common sense. McNAIR, J., towards the end of his judgment, said ([1952] 2 All E.R. 461):

“The mother, in my judgment, was wholly outside the area or range of reasonable anticipation, and if I am asked where the line is to be drawn I should humbly reply in the language of LORD WRIGHT, used admittedly in a slightly different context, that it should be drawn ([1942] 2 All E.R. 406): ‘ . . . where in the particular case the good sense of the jury, or of the judge, decides ’. It seems to me to be contrary to common sense to say that a taxi-driver ought reasonably to have contemplated that, if he backed his taxi without looking where he was going, he might cause injury by shock, or any other injury, to a woman in a house some seventy or eighty yards away up a side street.”

There is, indeed, a sense of remoteness in this case. In my opinion, the appeal should be dismissed.

DENNING, L.J.: In this case a taxi-driver negligently backed his cab without looking where he was going and ran into a small boy on a tricycle. His mother, who was in her home seventy or eighty yards away, heard him scream and, looking out of the window, saw his peril. She suffered nervous shock, and the question is whether she can recover damages on that account. Counsel for the mother put the case on her behalf quite simply. His first proposition was that the taxi-driver was under a duty to drive his cab with reasonable care, and that he owed that duty to everyone in the vicinity, not only to people in physical danger, but also to those in emotional danger, particularly to a mother who was put in fear for her children's safety. For this proposition he relied on *Hambrook v. Stokes Brothers* (3). His next proposition was that the taxi-driver by his negligence had broken that duty and was liable for all the direct consequences of the breach, whether they could reasonably have been foreseen or not. For this proposition he relied on *Re Polemis & Furness, Withy & Co.* (4).

If the two cases on which counsel relied stood alone, they would be sufficient to warrant a decision in favour of the mother, but they have to be read in the light of the case of the Edinburgh fishwife, *Hay (or Bourhill) v. Young* (1). In that case the negligence of a motor cyclist brought about a collision which so upset a fishwife (who was standing nearby) that she suffered a miscarriage. She was held not entitled to recover. It seems to me that each member of the House of Lords based his decision on the ground that the motor cyclist could not reasonably be expected to have foreseen that the fishwife would suffer injury by emotional shock. The test applied was not foreseeability of physical injury, but foreseeability of emotional shock. It would, I suppose, be open to this court to apply that test uncritically in the present case and ask ourselves simply whether the taxi-driver could reasonably have foreseen that the mother might suffer nervous shock. But I do not think we can quite do this. We have to try to reconcile *Hay (or Bourhill) v. Young* (1) with *Hambrook v. Stokes Brothers* (3), particularly with regard to the duty of the driver. In *Hambrook v. Stokes Brothers* (3), the case of the runaway lorry, ATKIN, L.J., held that, apart from the admissions in the pleadings, the lorry driver was in breach of his duty to the mother, although she was not herself

in any personal danger, whereas in *Hay (or Bourhill) v. Young* (1) the House of Lords held that the motor cyclist was guilty of no breach of duty to the fishwife.

I am not sure that the whole difficulty does not arise because of the different senses in which we speak of the duty of care. Take the case of the fishwife. Although the House of Lords held that the motor cyclist was under no duty to her, that must mean that he owed her no duty in regard to emotional shock. It cannot mean that he did not owe her a duty in regard to physical injuries if it had so happened that she suffered any. In that regard he was clearly under a duty to her to drive with reasonable care. Suppose, for instance, that his negligence had caused her to be physically injured in some way or other. This was admittedly improbable, but it was not altogether outside the realms of possibility. She was standing at a point where she might conceivably have been struck. The excessive speed of the motor cyclist existed before the impact. He was not to know what vehicles would appear in his path. He might have collided with some negligently driven car coming in some other direction, and as a result of the collision one or other of the vehicles might have been flung back on her. One can never tell where vehicles will be placed after an accident. The risk of her being struck might be remote, but no matter how remote it was, and no matter how much it was outside the contemplation of the motor cyclist, nevertheless, if the fishwife had actually been struck as a result of his negligence, or of the negligence of him and others, she would have a cause of action in damages against him. So, also, with the case of the funeral procession, *Owens v. Liverpool Corpn.* (2). The mourners were not actually struck, but they were well within the area where they might have been. If their own carriage had been going a little faster it might have become itself involved in the accident by having to pull up suddenly or to swerve, with consequent physical injury to the mourners, in which case they would clearly have had a cause of action for damages.

What is the reasoning which admits a cause of action for negligence if the injured person is actually struck, but declines it if he only suffers from shock? I cannot see why the duty of a driver should differ according to the nature of the injury. I should have thought that every driver was under a plain duty which he owed to everyone in the vicinity. He ought to drive with reasonable care. If he drives negligently with the result that a bystander is injured, then his breach of duty is the same, no matter whether the injury is a wound or is emotional shock. Only the damage is different. The bystander may be so close as to be put in fear for himself, or he may be just a little way off and be shocked by fear for the safety of others. In either case he has been injured by the driver's negligence. If you view the duty of care in this way, and yet refuse to allow a bystander to recover for shock, it is not because there was no duty owed to him, nor because it was not caused by the negligence of the driver, but simply because it is too remote to be admitted as a head of damage.

A different result is reached by viewing the driver's duty differently. Instead of saying simply that his duty is to drive with reasonable care, you say that his duty is to avoid injury which he can reasonably foresee, or, rather, to use reasonable care to avoid it. Then you draw a distinction between physical injury and emotional injury, and impose a different duty on him in regard to each kind of injury, with the inevitable result that you are driven to say there are two different torts, one tort when he can foresee physical injury, another tort when he can foresee emotional injury. I do not think that is right. There is one wrong only, the wrong of negligence. I know that damage to person and damage to property are for historical reasons regarded as different torts, but that does not apply to physical injury and emotional injury. LORD WRIGHT clearly treated impact and shock as one cause of action when he said in *Hay (or Bourhill) v. Young* (1) ([1942] 2 All E.R. 405):

"The man who negligently allows a horse to bolt, or a car to run at large down a steep street, or a savage beast to escape is committing a breach of duty towards every person who comes within the range of foreseeable danger, whether by impact or shock . . ."

A The true principle, as I see it, is this. Every driver can and should foresee that, if he drives negligently, he may injure somebody in the vicinity in some way or other, and he must be responsible for all the injuries which he does in fact cause by his negligence to anyone in the vicinity, whether they are wounds or shocks, unless they are too remote in law to be recovered. If he does by his negligence in fact cause injury by shock, then he should be liable for it unless he is exempted on the ground of remoteness. This principle is the same as that stated by SIR FREDERICK POLLOCK in POLLOCK ON TORTS, 15th ed., p. 334:

B "... every one is bound to exercise due care towards his neighbours in his acts and conduct, or rather omits or falls short of it at his peril; the peril, namely, of being liable to make good whatever harm may be proved a consequence of the default."

C If this principle is correct, the only consequences for which he is excused are those which are too remote. Howsoever that may be, whether the exemption for shock be based on want of duty or on remoteness, there can be no doubt since *Hay (or Bourhill) v. Young* (1) that the test of liability for shock is foreseeability of injury by shock. But this test is by no means easy to apply. The test is not what the negligent party himself could reasonably have foreseen, for he rarely has time to foresee anything. The test is what a "reasonable hypothetical observer could reasonably have foreseen": see *Hay (or Bourhill) v. Young* (1) per LORD WRIGHT ([1942] 2 All E.R. 406). But where must this hypothetical observer be situate? In the driver's seat, or in an observation post on high? It is obvious that much must depend on his powers of observation and the scope of his imagination. One judge may credit him with more foresight than another. One judge may think that he should have foreseen the shock. Another may not. In both *Hambrook v. Stokes Brothers* (3) and *Chester v. Waverley Municipal Corpn.* (5), the judges were divided in opinion whether the shock to the mother could reasonably have been foreseen. Some cases seem plain enough. A wife or mother who suffers shock on being told of an accident to a loved one cannot recover damages from the negligent party on that account. Nor can a bystander who suffers shock by witnessing an accident from a safe distance: *Smith v. Johnson & Co.* (6), cited in *Wilkinson v. Downton* (7); *Hay (or Bourhill) v. Young* (1), per LORD PORTER (ibid., 409). But if the bystander is a mother who suffers from shock by hearing or seeing, with her own unaided senses, that her child is in peril, then she may be able to recover from the negligent party, even though she was in no personal danger herself: *Hambrook v. Stokes Brothers* (3). LORD WRIGHT said he agreed with that decision. So do I.

G This brings me to the real question: Is the present case covered by *Hambrook v. Stokes Brothers* (3) or not? I think we should follow *Hambrook v. Stokes Brothers* (3) so far as to hold that there was a duty of care owed by the taxi-driver, not only to the boy, but also to his mother. In that case the negligence took place three hundred yards from the place where the mother was standing. H In this case it was only seventy or eighty yards. In that case the mother was not herself in any personal danger. Nor was she here. In that case she suffered shock by fear for the safety of her children from what she saw and heard. So did she here. In that case the mother was in the street, and in this case at the window of the house. I do not think that makes any difference. Nevertheless, I think the shock in this case is too remote to be a head of damage. It seems to me that the slow backing of the taxicab was very different from

the terrifying descent of the runaway lorry. The taxi-driver cannot reasonably be expected to have foreseen that his backing would terrify a mother seventy yards away, whereas the lorry driver ought to have foreseen that a runaway lorry might seriously shock the mother of children in the danger area.)

I may mention that some years ago, shortly after *Hay (or Bourhill) v. Young* (1) was reported, I tried a case at the Manchester Assizes where a woman, cutting a loaf of bread, found a dirty finger-stall in it. She suffered shock from the sight of it, and claimed damages from the baker. She did not make the contract with the baker, but he clearly was under a duty of care to her which he had broken. I held that she could not recover for the shock, because it could not reasonably have been foreseen. That case shows the difficulty of drawing the line. If she had eaten the loaf and been poisoned, she could have recovered damages, but because she was only shocked by sight, she could not. Where is the line to be drawn? Only where "in the particular case the good sense of the . . . judge decides." That is how LORD WRIGHT put it in *Hay (or Bourhill) v. Young* (1) (*ibid.*, 406), and I do not think we can get any nearer than that. I agree that the appeal should be dismissed.

HODSON, L.J.: The plaintiff's claim is for shock sustained owing to the negligence of a taxi-driver, the servant of the defendant, who ran into and injured her infant son who was playing in the street some little way from her house. The plaintiff, while in the house, heard a scream which she identified as that of her son. She saw the taxicab backing on to a tricycle and saw the tricycle under the cab, but could not see the boy. She ran down the road, the boy ran towards her, and she took him indoors. McNAIR, J., found that the negligence of the taxi-driver caused the injury to the boy and that the mother's shock was caused by what she saw and heard, but dismissed her claim on the ground that the driver could not reasonably have anticipated that to back his taxi-cab in the way he did, admittedly negligently vis-à-vis the boy, would cause injury to his mother in her home seventy or eighty yards away.

The law in shock cases where no direct contact is involved was considered by the House of Lords in *Hay (or Bourhill) v. Young* (1). It is clear that the action will lie for injury by shock whenever a person is placed in reasonable fear of immediate injury to himself, provided that the defendant could reasonably have foreseen the risk and ought to have guarded against it. As LORD RUSSELL OF KILLOWEN said ([1942] 2 All E.R. 401):

"In considering whether a person owes to another a duty a breach of which will render him liable to that other in damages for negligence, it is material to consider what the defendant ought to have contemplated as a reasonable man."

The difficulty lies in applying the law and in determining the range of the action. On the authorities it is at least doubtful whether it can extend to unintentional acts causing shock where there is no fear of personal injury to the plaintiff. Speaking, if I follow him correctly, of the range of the action, LORD WRIGHT, in *Hay (or Bourhill) v. Young* (1), was not prepared to impose any exact limit on it, saying that it should be where in the particular case the good sense of the judge or jury should decide.

McNAIR, J., in the case now under appeal, having directed himself in accordance with the speeches in *Hay (or Bourhill) v. Young* (1), and having arrived at the conclusion that the injury to the boy's mother was outside the range of the reasonable anticipation of the taxicab driver, I think an appellate court should hesitate long before disturbing his conclusion. The plaintiff contends that, since she has proved the negligent driving of the taxi-driver and injury by shock to have been caused thereby, the case is on all fours with, and, indeed, stronger than, *Hambrook v. Stokes Brothers* (3), in which the Court of Appeal,

by a majority, found that a husband was entitled to recover in an action under the Fatal Accidents Act where the death of his wife was caused by shock brought about by fear for her child's safety. That case, it is said, was not overruled by *Hay (or Bourhill) v. Young* (1), and, accordingly, the learned judge was wrong in directing himself by the speeches delivered in the House of Lords without regard to the earlier decision. This criticism is, I think, ill founded. In *Hay (or Bourhill) v. Young* (1), their Lordships had to deal with a case in which no breach of duty was admitted, while in *Hambrook v. Stokes Brothers* (3) there was an admission of negligence, so that the question of breach of duty did not arise. It seems to me that, in the absence of the admission, LORD THANKERTON would not have approved the decision in *Hambrook v. Stokes Brothers* (3). He quoted (*ibid.*, 400) a passage from ATKIN, L.J.'s judgment ([1925] 1 K.B. 156):

" 'I agree that in the present case the plaintiff must show a breach of duty to her, but this she shows by the negligence of the defendants in the care of their lorry. I am clearly of opinion that the breach of duty to her is admitted in the pleadings.' There are, however, certain obiter dicta on the question of duty, which might be considered too wide, and I reserve any opinion on them."

LORD RUSSELL OF KILLOWEN preferred the dissenting judgment of SARGANT, L.J.; LORD MACMILLAN reserved his opinion on the case; LORD WRIGHT said that, as at present advised, he agreed with the decision. LORD PORTER expressed no dissent, emphasising that all the lords justices were careful to point out that the vital problem was the extent of the duty and not the remoteness of damage, a view with which he agreed. In these circumstances, although I think it is difficult to draw a valid distinction on the facts between this case and *Hambrook v. Stokes Brothers* (3), I think that MCNAIR, J., was entitled to treat the decision of the majority of the Court of Appeal in the way he did, for the reasons which he gave, and for those which can be extracted from the speeches to which I have referred in *Bourhill's* case (1). I agree that the appeal should be dismissed.

Appeal dismissed.

Solicitors: *Darracotts & Emtringham* (for the plaintiff); *A. E. Johnson* (for the defendant).

[*Reported by F. GUTTMAN, ESQ., Barrister-at-Law.*]

PAGE v. PAGE AND ANOTHER. METCALF AND ANOTHER v. WELLS.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Jenkins and Morris, L.J.J.),
February 10, 11, 1953.]

Legal Aid—Costs—Taxation—No order made as to costs—Duty of court to make order for taxation—Legal Aid and Advice Act, 1949 (c. 51), s. 6 (5), s. 6 (6), sched. III—Legal Aid (General) Regulations, 1950 (S.I., 1950, No. 1359), reg. 18 (3).

Where a person receives legal aid in connection with any proceedings, his solicitor and counsel are entitled, under the Legal Aid and Advice Act, 1949, s. 6 (5), s. 6 (6), and sched. III, to be paid out of the legal aid fund, and, therefore, the court is under a duty to make an order for taxation of the assisted person's costs notwithstanding that no order is made as to the costs of the proceedings.

In an action brought by an assisted person, the judge held that, as he was not making any order for the payment of the costs of the proceedings, the Legal Aid (General) Regulations, 1950, reg. 18 (3), did not apply and he was not bound to make any order for taxation of the assisted person's costs in accordance with the provisions of sched. III to the Act of 1949. On appeal to the Court of Appeal,

HELD: regulation 18 (3) of the regulations of 1950 did not cut down the general effect of the provisions in sched. III to the Act of 1949, which required that, to ascertain the proper payment to be made out of the legal aid fund to the counsel and solicitor of an assisted person under s. 6 (5) and s. 6 (6) of the Act, there should be taxation of the assisted person's costs in the ordinary way in every case, in the absence of regulations made under para. 5 of the schedule; reg. 18 (3) merely dealt with the method whereby the intention of s. 6 (5) and s. 6 (6) of the Act was to be achieved; and, therefore, an order for taxation of the assisted person's costs should be made, the court having no discretion in the matter.

Brown v. Brown ([1952] 1 All E.R. 1018), applied.

Decision of ROXBURGH, J. ([1952] 2 All E.R. 889), reversed.

FOR THE LEGAL AID AND ADVICE ACT, 1949, s. 2 (2), s. 6 (5), and sched. III, see HALSBURY'S STATUTES, Second Edn., Vol. 18, pp. 535, 541, and 565; and FOR THE LEGAL AID (GENERAL) REGULATIONS, 1950, reg. 18 (3), see HALSBURY'S STATUTORY INSTRUMENTS, Vol. 5, p. 218.

Cases referred to:

- (1) *Brown v. Brown*, [1952] 1 All E.R. 1018.
- (2) *Frost v. Frost*, [1952] 2 All E.R. 1125.

APPEALS.

In **PAGE v. PAGE**, the plaintiff, an assisted person, appealed from an order of **HARMAN, J.**, dated Nov. 13, 1952, in so far as he had refused thereby to make an order for taxation of the plaintiff's costs of the action for the purposes of the Legal Aid and Advice Act, 1949, sched. III. The learned judge held that, as he was making no order as to the costs of the action, the Legal Aid (General) Regulations, 1950, reg. 18 (3), did not apply and he was not required to make an order for taxation of the plaintiff's costs.

Stranders for the plaintiff.

The defendants did not appear.

In **METCALF v. WELLS**, the plaintiffs, both of whom were assisted persons, appealed from an order of **ROXBURGH, J.**, dated Oct. 31, 1952, and reported [1952] 2 All E.R. 889. The parties, having settled the action after it came on for trial, applied to the court for a consent order. The settlement contained no terms as to the costs of the proceedings, but counsel for the plaintiffs asked for an order for taxation of the plaintiffs' costs for the purposes of the Legal Aid

and Advice Act, 1949. ROXBURGH, J., held that, as he was not asked to make an order for the payment of the costs of the proceedings, the Legal Aid (General) Regulations, 1950, reg. 18 (3), did not apply, and, therefore, he was not bound to make any order for taxation of the plaintiffs' costs and would not do so.

Ferns for the plaintiffs.

The defendant did not appear.

A **SIR RAYMOND EVERSHED, M.R.:** The judgment which I am about to deliver is my judgment in both these cases. In each of these appeals the court is asked to reverse the judgment of the judge appealed from (in the one case *HARMAN, J.*, and in the other *ROXBURGH, J.*), in so far as those learned judges, in the form of order which they adopted, forbore from making any order pursuant to the terms of the Legal Aid and Advice Act, 1949, sched. III, so as to provide for the taxation of the costs in each case of the respective plaintiffs (being assisted persons) as between solicitor and client, as provided by that schedule.

B The exact facts of the cases are not, I think, of any great significance. In the first case, *Page v. Page*, the plaintiff had claimed in his writ and pleadings that a certain house, which had been acquired by his late mother, was acquired by her out of moneys provided by him, so that her estate (of which the two defendants were executors) held the property on trust for him. When the case was first opened by counsel for the plaintiff (and I should add, in justice to him, that he had come late into the proceedings) it appeared that, at the time when the house finally became vested free from encumbrances in the plaintiff's mother, the plaintiff was a bankrupt, and, although he was subsequently discharged, counsel on his behalf was fain to concede that he could not sustain the action unless he could somehow contrive (as he failed in fact to do) to get in from the trustee in bankruptcy the equity in the property. The second case, *Metcalf v. Wells*, also related to house property. The two plaintiffs claimed as persons who had acquired from the defendant certain premises and they alleged that the defendant had misrepresented the facts in regard to the title—
C in particular, in regard to a right of way—the result of which was to diminish the value of that which they bought. They, therefore, sued in the action for damages.

E In *Page v. Page*, *HARMAN, J.*, obviously took the view that the legal aid certificate should not have been granted. It may well be that the plaintiff himself forbore to give full information about his bankruptcy, either to his
F then solicitors or, through them, to the legal aid committee. However that may be, the judge was of opinion that, as the plaintiff was, at the material time, a bankrupt, the action was, admittedly, not maintainable by him and, therefore, it was not a case in which, properly, a certificate should have been granted. After a considerable discussion about costs, *HARMAN, J.*, arrived at the conclusion that, so far as the costs of the proceedings were concerned
G (and they included a counterclaim), he did not propose to make any order inter partes as to the costs at all, for by taking that line (in his own language) he would be able to avoid the effect of reg. 18 (3) of the Legal Aid (General) Regulations, 1950, made under the Legal Aid and Advice Act, 1949. In *Metcalf v. Wells*, the substance of the matter was the same. It appeared from the judgment of *ROXBURGH, J.* ([1952] 2 All E.R. 889) that, before the proceedings had started, a person who was not a party to the action had made an offer to permit the plaintiffs to have a right of access over certain land, which offer greatly diminished any loss or damage that the plaintiffs could suffer. After the case had opened, the plaintiffs, through their counsel, informed the judge that they were not proceeding further with the matter, it having been settled on the terms that the offer, which had previously been made and remained open, had been accepted. The judge was of opinion that the offer should have been accepted from the start and that, in bringing the proceedings, the plaintiffs
H

had acted wholly unreasonably, and I rather guess that he thought that those advising the plaintiffs had engaged in the proceedings rather for their own benefit than for any possible advantage which they could bring to the plaintiffs. Therefore, ROXBURGH, J., like HARMAN, J., studiously forbore from making any order in the action as to costs. Indeed, it was not open to him to do so, in a sense, because the matter was settled, and, therefore, as he said, reg. 18 (3) of the regulations of 1950 had no application. He held, therefore, that he was not bound to make the order as to solicitor and client costs which the plaintiffs, as assisted persons, sought. He added that, if he had a discretion in the matter, then, for the reasons which I have indicated, viz., the circumstances in which the action had been brought and settled, he thought he should not exercise his discretion in the plaintiffs' favour.

The result in each case appears to be that the solicitors of the respective plaintiffs are left without any means of recovering their proper profit costs and disbursements, and the learned counsel, similarly, would get no reward, seeing that the disbursements (viz., their fees) would not be paid. That, I think, is, plainly, the result, because, as appears from s. 2 (2) (b) of the Act, the effect of the grant of a certificate is that the legal advisers of the assisted person are disabled from making any claim in respect of their charges against that person. Section 2 (2) provides:

"Where a person receives legal aid in connection with any proceedings . . . (b) his solicitor and counsel shall not take any payment in respect of the legal aid except such payment as is directed by this Part of this Act to be made out of the legal aid fund."

The effect, therefore, of the decision of the judge in each of these cases was to impose a punishment, in a sense, on the solicitor and counsel. I rather assume that that may have been deliberate in the case before ROXBURGH, J., but I am not by any means sure that it was so in the case before HARMAN, J. Certainly, the actual parties themselves would suffer no pecuniary loss, having regard to s. 2 (2) (b) of the Act, unless it could be shown (and, plainly, it could not in these cases) that any contribution they had been ordered to make would, or would be likely to, exceed the amount of the taxed costs. It is to be noted that the Act itself, in s. 6 (5), makes provision regarding the costs of assisted litigants in quite imperative terms. Section 6 (5) provides:

"Subject to this Part of this Act, a solicitor who has acted for a person receiving legal aid shall be paid for so acting out of the legal aid fund, and any fees paid to counsel for so acting shall also be paid out of that fund."

Having regard to the form of that sub-section, it is, perhaps, pertinent to note that counsel at law have no contractual relationship either with the solicitors who engage them or with the litigant on whose behalf they appear. They cannot, therefore, legally claim or sue for their fees. But, as a matter of professional decorum and honour, solicitors who engage counsel and agree a fee with them feel it incumbent on them to discharge the moral obligation which that engagement imposes, and, if, therefore, they did so, the last words of s. 6 (5), "fees paid to counsel . . . shall also be paid out of" the legal aid fund, would apply.

Regulation 18 of the Legal Aid (General) Regulations, 1950, is headed "Miscellaneous provisions as to costs". Regulation 18 (3) appears to be the only provision in the regulations (and there is nothing in the Act beyond those parts of it to which I have already referred) which directly relates to the method whereby the intention of s. 6 (5) of the Act is to be achieved, namely, the taxation of the bill of costs and the payment out of the legal aid fund. Regulation 18 (3) is:

"Any order for the payment of the costs of any proceedings to which an assisted person is a party shall include a direction that his costs are (in addition to any other direction as to taxation contained in the order)

to be taxed as between solicitor and client in accordance with the provisions of sched. III to the Act."

That paragraph is not very happily phrased, for it obviously gives rise to the conception, which appealed in these two cases to the learned judges, that, if there was no order at all for the payment of any costs of the proceedings, reg. 18 (3) was excluded, and there was nothing else in the regulations which made it incumbent on the judge to make an order such as is now sought. In my judgment, reg. 18 (3) has no such exhaustive effect. It provides a certain piece of machinery. But the relevant purpose of the Act is generally expressed in s. 6 (5). As a matter of practice (and, perhaps, also as a matter of law) the taxing master cannot, or cannot properly or effectively, tax the costs of any party to a proceeding unless he is directed so to do by Act of Parliament or unless there is an order of the court similarly so directing him. Notwithstanding, therefore, s. 6 (5) of the Act of 1949, which is imperative, in each of these cases the taxing master was powerless to tax the costs, and, as I think, the intention of the Act, as plainly set out in s. 6 (5), was, therefore, defeated.

The task of the court in the two cases now before us has been rendered easier by the circumstance that a somewhat similar case, *Brown v. Brown* (1), came before this court in 1952. A learned commissioner in a divorce suit had taken a point similar to that taken by the two judges who are concerned in these cases and declined to make any order for costs and, consequently, felt himself disembarassed of the provisions of reg. 18 (3). He, therefore, made no order for taxation as between solicitor and client of the costs of an assisted person. This court came to the conclusion that the commissioner was not entitled to adopt that course, which, as I have indicated, would have the effect of frustrating the plain and express intention of the Act of 1949. They, therefore, made an order for the taxation of the assisted person's costs as between solicitor and client, as provided by sched. III to the Act. In the leading judgment, SINGLETON, L.J., made it plain, I think, that the intention of the Act, expressed in s. 6 (5), must be carried out. There is, therefore, as I apprehend, no discretion in the matter. It may, no doubt, be that on occasion the court may think that the legal aid committee has erred in granting a certificate, but neither the High Court nor the Court of Appeal is invested with appellate powers over the transactions of the legal aid committees. No doubt, it is proper for the court, if it thinks that there has been some misuse of public funds, to draw the attention of the Law Society to the matter or publicly to state its view. Further, there are provisions in the regulations of 1950 whereby, on proper procedure being followed, the court may revoke a certificate which has been granted: see reg. 11 (4). But neither in *Brown v. Brown* (1), nor in the two cases with which we are concerned, was that procedure adopted. In all three cases, therefore, the certificates must be taken to have been validly and properly granted and the effect of the grant, as laid down by the Act of 1949, must be observed. I think, therefore, that in such circumstances the court has no option in the matter. There is no discretion, and the effect which the Act requires must be given to the certificate by making the necessary order for taxing the costs. It seems to me, if I may venture to say so, that, since such an order is obligatory, as I understand it, in every case, it might be better to provide, by regulation or otherwise, that the costs should be taxed, rather than leave it as a matter for the court to deal with, for, apart from cases such as these, other cases may occur in which the court may not have to make any order at all, or by omission the necessary direction may be left out. That, however, is a matter for those responsible for drafting the regulations.

During the course of the arguments I felt some doubt in regard to the jurisdiction of the Court of Appeal in this matter, and for this reason. In each of the cases now before us, as in *Brown v. Brown* (1), the real question which this court is being asked to consider is whether the legal advisers of the assisted

person should get the costs which the Act of 1949 says that they should obtain. Subject only to one point in *Metcalf v. Wells*, with which I shall deal later, in neither of the two cases is a party to the action financially interested in the matter now before the court. By s. 2 (2) (b) of the Act, after a certificate has been granted and so long as it is outstanding, the legal advisers of the assisted person cannot ask him to make any payment towards their costs. From a monetary point of view, therefore, the appellant in each case is quite unconcerned (so far as I can see) with the result of these appeals. Still more, the respondents in all three cases have been in no way concerned, and their lack of concern is well illustrated by the circumstance that in not one of the three cases have they incurred the expenditure of a futile appearance. I have, therefore, wondered whether there was any lis, any issue, in the proceedings which, according to the Supreme Court of Judicature (Consolidation) Act, 1925, s. 27 (1), and under R.S.C., Ord. 58, it was competent for the Court of Appeal to entertain. On the whole, I have come to the conclusion that that difficulty should not stand in our way in these cases. It is, I think, true to say that, as a result of the impact of the Legal Aid and Advice Act, 1949, on the litigation, the order which the respective plaintiffs sought for taxation of their costs in the court below was an order in the action, for which they were properly entitled to ask, and, having been deprived of it, it may be said that they are now entitled to ask this court to make the necessary direction or order which, on their application, the court below refused to make. But, in any case, this point, clearly, was present to the minds of the Court of Appeal in *Brown v. Brown* (1), as SINGLETON, L.J., is reported to have observed ([1952] 1 All E.R. 1019):

“The difficulty I felt at one time was whether in those circumstances it was open to this court to interfere with the order at all.”

It does not appear from the report exactly how that doubt in the mind of the learned lord justice was resolved, but it is obvious that, the doubt having been entertained, it was resolved, and the court, by making the order that it did, in effect stated that it had jurisdiction to deal with this matter, and we are, I think, bound by that decision. I, therefore, say no more about that aspect of the matter.

In the observation which I made earlier, viz., that the parties to the actions were not financially interested in the matter now before us, I indicated a reservation, and it is this. It is a singular feature of *Metcalf v. Wells*, that one of the plaintiffs to whom a legal aid certificate has been granted for the purpose of prosecuting this appeal has been required to make a contribution. I should, I think, be going back on the implications of what I have already said if I were to spend any time in commenting on the circumstance that each of these appeals is, in substance, an appeal for the benefit of the legal advisers of the respective litigants and not for the benefit of the litigants themselves. I note that, notwithstanding that fact, a legal aid certificate has been granted in each case to prosecute this appeal. Having noted it, I say no more. Obviously, I ought not to say any more. As I have already stated, it is not for us to act in any way in an appellate capacity over the legal aid committee. But I do think it singular, in the circumstances, that, though the plaintiffs in *Metcalf v. Wells* were required in the court below to make no contribution to the costs of the case, one of them has been required to make a contribution for the purposes of the appeal to this court, though it is an appeal out of which the plaintiffs cannot derive any conceivable advantage whatever. I do not, of course, know the facts fully, and it may be that the legal aid committee thought it was a proper and fair thing to do, because, on reflection, they may have felt that the plaintiffs might have been asked to make a contribution at first instance. I have drawn attention to the matter, however, because I venture to think that the legal aid committee might properly re-consider the matter. Assuming, as I do, and must do, that it is proper that the public funds should be used for the purpose

of prosecuting these appeals—which are, as I have said, from a pecuniary point of view, exclusively for the benefit of the legal advisers—is it right that the lay litigant should be made to contribute to them? I notice that the contribution is to be paid by instalments, and, if the legal aid committee thought there was substance in what I am saying, they might think it appropriate to revise the direction as to contribution so far, at any rate, as relates to future instalments.

- A I observe that, in neither case below, so far as I can see, were the imperative terms of s. 6 (5) drawn to the attention of the learned judge. I observe, further, that, in *Metcalf v. Wells*, *Brown v. Brown* (1) was not mentioned before ROXBURGH, J. Since that case there has been another instance of the same point in *Frost v. Frost* (2), before WILLMER, J., who, following the effect of *Brown v. Brown* (1), came to the conclusion, notwithstanding the decision of
- B ROXBURGH, J., in *Metcalf v. Wells* which was cited to him, that he had no such discretion as ROXBURGH, J., had supposed, but was bound to make the order for taxation which he was asked to make. I only add that, if, contrary to my view, there is a discretion, I do not think that the circumstances to which ROXBURGH, J., alluded in his judgment are proper to be taken into account in depriving the legal advisers of the assisted person of their proper costs for acting on his behalf. If I were wrong about that, it would inevitably follow, as it seems to me, that the court of first instance would, in effect, be exercising a power to revoke or review the decision of the legal aid committee and to impose a kind of punishment on the lawyers who had acted on the faith of the legal aid certificate. In the circumstances, I think that both appeals succeed and that, in each case, the order which was asked for should be made,
- C
- D namely, that the costs of the assisted plaintiff or plaintiffs should be taxed as between solicitor and client in accordance with the Legal Aid and Advice Act, 1949, sched. III.

JENKINS, L.J.: I agree. [HIS LORDSHIP read s. 2 (2) (b) and s. 6 (5) of the Act of 1949, and continued:] Section 6 (6) provides:

- E “The sums payable under the last foregoing sub-section to a solicitor or counsel shall not exceed those allowed under sched. III to this Act.”

Pausing there, the provisions of s. 2 (2) (b), s. 6 (5) and s. 6 (6) clearly show, to my mind, that an assisted person's costs of proceedings, in respect of which a certificate has been granted and remains unrevoked or undischarged, are to be paid out of the legal aid fund, and, moreover, are not to be paid by any other means. Schedule III to the Act, which is referred to in s. 6 (6), is headed

F “Remuneration of persons giving legal aid under Part I”. The significance of this schedule is that it contains, throughout, repeated references to the taxation of costs. Paragraph 1 reads:

- G “(1) The sums allowed to counsel in connection with proceedings in the . . . Supreme Court shall be eighty-five per cent. of the amount allowed on taxation of the costs . . . (2) The sums allowed to counsel in connection with proceedings in the county court shall be the full amount allowed on taxation of the costs.”

Paragraph 2 contains provisions in regard to the sums allowed to solicitors, with similar references to taxation of the costs. Paragraph 4 (1) is:

- H “Subject to the last foregoing paragraph, costs shall be taxed for the purposes of this schedule according to the ordinary rules applicable on a taxation as between solicitor and client where the costs are to be paid out of a common fund in which the client and others are interested . . .”

Paragraph 5, the final paragraph of the schedule, provides:

“Regulations may provide that for the purposes of this schedule, instead of costs being taxed in the ordinary way,—(a) they shall be taxed by the

prescribed person (whether an officer of a court or not); or (b) the amount of the costs shall be fixed (whether by an officer of a court or not) by an assessment made without taxation but with a view to allowing as nearly as may be the same amount as on a taxation."

So far, it seems to me that this position has been reached. The solicitor and counsel acting for an assisted person are entitled to be paid for so acting out of the legal aid fund and are not entitled to receive payment from elsewhere. Further, sched. III requires that, to ascertain what payment is proper, there shall be a taxation, and, in the absence of regulations under para. 5 of the schedule prescribing some special method of taxation or of assessment in lieu of taxation, the schedule, in effect, enjoins that the costs in question shall be taxed in the ordinary way. That, it seems to me, suggests, in the absence of any special regulation, that the proper time for making an order for the taxation of such costs (without which, in the ordinary way, no taxation can proceed) would be the time when an order is made disposing of the proceedings in question. Accordingly, it seems to me that the learned judges in the two cases under appeal ought, in accordance with the imperative provisions of s. 6 (5) and s. 6 (6) of the Act and sched. III thereto, to have made orders for taxation of the assisted person's costs in both cases.

I should next refer to the Legal Aid (General) Regulations, 1950, reg. 18 (3), because, if I may say so with respect, I think the learned judges misconceived the effect of that provision. [His LORDSHIP read reg. 18 (3) and continued:] Both HARMAN, J., and ROXBURGH, J., seem to have read reg. 18 (3) as meaning that a direction for taxation of an assisted person's own costs was appropriate only in a case in which a court made an order for the payment of the costs of the relevant proceedings, so that, if no order was made as to the payment of any costs, no question arose of giving any direction for the taxation of the assisted person's costs. In my view, to attribute that effect to reg. 18 (3) is to overlook the provisions of sched. III, which, to my mind, in effect, enjoin the taxation in the ordinary way of the assisted person's costs in all cases not specially provided for by regulations under para. 5 of the schedule. Regulation 18 (3) does not, to my mind, cut down the general effect of those provisions, but is rather inserted by way of reminder or *nota bene*, as much as to say that, as it is essential to have a taxation of the assisted person's costs, it should be remembered that (in effect) any order dealing with costs must include the proper direction to that end. I repeat that I cannot regard this provision in the regulations as cutting down the general effect of sched. III to the Act.

Accordingly, I agree with SIR RAYMOND EVERSLED, M.R., that in these two cases the learned judges were in error in refusing the essential direction for the taxation of the assisted person's costs. It would, strictly, not have been necessary for us to give reasons for the view we have formed, for, as my Lord has said, the case is covered by the decision of this court in *Brown v. Brown* (1), but, as we are differing from two learned judges (of whom ROXBURGH, J., apparently, did not have the advantage of being referred to that authority), and as the matter is of some public importance, I have thought it right to state in my own words the reasons why I think, on the true construction of the Act and of the regulations, the direction sought for the taxation of the costs of the assisted person ought to have been made in both cases. Accordingly, I agree with my Lord that these appeals should be allowed.

MORRIS, L.J.: I am in full agreement with the judgments which SIR RAYMOND EVERSLED, M.R., and JENKINS, L.J., have delivered. It is provided by s. 2 (2) (c) of the Act that an assisted person may be required to make a contribution to the legal aid fund "in respect of the sums payable thereout on his account." If an assisted person has been required to make a contribution to the fund, he has made that contribution on the basis that there will be payments out of it to his solicitor and counsel. It would be a strange result

if, after a payment had been made, an application for taxation of the costs were not granted, with the result that any payment that he had made would simply remain as a contribution to the fund. An assisted person who had so paid, would, I think, desire that his solicitor and counsel should be paid out of the fund. By s. 2 (2) (b) solicitor and counsel may not take any payment in respect of the legal aid except such payment as is directed by the Act to be made out of the legal aid fund. It seems to me, therefore, that a person who has paid to the fund would have an interest to make an application to the court that there should be taxation in accordance with sched. III. But, equally, I think, there would be an interest even if an assisted person had not been required to make a contribution to the fund. In either case the assisted person would make an application for taxation at the conclusion of the hearing and the application would be one which, in my judgment, ought to be acceded to. In the result, therefore, if the application is refused, it seems to me that the party applying would have a matter of appeal which he could bring to this court, for he would, in the proceedings, have made an application which was a proper application and one which should have been granted.

I would only add this. SIR RAYMOND EVERSHED, M.R., referred to reg. 11 (4) of the regulations of 1950. Regulation 11 is headed "Discharge and revocation of certificates," and reg. 11 (4) is:

"At any time during the hearing of any proceedings to which an assisted person is a party the court may, upon application by or on behalf of any other party to the proceedings or by the Law Society, consider whether the assisted person—(a) has wilfully failed to comply with any regulation as to the information to be furnished by him; or (b) in furnishing any such information has knowingly made a false statement or false representation; and on any such application the court may make an order revoking the certificate or discharging it from such date as may be appropriate and the court's decision shall be final: Provided that no order shall be made under this sub-paragraph until the assisted person has been given an opportunity to show cause why the certificate should not be discharged, or, as the case may be, revoked."

Regulation 12 deals with the effect of the discharge and revocation of certificates, and paras. (1) to (3), inclusive, are relevant, but I only read para. (3), which is as follows:

"Upon determination of a retainer under this regulation—(a) the costs of the proceedings to which the certificate related, incurred by or on behalf of the person to whom it was issued, shall, as soon as practicable thereafter, be taxed or, as the case may be, assessed in accordance with the provisions of the Act and these regulations; (b) the fund shall remain liable for the payment of any costs so taxed or assessed."

It is, I think, not without relevance to see the provisions of the regulations in the event of discharge or revocation of certificates which may take place under reg. 11 (4). As I have already said, I concur fully in the reasons which my Lords have assigned for allowing these appeals.

Appeals allowed.

Solicitor in *Page v. Page*: J. B. Hoy, Edgware (for the plaintiff).

Solicitors in *Metcalf v. Wells*: Bracewell & Leaver, agents for William E. Gill, Shepherd & Co., Blackpool (for the plaintiffs).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

Re JON BEAUFORTE (LONDON), LTD. APPLICATIONS OF GRAINGER SMITH & CO. (BUILDERS), LTD., JOHN WRIGHT & SON (VENEERS), LTD., AND LOWELL BALDWIN, LTD.

[CHANCERY DIVISION (Roxburgh, J.), February 9, 16, 1953.]

Company—Winding-up—Claim under ultra vires contract—Issue of ultra vires not before court when judgment on contract obtained by creditor.

A company owed sums of money to builders and to suppliers of veneers under contracts which were, in both cases, ultra vires the company. In an action by the builders against the company for the sum of £2,078 9s. 3d., it was ordered by consent that the company should pay £2,000 in four instalments, and, if it made default, the builders might sign judgment for the balance of the £2,078 9s. 3d. then remaining due. The company having made default, the builders signed judgment for the whole amount. The suppliers of veneers brought an action against the company for £1,011 2s. 10d., the price of goods supplied, and, as the company did not defend the action, they obtained leave to sign judgment under R.S.C., Ord. 14, r. 1, for the sum claimed and costs. The issue of ultra vires was not raised in either of the actions. On the winding-up of the company by the court, the builders and suppliers each lodged a proof for the amount of their judgment debt, but the liquidator rejected the proofs on the ground that the contracts were ultra vires the company.

HELD: no judgment founded on an ultra vires contract was inviolable unless it embodied a decision of a court on the issue of ultra vires or a compromise of that issue; any compromise made on the footing that the contract was intra vires, or any judgment in which the defence of ultra vires was not raised, could be set aside; and, therefore, the liquidator had rightly rejected the proofs of the builders and the suppliers.

Great North-West Central Ry. Co. v. Charlebois ([1899] A.C. 114), applied.

Company—Winding-up—Claim under ultra vires contract—Supply of fuel for unauthorised purpose—Constructive notice of memorandum.

A company, having decided to carry on the business of manufacturing veneered panels which it was not empowered to do by its memorandum of association, ordered a supply of fuel on notepaper describing the company as "veneered panel manufacturers" and containing further particulars of its work in that capacity. On the winding-up of the company by the court, the fuel merchants lodged a proof for the price of the fuel which had not been paid. The liquidator rejected the proof on the ground that the contract was ultra vires the company. On an appeal from his decision, the fuel merchants contended that, as the company needed fuel for its legitimate business, they should not be prejudiced by its misapplication.

HELD: as the fuel merchants had clear notice that the business for which the fuel was required was that of veneered panel manufacturers, and as they had constructive notice of the company's memorandum of association, they had notice that the transaction was ultra vires the company, and the liquidator had rightly rejected their proof.

AS TO PROOF OF DEBTS, see HALSBURY, 1949 Edn., Vol. 5, pp. 738-758, paras. 1198-1238.

Cases referred to:

- (1) *Great North-West Central Ry. Co., v. Charlebois*, [1899] A.C. 114; 68 L.J.P.C. 25; 79 L.T. 35; 9 Digest 632, 4185.
- (2) *Re South American & Mexican Co. Ex p. Bank of England*, [1895] 1 Ch. 37; 64 L.J.Ch. 189; 71 L.T. 594; 10 Digest 926, 6349.
- (3) *York Corpn. v. Leatham (H.) & Sons, Ltd.*, [1924] 1 Ch. 557; 131 L.T. 127; 21 Digest 274, 916.

ADJOURNED SUMMONSES.

In each case the applicant appealed from a decision of the liquidator in the winding-up of the company by the court rejecting a proof of debts lodged by the applicant on the ground that the transactions out of which the debts arose were ultra vires the company. The first and second applicants had each obtained judgment against the company for the amount claimed, but the issue of ultra vires was not raised in either action. In the action brought by the first applicant the judgment was by consent of the parties. The company did not defend the action by the second applicant.

Russell, Q.C., and *G. B. Parker* for the first applicant, Grainger Smith & Co. (Builders), Ltd.

K. L. Coghlan for the second applicant, John Wright & Son (Veneers), Ltd.

P. E. Whitworth for the third applicant, Lowell Baldwin, Ltd.

J. G. Strangman, Q.C., and *T. D. D. Divine* for the liquidator.

Cur. adv. vult.

Feb. 16. **ROXBURGH, J.**, read the following judgment. Jon Beauforte (London), Ltd. is being wound up by the court. According to its memorandum of association (as it stood at the material times) its objects were:

“(a) To carry on the business of costumiers, gown, robe, dress and mantle makers, tailors, silk mercers, makers and suppliers of clothing, lingerie, and trimmings of every kind, corset makers, furriers, general drapers, haberdashers, milliners, hosiers, glovers, lace makers and dealers, feather dressers and merchants, hatters, boot and shoe makers, dealers in fabrics and materials of all kinds, ribbons, fans, perfumes and flowers (artificial and natural); (b) To carry on any other trade or business whatsoever which can, in the opinion of the board of directors, be advantageously carried on by the company in connection with or as ancillary to any of the above businesses or the general business of the company . . . (v) To do all such other things as are incidental or conducive to the above objects or any of them.”

The company was minded to carry on the business of manufacturing veneered panels—which was, admittedly, ultra vires—and, accordingly, entered into an oral contract with Grainger Smith & Co. (Builders), Ltd. (the contract being, admittedly, ultra vires) for the construction of a factory on the Bedminster Trading Estate near Bristol on a “cost plus” basis, which worked out at £2,078 9s. 3d. On Sept. 20, 1950, the builders sued the company for that amount. The action was transferred to the official referee and leave to defend was given. The defence was that the work was not licensed. On May 30, 1951, it was by consent ordered that all proceedings be stayed and that the company should pay £2,000 in four instalments, and that, if the company made default, the builders might sign judgment for the balance of the sum of £2,078 9s. 3d. then remaining due, and that there be no order as to costs. The company made default and on Aug. 9, 1951, the builders signed judgment for £2,078 9s. 3d. This consent judgment was in the nature of a compromise, but was obviously arrived at on the footing that the contract was intra vires. The builders lodged a proof for this sum and the liquidator has rejected it. John Wright and Sons (Veneers), Ltd., supplied the company with veneers and sued the company for the price, namely, £1,011 2s. 10d. The company did not defend the action or raise the issue of ultra vires and the suppliers obtained leave to sign judgment under R.S.C., Ord. 14, r. 1, for that sum and costs. The purchase of the veneers was, admittedly, ultra vires. The liquidator has rejected the supplier’s proof. On May 17, 1950, the company, on paper describing it as “Veneered Panel Manufacturers”, and containing this description of its work, “Plywood panels veneered in all woods for interior decoration and furniture, wood block, strip and parquet flooring”, began a correspondence with Lowell Baldwin, Ltd., fuel

merchants, which led to a supply of fuel. The liquidator has rejected a proof for the unpaid price.

I have before me three appeals against these rejections. As regards the last, the argument is that the company needed fuel for its legitimate business, and that the fuel merchants cannot be prejudiced by its misapplication. I need not consider what the position might have been if the fuel merchants had not had clear notice that the business which the company was carrying on and for which the fuel was required was that of veneered panel manufacturers. The correspondence shows that they had notice of that and, as they had constructive notice of the contents of the memorandum of association, they had notice that the transaction was ultra vires the company. Their proof was rightly rejected, although they and the other two claimants may have other rights arising out of these ultra vires transactions. The other two cases depend on whether the claimants can pray their judgments in aid, for the transactions out of which they arose are, admittedly, ultra vires.

There seems to be but one authority on the efficacy of a judgment obtained on an ultra vires contract. It is the decision of the Privy Council in *Great North-West Central Ry. Co. v. Charlebois* (1). On Sept. 9, 1891, the company sued Charlebois for breach of an ultra vires contract and two days afterwards Charlebois sued the company to recover the balance due to him under the contract and to establish a lien. The question of ultra vires was not raised. By consent there was judgment against the company for a large sum and a declaration of lien. In a suit by the company to set aside the contract and judgment, the Chancellor of Ontario said in the court of first instance ([1899] A.C. 116):

"It follows that, if the act is beyond the power of the company to do or ratify, no judgment obtained by the consent of the company treating it as authorised can remove its invalidity, for the virtue of such judgment rests merely on the agreement of the parties, and the incapacity to do the act involves the incapacity to consent that it be treated as valid."

The majority of the Supreme Court of Canada took a different view. KING, J., delivering that judgment, affirmed the Chancellor's finding that the contract was ultra vires, and went on to say (*ibid.*, 117):

"But now we come to a wholly different question. Charlebois is not suing upon the contract. That has become merged in the judgment rendered upon it, and the present proceedings are to set aside that judgment or to restrain its enforcement. The learned Chancellor was of opinion that the judgment has no greater validity than the contract, because it was determined by consent, and the company could not validly give a consent to treat as valid what was ultra vires. In *Re South American & Mexican Co. Ex p. Bank of England* (2), decided subsequently to the Chancellor's judgment, it is held that a judgment by consent creates an estoppel to the same extent as a judgment where the court has exercised a judicial discretion."

The Privy Council, however, disagreed with the decision of the Supreme Court of Canada. LORD HOBHOUSE, delivering the judgment of the Board, said (*ibid.*, 123):

"But the difficulty is to reconcile an opinion that the contract is ultra vires with an opinion that a judgment obtained as this was is a binding judgment. The authorities referred to by the Supreme Court do not relate to contracts ultra vires. It is quite clear that a company cannot do what is beyond its legal powers by simply going into court and consenting to a decree which orders that the thing shall be done. If the legality of the act is one of the points substantially in dispute, that may be a fair subject of compromise in court like any other disputed matter. But in this case both the parties, plaintiff or defendant in the original action and in the cross-action, were equally insisting on the contract. The president, who appears

to have been exercising the powers of the company, had an interest to maintain it, and took a large benefit under the judgment. And as the contract on the face of it is quite regular, and its infirmity depends on extraneous facts which nobody disclosed, there was no reason whatever why the court should not decree that which the parties asked it to decree. Such a judgment cannot be of more validity than the invalid contract on which it was founded."

- A The first difficulty is to decide whether the Privy Council adopted the reasoning of the Chancellor with only one reservation (namely, that, where ultra vires or intra vires is a point substantially in dispute, that point may be validly compromised) or whether the Board declined to decide the issue between the Chancellor and the Supreme Court in the general terms in which it was raised and confined themselves to holding that, where both parties are equally insisting on the contract in the circumstances which existed in that case, a consent order cannot be valid. I think that the first alternative is to be preferred.
- B LORD HOBHOUSE said (*ibid.*, 124):

"It is quite clear that a company cannot do what is beyond its legal powers by simply going into court and consenting . . ."

- C That proposition seems to me to negative the basis of the judgment of the Supreme Court that a consent judgment raises an estoppel and to involve the adoption of the reasoning of the Chancellor, with the one reservation to which I have referred. If that be so, the next question is to draw the line which bounds the principle and the reservation. It seems to me that any compromise made on the footing that the contract is intra vires and any judgment suffered
- D in an action in which the defence of ultra vires is not raised can be set aside, because (applying the principle stated) it is ultra vires the company to proceed on the footing that the contract is intra vires, whether by negotiating a compromise on that footing or by submitting to judgment without delivering an appropriate defence. Accordingly, I interpret the judgment of the Privy Council as meaning that, in the case of an ultra vires contract, no judgment founded
- E on it is inviolable unless it embodies a decision of a court on the issue of ultra vires or a compromise of that issue, and I adopt the reasoning which appears to lead to that conclusion. This decision was cited to RUSSELL, J., in *York Corporation v. H. Leetham & Sons, Ltd.* (3), where he said ([1924] 1 Ch. 573):

"An ultra vires agreement cannot become intra vires by reason of estoppel, lapse of time, ratification, acquiescence, or delay."

- F Accordingly, the proofs of the builder and the suppliers were rightly rejected. ✓ In view of this conclusion, I need not further explore the arguments which I heard on the question whether these judgments could be re-opened in accordance with the principles applied in bankruptcy and liquidation to judgments generally. But the rejection of the proofs must be accompanied by a reservation of tracing
- G rights which may arise.

Orders accordingly.

Solicitors: *Gibson & Weldon*, agents for *Burley & Geach*, Petersfield (for the first applicant); *Syrett & Sons* (for the second applicant); *Gibson & Weldon*, agents for *Bayliss, Rowe & Co.*, Bristol (for the third applicant); *Hatchett Jones & Co.*, agents for *Bolton & Davidson*, Bristol (for the liquidator).

[Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.]

BELL v. TRAVCO HOTELS, LTD.

[COURT OF APPEAL (Lord Goddard, C.J., Singleton and Hodson, L.J.J.),
February 11, 1953.]

Inn—Safety of premises—Hotel drive—Duty to take reasonable care to see reasonably safe—Slipperiness.

Through some of the stones with which a hotel drive was made up having become shiny, part of the drive a quarter of a mile from the hotel was slippery. A guest at the hotel slipped on that part, fell, and was injured.

HELD: the proprietors of the hotel were under a duty towards the guest to take reasonable care to see that the drive was in all respects reasonably safe for the purpose for which it was to be used, but there was no implied warranty by them that the drive was as safe as reasonable care and skill could make it, and the mere fact that part of the drive was slippery was not evidence of failure to take reasonable care.

Gillmore v. London County Council ([1938] 4 All E.R. 331), and *Protheroe v. Railway Executive* ([1950] 2 All E.R. 1093), applied.

Maclean v. Segar ([1917] 2 K.B. 325), distinguished.

AS TO THE LIABILITY OF AN INNKEEPER FOR THE SAFETY OF GUESTS, see HALSBURY, Hailsham Edn., Vol. 18, p. 148, para. 206; and FOR CASES, see DIGEST, Vol. 29, pp. 9, 10, Nos. 116-127.

Cases referred to:

(1) *Davies v. De Havilland Aircraft Co., Ltd.*, [1950] 2 All E.R. 582; [1951] 1 K.B. 50; 2nd Digest Supp.

(2) *Maclean v. Segar*, [1917] 2 K.B. 325; 86 L.J.K.B. 1113; 117 L.T. 376; 29 Digest 9, 120.

(3) *Gillmore v. London County Council*, [1938] 4 All E.R. 331; 159 L.T. 615; 103 J.P. 1; Digest Supp.

(4) *Protheroe v. Railway Executive*, [1950] 2 All E.R. 1093; [1951] 1 K.B. 376; 2nd Digest Supp.

APPEAL against an order of HAVERS, J., dated Nov. 5, 1952, in an action for damages for breach of an implied warranty in a contract and for negligence.

The plaintiff, a guest at the defendants' hotel, slipped on a slippery part of the hotel drive and sustained injuries. She contended that: (i) her contract with the defendants contained an implied warranty that the premises were as safe for the purpose for which they were being used as reasonable care and skill could make them; and (ii) that she was an invitee of the defendants, and that the defendants had failed to carry out the duty which they owed her. HAVERS, J., held that there was an implied warranty by the defendants that the premises were as safe for the contemplated purpose as reasonable care and skill could make them and gave judgment for the plaintiff. The defendants appealed.

Wingate-Saul for the plaintiff.

John Thompson for the defendants.

LORD GODDARD, C.J.: This is an appeal from an order of HAVERS, J., in favour of the plaintiff in an action for damages for personal injuries sustained through her slipping. As SOMERVELL, L.J., said in *Davies v. De Havilland Aircraft Co., Ltd.* (1) ([1950] 2 All E.R. 583):

"It would be impracticable to maintain passages and roads and pathways so that there was never a slippery place, especially after rain, on which a man might slip. Slipping is quite a common incident of life, and usually no harm is done. The victim usually suffers no permanent injury, but, unfortunately, the plaintiff received serious damage to his ankle."

The idea that whenever an accident occurs from which an injury is sustained somebody ought to be liable is becoming far too common. A person can recover compensation, not for every injury sustained in everyday life, but only for an injury which is due to the fault of some person who owes him a duty.

A The plaintiff was one of a party on a coach tour through parts of England and Scotland, in the course of which the passengers stayed at night in various hotels. The party arrived on a fine and bright evening at a hotel at Grange-over-Sands, and, having had dinner, the plaintiff and her friends went to look at the sea. The drive leading to and from the hotel was steep, though not in itself dangerous, but almost at the bottom where it joined the main road, the plaintiff's friends walking with her said they found it slippery. The plaintiff walked down the drive and slipped at this point, sustaining a Potts fracture just above the ankle. Evidence was given that this was a perfectly well-made road, which had existed in this condition certainly for three years, and, apparently, without any complaint. Nothing has been done to it since the accident, and it has remained in the same condition. A surveyor who was called said that some of the larger stones with which the road was made up had got shiny or polished and that some limestone chips ought to have been put on it when it was laid. What the effect would have been after three years' wear
B I do not know, but I should hardly think it would be considered the duty of anyone to repair a well-made-up drive more often than every three years, and, it would seem, this drive is in the same condition now as it was in in 1949.

There must be many places which are slippery from time to time on ordinary roads in this country and on ordinary drives which have been metalled, but I cannot see that there was any evidence here that would justify this place
D being called dangerous, and there was certainly nothing unusual about it. The learned judge, I think, took the view that, because the plaintiff could slip and did slip in this place, he ought to hold that it was a dangerous place, and he applied the standard of care laid down by McCARDIE, J., in *Maclean v. Segar* (2) that where a person receives another person on his premises for reward there is an implied warranty that the premises are as safe as reasonable skill and care can make them. The learned judge might have been right in applying that standard of care to the interior of a hotel, but if it is to be applied to a drive a quarter of a mile long, so that every portion of that drive must be made as safe as reasonable skill and care can make it, it seems to me that it must be applied in the same way to every path or place in the grounds of a hotel. I think the far more satisfactory test is the standard laid down by
E DU PARCQ, L.J., in *Gillmore v. London County Council* (3) ([1938] 4 All E.R. 333):

"If any person or body of persons invite a man for reward to take part in physical training, and invite him to come for that purpose to premises which they have hired, or of which for the time being they are in possession, then, in those circumstances, that person or body of persons impliedly
G warrant that they have taken reasonable care to see that the premises are in all respects reasonably safe for the purpose."

I cannot say that, because one part of a drive, which is a quarter of a mile long, was slippery—and I accept that it was slippery—the drive was dangerous, or that that in itself is any evidence that the premises were not reasonably safe for the guests at the hotel to use. I think this is just a case in which a
H person has met with a misfortune on an evening walk. The mere fact that the plaintiff slipped on some stones which had become polished owing to ordinary wear in this drive is no justification for holding that this was a dangerous place, or that reasonable care had not been used to see that the premises were reasonably safe. I do not think there was any evidence of lack of reasonable care, and I do not think it was right to hold on these facts that the premises were not reasonably safe. For these reasons I think the learned judge came to a wrong conclusion, and that his decision ought to be reversed.

SINGLETON, L.J.: I am of the same opinion. The case for the plaintiff was put in two ways. It was said that the contract between the plaintiff and the defendants contained an implied warranty that the premises were as safe for the purpose for which they were being used as reasonable care and skill on the part of anyone could make them. Secondly, it was said that the plaintiff was at least an invitee of the defendants, and that they had failed to carry out the duty which they owed to her. The learned judge determined the case on the first submission, and he gave judgment in these terms:

"I hold, therefore, that, under the terms of the contract between the plaintiff and the defendants in the circumstances of this case, there was an implied warranty by the defendants that the premises were as safe for the contemplated purpose as reasonable care and skill on the part of anyone could make them."

The plaintiff was the guest of the defendants at their hotel. At the time when she met with an accident she was a quarter of a mile away from the hotel at the far end of the drive close to the main road. **HAVERS, J.**, following the decision of **McCARDIE, J.**, in *Maclean v. Segar* (2), held that there was an implied warranty on the part of the defendants that that part of the drive on which she slipped was as safe for the contemplated purpose as reasonable care and skill on the part of anyone could make it. **McCARDIE, J.**, in that case was dealing with an accident inside a hotel. The circumstances here are different, and it is unnecessary to express any opinion on the decision of **McCARDIE, J.**, for it cannot be held to cover the facts of this case. In circumstances such as these, I think that the duty stated by **DU PARCQ, L.J.**, in *Gillmore v. London County Council* (3) which my Lord has read ([1938] 4 All E.R. 333) is sufficient for this purpose, viz., that the defendants impliedly warranted they had taken reasonable care to see that the premises were in all respects reasonably safe for the purpose for which they were to be used. There is no evidence to the contrary, I think. I am satisfied for myself that they had taken reasonable care to see that that drive was reasonably safe for use as a drive whether for people to drive or to walk on.

On the second head of the case, it is claimed that the defendants were negligent. The duty owed to an invitee is that she, using reasonable care on her part for her own safety, is entitled to expect that the invitor shall on his part use reasonable care to prevent damage from unusual danger which he knows, or ought to know. It is sufficient to say there was no unusual danger here. If the danger of slipping could be described by anyone as unusual, again it seems to me, on the facts in this case, that the defendants had taken reasonable care. Indeed, the learned judge did not find that they had not. I agree that the appeal ought to be allowed, and that judgment ought to be entered for the defendants.

HODSON, L.J.: I also agree. I only wish to add, on the contractual aspect of this case, that in the circumstances of it I would apply the test laid down by **DU PARCQ, L.J.**, in *Gillmore v. London County Council* (3) ([1938] 4 All E.R. 333), which was also recently applied by **PARKER, J.**, in *Protheroe v. Railway Executive* (4) ([1950] 2 All E.R. 1095), rather than the test which the learned judge felt himself obliged to apply laid down by **McCARDIE, J.**, in *Maclean v. Segar* (2). I, therefore, agree that the appeal should be allowed.

Appeal allowed.

Solicitors: *Claremont, Haynes & Co.* (for the plaintiff); *Fred Hollis* (for the defendants).

[Reported by **F. A. AMIES, Esq., Barrister-at-Law.**]

R. v. MOORE.

[COURT OF CRIMINAL APPEAL (Lord Goddard, C.J., Byrne and Gerrard, JJ.),
February 23, 1953.]

*Criminal Law—Trial—Place of trial—Case sent for trial to other court—
Amendment of indictment—Power to new court of trial—Assizes and Quarter
Sessions (Convenient Court) Order, 1926 (S.R. & O., 1926, No. 774),
art. 1 (d)—Criminal Justice Act, 1925 (c. 86), s. 14 (2), s. 14 (3).*

A

Quarter sessions to which a case had been sent for re-trial under s. 14 (2) of the Criminal Justice Act, 1925, refused to try it on the ground that there was no indorsement on the indictment that the case had been ordered to be tried by that court. By art. 1 (d) of the Assizes and Quarter Sessions (Convenient Court) Order, 1926, made under s. 14 (3) of the Act of 1925:

B

“any . . . indictments . . . may be altered so far as may be necessary for the purpose of giving effect to the said s. 14 . . .”

HELD: there was no provision in s. 14 (2) or s. 14 (3) of the Act of 1925 nor in art. 1 (d) of the order of 1926 which compelled the remitting court to alter the place of trial named in the indictment though it might often be desirable for that to be done, but a court to which a case was remitted for trial or re-trial could amend the place of trial in the indictment and proceed with the hearing of the case.

C

AS TO THE POWER OF A COURT OF QUARTER SESSIONS TO DIRECT THE TRIAL OF A CASE IN ANOTHER PLACE, see HALSBURY, Hailsham Edn., Vol. 9, p. 172, para. 251.

D

APPLICATION for leave to appeal against conviction.

The applicant was convicted before the recorder at Wolverhampton Quarter Sessions of obtaining money by false pretences and was sentenced to three months' imprisonment to run consecutively to a previous sentence of five years' imprisonment for larceny.

E

No counsel appeared.

LORD GODDARD, C.J., delivered the following judgment of the court. This is an application for leave to appeal against conviction. There is no ground for granting that application, but the court thinks it desirable to state what has happened in this case and to give a ruling or direction to quarter sessions with regard to the practice where an indictment found at one quarter sessions is for any reason ordered to be tried at another quarter sessions.

F

The applicant was originally indicted at the midsummer quarter sessions for the county borough of Dudley and charged with obtaining money by false pretences. He was tried by the learned recorder and the jury disagreed. The learned recorder then made an order for the re-trial of the case at the West Bromwich Borough Quarter Sessions. According to a note which had been indorsed on the indictment, the recorder at West Bromwich felt a difficulty about trying the case because he had been concerned professionally with the applicant on other occasions, and he ordered that the indictment should be tried at the Worcestershire County Quarter Sessions. No formal indorsement was made on the indictment, and when it got to the Worcestershire Quarter Sessions the chairman refused to try the case because an indorsement had not been put on the indictment directing that it was to be tried at the Worcestershire Quarter Sessions. Accordingly, he sent it back to West Bromwich, and the recorder of West Bromwich sent it to be tried at Wolverhampton, where it was at last tried.

G

H

It is unfortunate that an indictment should be sent backwards and forwards in this way merely because there has not been an indorsement put on it, and this court, having examined s. 14 (2) of the Criminal Justice Act, 1925, finds that it does not provide that a court which is sending a case for trial at some

other place must indorse on the indictment an order that the case is to be tried there. The proper course is for the clerk of the peace to forward all the documents in the case, together with the indictment, and then the court which is to try the case will be informed that the case has been sent to it for trial from the original court. The only regulations with regard to the provisions of the section are contained in the Assizes and Quarter Sessions (Convenient Court) Order, 1926 (S.R. & O., 1926, No. 774), art. 1 of which provides:

"(c) all recognisances, inquisitions, depositions (including exhibits thereto) and documents shall be transmitted to the proper officer of the court at which the person is to be tried or re-tried; (d) any commissions, writs, precepts, indictments, recognisances, proceedings and documents may be altered so far as may be necessary for the purpose of giving effect to the said s. 14 and to this order."

That is a provision merely that indictments may be altered so far as is necessary to give effect to s. 14. Section 14 (2) enables the foreign court to try the case, and there is no reason why, when the matter was before the Worcestershire Quarter Sessions and they were informed that the indictment had been received from West Bromwich, the court of trial in the indictment should not have been altered to the general quarter sessions of the peace for the county of Worcester. They could have altered it themselves. Quarter sessions should understand that neither the statute nor the order compels the remitting court to alter the documents, although, no doubt, it would often be very desirable that they should put some such indorsement on the indictment as: "Ordered to be tried at such and such a court". When the Worcestershire Quarter Sessions received this indictment they could have been informed that it had been received from another quarter sessions, that the recorder there had transferred the case, for whatever reason, for them to try, and they could have altered the place of trial named in the indictment—which is the only thing that need be altered—and the case could have proceeded.

Application refused.

[Reported by G. A. KIDNER, ESQ., Barrister-at-Law.]

GREEN v. PORTSMOUTH STADIUM, LTD.

[QUEEN'S BENCH DIVISION (Parker, J.), February 10, 20, *Reversed*. C.A. [1953] 2 All E.R. 10

Bookmaker—Admission charge to racing track—Excessive charge—Recovery of excess by bookmaker—Betting and Lotteries Act, 1934 (c. 58), s. 13 (1), (2).

The plaintiff, a bookmaker, alleged that over a period he had been overcharged for admission to a greyhound racing track occupied by the defendants, contrary to s. 13 (1) and (2) of the Betting and Lotteries Act, 1934, and he claimed from the defendants the excess amount so paid. It was contended on behalf of the defendants that, since s. 13 (1) and (2) (which provided that the charge for admission to a licensed race-track made to a bookmaker should not exceed five times the amount of the highest charge made to the public, and that, if the charge made to a bookmaker exceeded that amount, the occupier of the track should be guilty of an offence), was a penal section, the obligation it imposed was enforceable only by criminal proceedings and not by civil proceedings.

HELD: although the plaintiff might be seeking indirectly to enforce an obligation created by s. 13 (1), his claim was a claim for money had and received and was not a claim under the Act, and, therefore, he was not debarred from proceeding with his claim.

AS TO ADMISSION FEES TO BOOKMAKERS, see HALSBURY, Hailsham Edn., 1952 Supp., Gaming and Wagering, para. 927; and FOR THE BETTING AND LOTTERIES ACT, 1934, s. 13 (1), (2), see HALSBURY'S STATUTES, Second Edn., Vol. 10, p. 796.

Cases referred to:

- (1) *Browning v. Morris*, (1778), 2 Cowp. 790; 98 E.R. 1364; 12 Digest, Replacement, 322, 2485.
- (2) *Cutler v. Wandsworth Stadium, Ltd.*, [1949] 1 All E.R. 544; [1949] A.C. 398; [1949] L.J.R. 824; 2nd Digest Supp.

A POINT OF LAW ordered to be tried under R.S.C., Ord. 25, r. 2, in an action by the plaintiff for money paid to the defendants under a mistake of fact, or, alternatively, for money had and received by the defendants to the use of the plaintiff.

At various times between 1941 and 1947 the plaintiff, who was a bookmaker, carried on business at the Portsmouth Stadium Greyhound Racing Track, which was occupied by the defendant company. He alleged that, during this period, he had been charged an admission fee of £2 per meeting, an excess charge of £1 8s. 9d. per meeting, and he had, therefore, been overcharged for admission to the track, contrary to s. 13 (1) of the Betting and Lotteries Act, 1934. He claimed £585 as the excess amount so paid. The defendants contended, inter alia, that (i) any payments he had made were under a mistake of law and were illegal, and, therefore, irrecoverable; and (ii) any payments he had made were not recoverable by reason of any matter set out in the statement of claim, or by reason of the Betting and Lotteries Act, 1934, or at all, and the statement of claim disclosed no cause of action. By an order dated Oct. 20, 1952, the master ordered that the issues raised in (i) should be tried as a preliminary point of law, and, by consent of the parties, the order was amended to include the issue raised in (ii).

R. Hughes and D. F. Townsend for the plaintiff.

D *McLellan* for the defendants.

Cur. adv. vult.

Feb. 20. PARKER, J., read the following judgment. This is a claim for money had and received. It arises in the following way. The plaintiff is a bookmaker who for many years has attended the Portsmouth Stadium Greyhound Racing Track which is in the occupation, and under the management and control, of the defendants. By s. 13 (1) of the Betting and Lotteries Act, 1934, it is provided, in so far as it is material for this action:

"The occupier of any licensed track may make to a bookmaker . . . any charge for admission to any particular part of the track not exceeding . . . five times the amount . . . of the highest charge made to members of the public for admission to that part of the track . . ."

F By sub-s. (2) it is provided:

"If any charge other than a charge authorised by the preceding subsection is made to a bookmaker . . . the person immediately responsible and also the occupier of the track shall be guilty of an offence . . ."

G The plaintiff claims that, as a condition to obtaining admittance to the track, he has had to pay an admission charge which exceeds the permitted amount, and it is the excess so paid over a period which he claims as money had and received by the defendants to his use.

H A number of defences was raised, and (inter alia) by para. 8 of the defence it was contended that any payment made by the plaintiff was under a mistake of law and was illegal, and, therefore, irrecoverable. By an order of the master dated Oct. 20, 1952, it was ordered that the issues so raised should be tried as a preliminary point under R.S.C., Ord. 25, r. 2. It was further alleged by para. 6 of the defence that any payments made were not recoverable by reason of any matter set out in the statement of claim, or by reason of the said Act, or at all, and that the statement of claim disclosed no cause of action. It was agreed between the parties that it would be convenient if this issue also were determined as a preliminary point, and, accordingly, I consented to the master's order, as amended, to include this issue.

Section 13 of the Act of 1934 is a penal section, and, accordingly, as the defendants contend, the contract made with the plaintiff on his admission on each occasion to the stadium was an illegal contract and, *prima facie*, any excess payment is irrecoverable. The plaintiff, in answer, contends that he was not in *pari delicto*, and in this connection refers to *Browning v. Morris* (1) where LORD MANSFIELD stated the principle (2 Cowp. 792):

“But, where contracts or transactions are prohibited by positive statutes, for the sake of protecting one set of men from another set of men; the one, from their situation and condition, being liable to be oppressed or imposed upon by the other; there, the parties are not in *pari delicto*; and in furtherance of these statutes, the person injured, after the transaction is finished and completed, may bring his action and defeat the contract.”

I think that that principle applies in this case, and, indeed, counsel for the defendant does not contend to the contrary. What, however, he maintains is that, even so, these proceedings do not lie because s. 13 of the Act of 1934 lays down obligations which are enforceable only by criminal proceedings and not by civil proceedings, and he refers me to the comparatively recent case of *Cutler v. Wandsworth Stadium, Ltd.* (2). In his speech, which was dealing with this very Act of 1934, LORD SIMONDS said ([1949] 1 All E.R. 549):

“Part II may, perhaps, be ignored, but Part I and Part III must clearly be read as a whole. So reading it, I have no doubt that the primary intention of the Act was to regulate in certain respects the conduct of race tracks and, in particular, the conduct of betting operations thereon. If in consequence of those regulations being observed some bookmakers will be benefited, that does not mean that the Act was passed for the benefit of bookmakers in the sense in which it was said of a Factory Act that it was passed in favour of the workmen in factories. I agree with SOMERVELL, L.J. ([1947] 2 All E.R. 821) that, where an Act regulates the way in which a place of amusement is to be managed, the interests of the public who resort to it may be expected to be the primary consideration of the legislature. If from the work of regulation any class of persons derives an advantage, that does not spring from the primary purpose and intention of the Act.”

In that case, however, it is to be observed that the proceedings were, in effect, an action to enforce a statutory duty. Section 11 of the Act obliges a person in the position of the defendants to provide a bookmaker with space on the track where he can conveniently carry on bookmaking, and the plaintiff claimed injunctions and declarations in effect to make the defendants carry out that obligation. In the present case the plaintiff is not, as was the plaintiff in that case, seeking to enforce directly an obligation created by the section of the Act. His claim here is for money had and received, and, although it can, perhaps, be said that he is indirectly enforcing the obligation laid down by s. 13, I do not think that thereby he is debarred from putting forward his claim. It is not a claim under the Act. For these reasons these issues must be determined in the plaintiff's favour.

Order accordingly.

Solicitors: *D. H. Browne*, agent for *H. F. E. Mathews*, Portsmouth (for the plaintiff); *Brash Wheeler, Chambers, Davies & Co.*, agents for *Glanvilles*, Portsmouth (for the defendants).

[Reported by G. A. KIDNER, ESQ., Barrister-at-Law.]

MARLES v. PHILIP TRANT & SONS, LTD.

(MACKINNON, Third Party) (No. 1).

[HAMPSHIRE SUMMER ASSIZES (Lynskey, J.), July 28, 29, 30 31, 1952.]

Contract—Illegality—Illegal performance by one party—Right of other party to sue on contract—Statutory statement of particulars not supplied by seller on sale of seeds—Buyer's right to sue for breach of warranty—Seeds Act, 1920 (c. 54), s. 1 (1), s. 8 (1).

Seeds—Particulars on sale—Failure to deliver statement—Misrepresentation as to type of seed—Buyer's right to sue for breach of warranty.

The sellers, who were seed merchants, in the course of their business sold seed as dressed spring wheat seed of the variety called Fylgia to the buyer, a farmer, who relied on their skill and judgment in supplying the seed. They failed to deliver a statement of particulars of the seed to the buyer as required by s. 1 (1) of the Seeds Act, 1920. The seed was, in fact, not Fylgia, but Vilmorin, a seed suitable for sowing in the winter, and the buyer suffered loss in consequence. In an action for damages for breach of warranty brought by the buyer against the sellers,

HELD: failure to deliver the statutory statement of particulars was an illegal performance of the contract precluding the sellers from taking advantage of the contract, but, in view of the provision in s. 8 (1) of the Act that the liability of the sellers to a fine for their failure to deliver a statement was "without prejudice to any civil liability" on the part of the sellers, which preserved the contract so far as the buyer was concerned, the illegal performance did not relieve them of their obligations to the buyer, who was, therefore, entitled to the damages claimed.

Cases referred to:

(1) *Anderson, Ltd. v. Daniel*, [1924] 1 K.B. 138; 93 L.J.K.B. 97; 130 L.T. 418; 83 J.P. 53; Digest Supp.

(2) *B. and B. Viennese Fashions v. Losane*, [1952] 1 All E.R. 909.

ACTION for damages for breach of contract.

The buyer, the plaintiff in the action, was a farmer and had bought from the sellers, the defendants, who were seed merchants, in the course of their business, twenty-nine hundredweights of seed described as dressed spring wheat seed of the variety called Fylgia. He relied on the sellers' skill and judgment in the supply of the seed. The seed was, in fact, not Fylgia, but Vilmorin, a seed suitable for sowing in winter, and the buyer suffered loss and damage in consequence. He claimed that the sellers were in breach of the contract or of implied conditions of the contract. The sellers admitted the contract and the conditions and that the seed delivered was not spring wheat seed and not Fylgia, but not that they had committed a breach of the contract or conditions or that the loss alleged by the buyer had been incurred. They brought in the third party, against whom they claimed a declaration that they were entitled to be indemnified against any damages and costs for which the buyer might recover judgment, and also damages for breach of representations and warranties and of conditions in a contract of sale by description of a consignment which included the seed. The third party contended, inter alia, (i) it was the duty of the sellers under s. 1 (1) of the Seeds Act, 1920, and regs. 2 and 3 of the Seeds Regulations, 1922, to deliver to the buyer a statement in writing of particulars of the variety, Fylgia, and of the purity and germination of the seed; (ii) that any particulars delivered by the sellers to the buyer stating that the seed was of the variety Fylgia would have been deemed to be true under s. 6 (1) of the Act of 1920 and regs. 2 and 3 of the regulations of 1922, unless shown to be untrue by means of a test of a sample of the seed made subject to s. 6 (2); (iii) that the sellers' failure to deliver the statement of particulars rendered their contract with the buyer unlawful, and that, therefore, the plaintiff could not recover damages under it; and

(iv) that the damages, if incurred, were caused by the sellers' failure to take care to clear up doubts as to the variety of the seed.

D. M. Scott for the buyer.

Laskey and Stansfeld for the sellers.

McGougan for the third party.

LYNSKEY, J., referred to the pleadings, stated the facts and continued: As between the buyer and the sellers no such issues [as to the legality of the contract and the effect of s. 6 (1) of the Act of 1920] are raised on the pleadings, but when an allegation of illegality is made, and a suggestion is made to the court that the contract is illegal, notwithstanding the fact that the illegality is not pleaded, the court is bound to take cognisance of the fact that the contract may be illegal, and, if it is illegal, the court cannot enforce it. I have, therefore, to consider whether this contract between the buyer and the sellers was unlawful because of the provisions of the Seeds Act, 1920, s. 1 (1), which provides:

"Every person who sells any seeds to which this Act applies or any seed potatoes, shall, on or before the sale, or if the goods are not delivered at the time of sale on or before delivery thereof, deliver to the purchaser a statement in writing containing the prescribed particulars with respect, in the case of seeds, to their variety, purity and germination, and in the case of seed potatoes, to their class, variety, size and dressing, and, in either case, to any other prescribed matters."

The prescribed matters are to be found in the Seeds Regulations, 1922 (S.R. & O., 1922, No. 915). Regulation 3 provides:

"The particulars to be stated in the case of a sale or exposure for sale of seeds or seed potatoes as required by s. 1 of the Seeds Act, 1920, are as follows: (a) in all cases the name and address of the seller; (b) in all cases (except in relation to seed potatoes) that the seeds have been tested in accordance with the provisions of the Seeds Act, 1920; (c) in all cases the kind of seeds sold or exposed for sale, and in the case of cereals, red clover, white clover, crimson clover and sainfoin, the distinctive name of the variety of the seeds, or if the distinctive name of the variety is not known, or the stock is mixed, a statement to that effect."

It is further provided by reg. 3 (1):

"In the case of the cereal seeds named in reg. 2 (b), the percentage of germination, provided that, if the percentage of germination is not less than the authorised minimum percentage of germination prescribed in sched. II to these regulations, a statement to that effect, which shall include the authorised minimum percentage of germination, shall be sufficient."

It is common ground, and it is admitted by the sellers, that they did not deliver a statement in writing to the buyer containing the prescribed particulars with respect to the variety, purity and germination of the seed which they supplied. The effect of that is that they did not carry out their contract with the buyer in the method prescribed by the statute, and the question then arises whether the contract with the buyer became an illegal contract. Fortunately, the matter is not without authority, otherwise I might have found some difficulty in coming to a conclusion. Section 8 of the Seeds Act, 1920, prescribes the penalties, and s. 8 (1) reads:

"If any person (a) fails to comply with or acts in contravention of any provision of this Act or any undertaking given by him under this Act or any condition attached to any exemption granted under this Act; or (b) makes or causes to be made any statement required to be delivered or displayed under this Act which is false in any material particular; he shall, without prejudice to any civil liability, be liable on summary conviction to a fine

not exceeding in the case of a first offence £5, and in the case of a second or subsequent offence £10."

The unusual words there are "without prejudice to any civil liability", which makes this case to some degree distinguishable from the ordinary case where one has an illegal contract.

A The matter came before the Court of Appeal under the Fertilisers and Feeding Stuffs Act, 1906, in *Anderson, Ltd. v. Daniel* (1). By s. 1 (1) of the Fertilisers and Feeding Stuffs Act, 1906:

"Every person who sells for use as a fertiliser of the soil any article which has been subjected to any artificial process in the United Kingdom, or which has been imported from abroad, shall give to the purchaser an invoice stating... what are the respective percentages (if any)..."

B of certain substances contained in the article. By s. 6 (1):

"If any person who sells any article for use as a fertiliser of the soil... (a) Fails without reasonable excuse to give, on or before or as soon as possible after the delivery of the article, the invoice required by this Act... he shall, without prejudice to any civil liability, be liable, on summary conviction... to a fine."

C In *Anderson, Ltd. v. Daniel* (1) there was a sale to farmers of a stuff known as "salvage" for use as manure. The stuff consisted of the sweepings of the holds of vessels, and it was commercially important to have it analysed and to set out the exact percentages of the different substances forming it. This could have been done, but it would have been such an expense that it would not have been worth while. According to the headnote, the Court of Appeal D held that

"... as the object of the statute in requiring the vendor to give the statutory invoice and imposing on him a penalty in the event of his default is to protect the purchasers of fertilisers, the effect of non-compliance with the requirement is not merely to render the vendor liable to the penalty, but E also to make the sale illegal and preclude the vendor from suing for the price."

Prima facie, on that headnote it would appear that the court was holding that the contract made for the sale of the fertiliser was an illegal contract, and, therefore, was void and no parties could acquire rights under it. But, in giving F judgment, BANKES, L.J., summarised the position in this way ([1924] 1 K.B. 145):

"So here I say that a vendor of fertilisers must comply with the provision as to invoice in order to take advantage of the contract of sale. From that point of view it is unnecessary to consider whether the contract was illegal ab initio."

G The effect of that judgment, as I understand it, is that, if one fails to comply with a statutory requirement in the performance of a contract, it does not necessarily follow that the contract itself is void ab initio. It simply means that the person who does not comply with the statute is performing his contract in an unlawful way, and, in performing it in that unlawful way, he does not perform the contract at all. The result, it was held in *Anderson, Ltd. v. Daniel* (1), was H that he could not recover for the price of the goods he had sold because of his unlawful performance. SCRUTTON, L.J., in the same case, said (*ibid.*, 147):

"[Counsel for the sellers] said, first, that that conclusion may be sound where the statutory provision that is broken relates to something to be done at or before the delivery, but has no application where it relates to something to be done after delivery; he said that you cannot treat the contract as becoming illegal when it was not only legal at the time when it was made, but also at the time when the article was delivered under it; you cannot

say the contract is illegal because of an omission after delivery, and therefore after the contract has been performed. The answer is that the giving of the invoice is part of the performance of the contract. It seems to me that where a statute requires the giving of an invoice within a reasonable time after the delivery of the goods exactly the same principle is to be applied as would be applicable if the statute required the invoice to be given at or before delivery, and a vendor on suing for the price could be met with the answer: 'You have performed the contract in an illegal way.' "

Thus SCRUTTON, L.J., took the same view as BANKES, L.J., did, namely, that the contract was not necessarily illegal because it was performed in an illegal manner, but the person so performing it could not rely on his illegal acts as performance of the contract. SCRUTTON, L.J., then went on to say (*ibid.*, 148):

"Secondly, [counsel for the sellers] contended that, even if that was true of other statutes, in this statute there is an exceptional provision that the imposition of the penalty is to be 'without prejudice to any civil liability,' that is to say without prejudice to the civil liability of the purchaser to pay the price. But I read those words 'without prejudice to any civil liability' as referring to the civil liability of the person who has broken the contract, in other words that the imposition of a penalty does not relieve the vendor from any obligation that he may be under to pay damages."

It seems to me that what SCRUTTON, L.J., was saying there was that, although the person who performs the contract in an illegal manner cannot take advantage of that performance for the purpose, at any rate, of suing for the price, having regard to the particular words of the section imposing penalty, "without prejudice to any civil liability", it still leaves the person who has performed the contract illegally under a liability, if he be under any liability, for damages for breach of contract. ATKIN, L.J., said (*ibid.*, 149):

"The question of illegality in a contract generally arises in connection with its formation, but it may also arise, as it does here, in connection with its performance. In the former case, where the parties have agreed to something which is prohibited by Act of Parliament, it is indisputable that the contract is unenforceable by either party. And I think that it is equally unenforceable by the offending party where the illegality arises from the fact that the mode of performance adopted by the party performing it is in violation of some statute, even though the contract as agreed upon between the parties was capable of being performed in a perfectly legal manner . . . On the question which has been raised as to the construction of the words 'without prejudice to any civil liability' in s. 6 (1), I have nothing to add to what was said by SCRUTTON, L.J. I agree that they mean 'without prejudice to *his*, the vendor's, civil liabilities', if any such there be."

The effect of *Anderson, Ltd. v. Daniel* (1) appears to me to be that, so far as the sellers are concerned, they were in breach of s. 1 of the Seeds Act, 1920. In delivering the seeds to the buyer without the statement in writing called for by the statute, they were performing their part of the contract in an illegal manner. But s. 1 of the Act of 1920, like s. 1 of the Act of 1906, was passed for the protection of the farmer, the buyer. Section 1 (1) of the Act of 1920 imposes the obligation only on the seller. The words read:

"Every person who sells any seeds to which this Act applies . . . shall . . . deliver . . . a statement . . ."

There is nothing in the Act which imposes any obligation on the purchaser to call for such a statement, or to require such a statement before he accepts delivery. The obligation, it seems to me, is on the seller, and, if he fails to comply with his obligation, his performance of the contract is illegal, and the contract,

having been performed illegally, is illegal so far as he is concerned. But, having regard to the saving words in s. 8 (1), the penalty clause, that it shall be "without prejudice to any civil liability," it seems to me that, if the seeds as delivered are in breach of the warranty or condition of the sale, then, although the seller is liable to a penalty, and although his act is an illegal one, nevertheless, so far as the purchaser is concerned, the seller remains, as SCRUTTON, L.J., said, under a liability to pay damages, notwithstanding that he is liable to a penalty and has, in fact, suffered that penalty.

Anderson, Ltd. v. Daniel (1) was considered recently in *B. and B. Viennese Fashions v. Losane* (2), which was a curious case. It looked as if the plaintiff had been guilty of sharp practice, if nothing else, because he supplied utility clothing without a mark in performance of a contract which called for non-utility clothing, and then sued for the price. The court followed the decision in *Anderson, Ltd. v. Daniel* (1), and did not extend that decision, as far as I can see from the judgment. JENKINS, L.J., said ([1952] 1 All E.R. 913):

"It is plain from *Anderson, Ltd. v. Daniel* (1) that illegality in the performance of a contract may avoid it although the contract was not illegal ab initio. That being so, one has to consider whether the mode in which the contract was performed, or purported to be performed, in this case sufficed to turn it into an illegal contract. I find myself constrained to hold that this was the result."

What I understand him to say is that it is an illegal contract from the point of view of the plaintiff, who was the offending person trying to enforce the contract. He does not say it is illegal ab initio. I do not think that the learned lord justice was there considering the position of the innocent party for whose protection in that particular case the order was made.

HODSON, L.J., quoted with approval (ibid., 914) the judgment of SCRUTTON, L.J., in *Anderson, Ltd. v. Daniel* (1) where he said ([1924] 1 K.B. 147):

"When the policy of the Act in question is to protect the general public or a class of persons by requiring that a contract shall be accompanied by certain formalities or conditions, and a penalty is imposed on the person omitting those formalities or conditions, the contract and its performance without those formalities or conditions is illegal, and cannot be sued upon by the person liable to the penalties."

The result is that, in my view, the correct construction of the Seeds Act, 1920, s. 1 (1), read with the penalty section, s. 8 (1), is to prevent the seller who is in default from taking advantage of the contract or alleging illegal performance of the contract, and, therefore, to prevent him recovering the price. But, in my view, this does not operate to free the offending seller from his obligations to the buyer. The intention of the words, "without prejudice to any civil liability", in s. 8 (1), was to preserve the contract so far as the buyer was concerned, and to entitle him to any rights he might have had if the contract had been duly and lawfully performed. Therefore, in my judgment, the fact that the contract between the buyer and the sellers was illegally performed by the sellers does not prevent the buyer from recovering damages for breach of that contract. In those circumstances, I hold that the buyer is entitled to recover from the sellers damages for the breach by them of their contract for the supply of spring wheat seed of the variety called Fylgia. They failed in that, and as a result of their supplying something else, namely, Vilmorin, the buyer's damages arose.

I will consider the position as between the sellers and the third party. The third party contended that, in view of the fact that the sellers performed their contract with the buyer in an unlawful manner, they could not put forward that contract as the basis of any claim which they may have against the third party.

By para. 8 of the statement of claim by the sellers against the third party the sellers plead:

“ By reason of the premises the [sellers] have suffered and will suffer loss and damage. They have re-sold the said wheat to the [buyer] and to other customers as Fylgia spring wheat.”

They then claim against the third party (a) a declaration that they are entitled to be indemnified against the amount of any damages and/or costs for which the buyer may recover judgment, (b) judgment for any amount that may be found to be due from the sellers to the buyer, and (c) judgment for the amount, if any, of costs, and (d) damages for breach of contract or warranty. The whole of that claim is based on re-sale of the wheat. Before the sellers can substantiate their right to claim against the third party, they have to set up their contract with the buyer to show that the damages which they have to pay to the buyer flowed from the breach of contract, and that there was a breach by the third party. Therefore, they have to set up the contract which they have performed in an unlawful manner, and which was, accordingly, an unlawful contract, at any rate so far as they are concerned. That seems to be the result of the two cases to which I have referred. That being so, it seems to me that they cannot set up a contract, being an illegal contract unlawfully performed by them, in support of their claim against the third party. On the question whether the third party sold the seeds to the sellers under the description of Fylgia, I am satisfied that I ought to prefer the evidence of the sellers' witnesses to those of the third party on this point. I am satisfied that the third party did sell this seed to the sellers as Fylgia seed, under the description of Fylgia seed, and that there was an implied condition, as it was in the course of the third party's business to sell these seeds. The fact that the sellers asked for this variety shows that they were relying on the third party's skill and knowledge, and he knew it was required for re-sale. Therefore, I am satisfied that, as far as the third party is concerned, he did sell this seed and was under a condition or warranty of his contract that the seed should be Fylgia and should have all the qualities of Fylgia which is a spring wheat seed. It seems to me, on the authorities, that the sellers, by performing their contract without compliance with s. 1 (1) of the Seeds Act, 1920, were turning the contract, as far as the buyer was concerned, into an illegal contract, and they cannot pray that contract in aid to support a claim for damages against the third party. The result is, as far as the claim by the sellers against the third party is concerned, that that claim fails.*

Orders accordingly.

Solicitors: *Rossetti & Peppercorn*, Kingsbridge (for the buyer); *C. G. Metson & Co.* (for the sellers); *Anstey & Thompson*, Exeter (for the third party).

[Reported by F. A. AMIES, ESQ., Barrister-at-Law.]

* The defendants appealed against the judgment in favour of the third party: reported sub nom. *Marles v. Philip Trant & Sons, Ltd.* (*MacKinnon, Third Party*) (No. 2), *infra*.

MARLES v. PHILIP TRANT & SONS, LTD.
(MACKINNON Third Party) (No. 2).

[COURT OF APPEAL (Singleton, Denning and Hodson, L.J.J.), January 30, February 2, 3, 16, 1953.]

Contract—Breach—Damages—Measure—Damages payable by plaintiff for breach of other contract—Illegal performance by plaintiff of other contract—No moral turpitude.

Seeds—Particulars on sale—Presumption of correctness—Proof by purchaser that goods supplied not in accordance with particulars—Seeds Act, 1920 (c. 54), s. 6 (1).

The third party sold seed to the defendants, who were seed merchants, under a warranty as dressed spring wheat seed, described as Fylgia. The defendants sold part of the seed to the plaintiff, a farmer, under the same description, but omitted to deliver to him a statement of particulars as required by s. 1 (1) of the Seeds Act, 1920. The seed was, in fact, not Fylgia, but Vilmorin, a seed suitable only for winter sowing, and in consequence the plaintiff suffered damage to his crops in respect of which he was held to be entitled to recover damages against the defendants. The defendants brought in the third party, and as evidence of damage adduced their liability under their contract with the plaintiff. The third party set up the defendants' non-compliance with s. 1 (1) of the Seeds Act, 1920, and the provisions of s. 6 (1) that particulars contained in a statement, if supplied by the defendants, would have been deemed to be true unless shown to be untrue on a test under the section.

HELD (HODSON, L.J., dissenting): (i) since the defendants could establish the third party's breach of contract without proving the contract with the plaintiff and the contravention of s. 1 (1) of the Seeds Act, 1920, they were entitled to damages for that breach, and as evidence of their damage they could prove the damages for which they were liable to the plaintiff, their contract with the plaintiff not being illegal ab initio, but only unenforceable owing to its illegal performance by the defendants, which was done by them without moral turpitude.

Anderson, Ltd. v. Daniel ([1924] 1 K.B. 138) and *B. and B. Viennese Fashions v. Losane* ([1952] 1 All E.R. 909), distinguished.

(ii) section 6 (1) of the Act of 1920 did not prevent a purchaser from proving that goods supplied were not in accordance with the description under which they had been sold, and, therefore, the third party was not entitled to resist liability on the ground that, if the defendants had not failed to deliver such particulars to the plaintiff, the plaintiff would have been bound by the particulars and unable to recover against the defendants.

AS TO INCIDENTS OF ILLEGAL CONTRACTS, see HALSBURY, Hailsham Edn., Vol. 7, pp. 173-177, paras. 248-250; and FOR CASES, see DIGEST, Replacement Vol. 12, pp. 310-336, Nos. 2390-2599.

Cases referred to:

- (1) *Anderson, Ltd. v. Daniel*, [1924] 1 K.B. 138; 93 L.J.K.B. 97; 130 L.T. 418; 88 J.P. 53; Digest Supp.
- (2) *Simpson v. Bloss*, (1816), 7 Taunt. 246; 129 E.R. 99; 12 Digest, Replacement, 311, 2399.
- (3) *Ex p. Bell. Re Scott*, (1813), 1 M. & S. 751; 105 E.R. 280; 12 Digest, Replacement, 318, 2450.
- (4) *B. and B. Viennese Fashions v. Losane*, [1952] 1 All E.R. 909.
- (5) *Langton v. Hughes*, (1813), 1 M. & S. 593; 105 E.R. 222; 12 Digest, Replacement, 302, 2327.

- (6) *Biggin & Co., Ltd. v. Permanite, Ltd.*, [1950] 2 All E.R. 859; [1951] 1 K.B. 422; *reversd.* C.A., [1951] 2 All E.R. 191; [1951] 2 K.B. 314; 2nd Digest Supp.
- (7) *Elliott v. Boynton*, [1924] 1 Ch. 236; 93 L.J.Ch. 122; 130 L.T. 497; 31 Digest, Replacement, 623, 7371.
- (8) *Howell v. Falmouth Boat Construction, Ltd.*, [1951] 2 All E.R. 278; [1951] A.C. 837; 2nd Digest Supp.
- (9) *Beresford v. Royal Insurance Co., Ltd.*, [1937] 2 All E.R. 243; [1937] 2 K.B. 197; 106 L.J.K.B. 712; 157 L.T. 50; *affd.* H.L., [1938] 2 All E.R. 602; [1938] A.C. 586; 107 L.J.K.B. 464; 158 L.T. 459; Digest Supp.
- (10) *Berg v. Sadler*, [1937] 1 All E.R. 637; [1937] 2 K.B. 158; 106 L.J.K.B. 593; 156 L.T. 334; Digest Supp.
- (11) *Dennis & Co., Ltd. v. Munn*, [1949] 1 All E.R. 616; [1949] 2 K.B. 327; [1949] L.J.R. 857; 2nd Digest Supp.
- (12) *Cory v. Thames Ironworks Co.*, (1868), L.R. 3 Q.B. 181; 37 L.J.Q.B. 68; 17 L.T. 495; 17 Digest 96, 115.
- (13) *Gordon v. Metropolitan Police Chief Comr.*, [1910] 2 K.B. 1080; 79 L.J.K.B. 957; 103 L.T. 338; 74 J.P. 437; 12 Digest, Replacement, 313, 2414.
- (14) *Haseldine v. Hosken*, [1933] 1 K.B. 822; 102 L.J.K.B. 441; 148 L.T. 510; Digest Supp.
- (15) *Askey v. Golden Wine Co., Ltd.*, [1948] 2 All E.R. 35; 2nd Digest Supp.
- (16) *Burrows v. Rhodes*, [1899] 1 Q.B. 816; 68 L.J.Q.B. 545; 80 L.T. 591; 63 J.P. 532; 35 Digest 50, 455.
- (17) *Crage v. Fry*, (1903), 67 J.P. 240; 17 Digest 113, 235.
- (18) *Cointat v. Myham & Son*, [1913] 2 K.B. 220; 82 L.J.K.B. 551; 108 L.T. 556; 77 J.P. 217; *on appeal* C.A., (1914), 84 L.J.K.B. 2253; 110 L.T. 749; 78 J.P. 193; 17 Digest 35, 393.
- (19) *Weld-Blundell v. Stephens*, [1919] 1 K.B. 520; 88 L.J.K.B. 689; 120 L.T. 494; *affd.* H.L., [1920] A.C. 956; 89 L.J.K.B. 705; 123 L.T. 593; Digest Supp.
- (20) *Simon v. Pawson & Leafs*, (1932), 148 L.T. 154; 38 Com. Cas. 151; Digest Supp.
- (21) *Tinline v. White Cross Insurance*, [1921] 3 K.B. 327; 90 L.J.K.B. 1118; 125 L.T. 632; 29 Digest 408, 3214.
- (22) *James v. British General Insurance Co.*, [1927] 2 K.B. 311; 96 L.J.K.B. 729; 137 L.T. 156; Digest Supp.

APPEAL by defendants against an order of LYNKEY, J., made at Winchester Assizes on July 31, 1952.

The third party sold seed to the defendants as dressed spring wheat seed, described as Fylgia, which was, in fact, Vilmorin, a wheat suitable only for winter sowing, and the defendants sold part of the seed under the same description to the plaintiff. In an action for damages for breach of warranty by the plaintiff, the defendants brought in the third party, against whom they claimed (a) a declaration that they were entitled to be indemnified against the amount of any damages and/or costs for which the plaintiff might recover judgment, (b) judgment for any amount that might be found to be due from the sellers to the plaintiff, and (c) judgment for the amount, if any, of costs, and (d) damages for breach of contract or warranty. The third party set up the defendants' failure to deliver particulars of the seed to the plaintiff with the seed as required by s. 1 (1) of the Seeds Act, 1920. The third party contended that the defendants were precluded from proving as damage any damages awarded to the plaintiff, on the ground that that would involve the defendants' proving their own illegal performance of the contract with the plaintiff, and that, if they had delivered the particulars required, those particulars would have been deemed

to be true under s. 6 (1) of the Act unless shown to be untrue by a test made subject to the provisions of that section. LYNSEY, J., gave judgment for the plaintiff against the defendants and held that the defendants were precluded from recovering the damages awarded to the plaintiff from the third party. The defendants appealed against the judgment in favour of the third party.

Scott Cairns, Q.C., and Laskey for the defendants.

A *MacKenna, Q.C., and McGougan for the third party.*

Cur. adv. vult.

Feb. 16. The following judgments were read.

B **SINGLETON, L.J.:** The defendants are seed merchants. Early in 1950 the plaintiff, a farmer, bought from them twenty-nine hundredweights of dressed spring wheat seed which was described as Fylgia. The greater part of the wheat delivered under the contract was not Fylgia, nor was it suitable for spring sowing, and in consequence the crop which the plaintiff expected did not materialise. He brought an action against the seed merchants claiming damages for breach of contract and breach of warranty. He satisfied the judge that his claim was right, the damages were assessed at the sum of £418 5s. 10d., and judgment was given for him for that amount (less a sum owing by him), C and the defendants were ordered to pay the costs of the action. The defendants brought in as third party a farmer from whom they had bought the wheat which was wrongly described. They claimed that the sale to them was a sale by description, that the third party prior to, and at the time of, the sale represented and warranted to them that the wheat was a spring wheat and D was Fylgia, that he knew that they were buying the wheat for re-sale to farmers for spring sowing and were relying on his representations and on his skill and judgment as a farmer whose business it was to grow and sell wheat. They claimed to be indemnified against the claim of the plaintiff in the action, and they also asked for damages. The defendants had, in fact, purchased some ten tons of wheat from the third party which the latter had described as Fylgia, and which he knew the defendants intended to dress and clean and to sell for the E purpose of spring sowing. The wheat delivered by the third party was not Fylgia, but was Vilmorin, a type which is only suitable for winter sowing, and which is properly described as a winter wheat. The defendants sold to a number of farmers, who suffered loss and damage through failure of their crops, and who made claims against the defendants. The third party denied that he had represented or warranted that the seed was Fylgia.

F The case was tried before LYNSEY, J., at the Winchester Assizes, and his judgment was given on July 31, 1952. On this part of the case his finding was in favour of the defendants. He said:

G “Having heard and seen the witnesses, I am quite satisfied that I ought to prefer the evidence of the defendants’ witnesses to the third party on this point. I am satisfied that the third party did sell this seed to the defendants as Fylgia seed, under the description of Fylgia seed, and that there was an implied condition, as it was in the course of his business to sell these seeds and it is shown by the fact that they asked for this variety, that the defendants were relying on his skill and knowledge. He knew it was required for re-sale, and, therefore, I am satisfied that, as far as the third party is concerned, he did sell this seed and was under a H condition or warranty of his contract that the seed should be Fylgia and should have all the qualities of Fylgia which is a spring wheat seed.”

The learned judge was, however, of opinion that the defendants were not entitled to the relief which they sought against the third party because of the terms of the Seeds Act, 1920. Section 1 of the Act provides:

“(1) Every person who sells any seeds to which this Act applies or any seed potatoes, shall, on or before the sale, or if the goods are not delivered

at the time of sale on or before delivery thereof, deliver to the purchaser a statement in writing containing the prescribed particulars with respect, in the case of seeds, to their variety, purity and germination, and in the case of seed potatoes, to their class, variety, size and dressing, and, in either case, to any other prescribed matters . . . (3) The statement required to be delivered under this section to a purchaser shall be contained in a sale note or invoice or be attached to, inserted in, or written on, the package containing the seeds, or seed potatoes, as the case may be. . . . (5) The particulars to be contained in a statement to be delivered under this section to a purchaser of seeds shall, so far as they are particulars relating to the purity and germination of the seeds, be particulars ascertained on a test of those seeds made in accordance with the provisions of this Act."

Then s. 2 (1) reads:

"A test of seeds for the purpose of the preceding section shall, in the case of seeds other than garden seeds, be made either at one of the official seed testing stations established under this Act or at some testing station licensed by the Minister, and, in the case of garden seeds, be made either as aforesaid or in any other sufficient manner."

Section 8 provides that, if any person fails to comply with, or acts in contravention of, any provision of the Act or makes a statement required to be delivered under the Act which is false in any material particular, he shall, without prejudice to any civil liability, be liable on summary conviction to a fine.

The seed merchants had the wheat tested at an official testing station, and the result of the test showed that it satisfied requirements as to purity and germination. But the seed merchants did not deliver to the plaintiff the statement required by s. 1 (1) of the Act. No complaint on that head was made by the plaintiff. It may well be that he did not realise the necessity for it, as appears to have been the position of the seed merchants. None the less, it is submitted on behalf of the third party that the failure to deliver the statement makes the contract between the defendants and the plaintiff an illegal contract, from which it follows, it is said, that no part of the damages for breach of warranty awarded to the plaintiff against the seed merchants can be recovered from their supplier, though it is proved to the satisfaction of the judge that it was their supplier's breach of warranty which led to the damage.

The argument advanced on behalf of the third party gains support from the decision of this court in *Anderson, Ltd. v. Daniel* (1) in which the plaintiffs had sold something which fell within the provisions of the Fertilisers and Feeding Stuffs Act, 1906, so that an invoice in prescribed terms had to be delivered to the purchaser. No such invoice was given. The vendors sued for the price, and it was held that they were not entitled to recover. ATKIN, L.J. ([1924] 1 K.B. 149) regarded the contract as

" . . . unenforceable by the offending party where the illegality arises from the fact that the mode of performance adopted by the party performing it is in violation of some statute, even though the contract as agreed upon between the parties was capable of being performed in a perfectly legal manner";

and that was sufficient for the decision of the court. Both BANKES, L.J., and SCRUTTON, L.J. (*ibid.*, 144, 147), went further and spoke of the contract as illegal. BANKES, L.J., added (*ibid.*, 145):

"So here I say that a vendor of fertilisers must comply with the provisions as to invoice in order to take advantage of the contract of sale. From that point of view it is unnecessary to consider whether the contract was illegal ab initio."

While I follow the reasoning that the delivery was a bad, or an incomplete, delivery, I cannot see that the contract became an illegal contract, nor was that point necessary for the case under review. Clearly the purchaser could have sued on the contract. Reliance was also placed on parts of the judgment of SIR VICARY GIBBS, C.J., in *Simpson v. Bloss* (2) in which it was said that (7 Taunt. 250):

A “ . . . the plaintiff’s claim is so mixed with the illegal transaction in which he and the defendant and Brograve were jointly engaged, that it cannot be established without going into proof of that transaction, and therefore cannot be enforced in a court of law ”.

In that case reference was made (ibid.) to the decision in *Ex p. Bell. Re Scott* (3):

B “ . . . because the claim was bottomed in an illegal contract.”

The decision in *Anderson, Ltd. v. Daniel* (1) was followed in this court in *B. and B. Viennese Fashions v. Losane* (4) in which JENKINS, L.J., said ([1952] 1 All E.R. 913):

C “ It is plain from *Anderson, Ltd. v. Daniel* (1) that illegality in the performance of a contract may avoid it although the contract was not illegal ab initio. That being so, one has to consider whether the mode in which the contract was performed, or purported to be performed, in this case sufficed to turn it into an illegal contract. I find myself constrained to hold that this was the result.”

D The principle underlying these decisions is really the same as that stated by LORD ELLENBOROUGH, C.J., in *Langton v. Hughes* (5) (1 M. & S. 596):

“ . . . what is done in contravention of the provisions of an Act of Parliament, cannot be made the subject-matter of an action.”

In his judgment in this case, LYNKEY, J., said:

E “ The whole of the claim is based on re-sale of the wheat. Before the defendants can substantiate their right to claim against the third party they have to set up this contract with the plaintiff in order to show that the damages which they have to pay the plaintiff flowed from the breach of contract, and that there was a breach by the third party. So, they have to set up this contract which they have performed in an unlawful manner, and therefore made an unlawful contract, at any rate, so far as they are concerned. That seems to be the result of the two cases to which I have referred. That being so, it seems to me that they cannot set up a contract, being an illegal contract unlawfully performed by them, in support of their claim against the third party.”

G The defendants appeal to this court against the judgment of LYNKEY, J., in favour of the third party, and the question for consideration is whether the passage I have just read is right. Before us it was admitted that the defendants were entitled to nominal damages, for which they asked at the trial in the event of their not being held entitled to an indemnity. There was no such admission at the trial, nor were the defendants given nominal damages. Counsel for the defendants submitted that, if by reason of the point raised H the defendants were not entitled to an indemnity or to damages—in the nature of special damages—arising from the sub-sale, they were still entitled to general damages, that is, the damages which flowed naturally from the breach, and at least to the price of the seed wheat which turned out to be useless to them. No such claim was put forward at the trial. I do not think that it can properly be raised now. And I draw attention to that which was said by DEVLIN, J., in *Biggin & Co., Ltd. v. Permanite, Ltd.* (6) ([1950] 2 All E.R. 869):

"If, however, a sub-sale is within the contemplation of the parties, I think that the damages must be assessed by reference to it, whether the plaintiff likes it or not. Suppose that the only fault in the compound was its incompatibility with bitumen felt, the chance that it might produce bad results would certainly reduce its market value before use. But if it is the plaintiff's liability to the ultimate user that is contemplated as the measure of damage and if in fact it is used without injurious results so that no such liability arises, the plaintiff could not claim the difference in market value and say that the sub-sale must be disregarded."

It seems to me that the defendants do not need to refer to their contract with the plaintiff in order to show a right of action against the third party. Their claim was for damages for breach of contract, or for breach of warranty, and on the facts found by the judge the claim was established. Indeed, as I have said, it was admitted by counsel for the third party that the defendants were entitled to nominal damages. The question as to whether they are entitled to more presents greater difficulty. The learned judge found that the damages he awarded to the plaintiff were damages which arose from the breach of warranty of the defendants, and it is clear that he would have found that the defendants were entitled to succeed against the third party but for the point raised under the Seeds Act. Thus the claim of the defendants can be put in this way: "We have been ordered by the court to pay damages to the plaintiff, and the cause of that was your breach of contract or breach of warranty. It is unnecessary to consider how we performed our contract with the plaintiff; that has nothing to do with the breach of warranty between you and us. The court has ordered us to pay damages, and the responsibility falls on you." If the case can properly be regarded in this way, the defendants do not need the contract between them and the plaintiff either to establish their cause of action, or to justify their claim to an indemnity or to the damages they have been ordered to pay to the plaintiff. Nor are they taking advantage of the contract of sale with the plaintiff, if I may repeat an expression of BANKES, L.J., though it is clear he had not this particular question in mind. He was considering a claim for the price of goods made by the vendor. Nor are they making their contract with the plaintiff the subject-matter of their action. They have been ordered to pay damages on it.

Further, I do not think that the contract between the plaintiff and the defendants ought to be regarded as an illegal contract, though the mode of performance by the defendants was not in accord with statutory requirements. They were guilty of an error of omission, which meant the creation of an offence under s. 8 of the Act, and which might have resulted in their being unable to recover the price from the plaintiff. The plaintiff did not raise any such question, nor has the loss incurred anything to do with that omission. Unless either (a) the contract was an illegal contract, or (b) the damage resulted from the omission, it does not seem to me that the third party can rely by way of answer to this claim on the fact that the defendants inadvertently omitted to supply to the plaintiff the statement in writing required by s. 1 (1) of the Act. The decision of LYNSKEY, J., that the failure to supply it to the plaintiff in the action enables the third party to avoid his obligations to the defendants goes further than any decision that has been cited, and I do not think that it should be upheld. The third party had nothing to do with the contract between the plaintiff and the defendants.

A further point raised on behalf of the third party was that, if the defendants had delivered a statement in writing containing the particulars required by s. 1 (1) of the Act, the plaintiff could have no claim, having regard to the terms of s. 6 (1):

"For the purpose of any legal proceedings on a contract for the sale of seeds, being a sale to which this Act applies, the particulars contained

in the statement delivered in pursuance of this Act on the sale shall be deemed to be true unless it is made to appear on a test made subject to the provisions of this section that the particulars were untrue and, in the case of particulars relating to purity or germination, that the actual percentage of purity or germination differs from the percentage appearing in the particulars by more than the prescribed limit of variation."

A It was said that, if the statement which ought to have been delivered had contained the description "Fylgia", that was to be deemed to be true in the absence of a test as to description. I find difficulty in saying what is the true meaning of s. 6 (1), and not one of the learned counsel who addressed us was able to give any real help on this. The Act was clearly designed to help the farmer against the seed merchant who supplied indifferent seed, but, if the argument advanced on behalf of the third party is accepted, it would defeat a claim by the farmer every time if he relied on the certificate as to variety and the seed was not in fact of the variety stated. It is the duty of the seed merchant to supply the statement, and it was not the intention of Parliament that the farmer should have another test made. Moreover, no one told us of any test for variety other than growth. Some, but not all, experts may be able to tell the variety of seed wheat, but what test there is other than sowing the seed and waiting for it to grow from the earth I do not know. I do not think that any can be contemplated at the testing station. Document 16 shows that the testing station received on Feb. 20, 1950, a sample described as "Fylgia" and tested it for purity and germination, and the test was satisfactory. These considerations lead me to think that variety ought not to be considered as within the word "particulars" in s. 6 (1), difficult though it is to reconcile the wording with this view. LYNKEY, J., left this point undecided. For myself I cannot see that s. 6 (1) can be treated as a bar to the defendants' claim against the third party. To come to any other conclusion would be to defeat the very purpose for which the Act was passed. I would allow the appeal and grant to the defendants the relief which they seek against the third party.

E DENNING, L.J.: In this case seed merchants in Devon bought ten tons of seed from a supplier by description. It was described by the supplier as spring wheat known as Fylgia. The seed merchants re-sold it, under the same description, in smaller parcels to several farmers in the district who sowed it as spring wheat. It was in fact winter wheat known as Vilmorin. The crops failed because it was not spring wheat. One of the farmers has brought an action against the seed merchants and recovered damages for his loss. Whereupon the seed merchants in their turn claim to recover over these damages from their supplier because he was the cause of all the trouble. There is no doubt that in the ordinary way the seed merchants would be entitled to an indemnity from their supplier, but it is said that in this case they are disabled from so doing because, when they re-sold to the farmer, they did not comply with all the necessary formalities. They did not deliver to the farmer a statement in writing containing the prescribed particulars—prescribed under the Seeds Act, 1920, s. 1 (1)—with respect to variety, purity and germination. The prescribed statement would in this case have been a mere formality. It would have made no difference to the farmer whether such a statement was delivered to him or not, but, nevertheless, the absence of it has been held by the judge to be a fatal bar to the seed merchants recovering an indemnity from their supplier.

The first question is: What is the legal effect of the omission to supply the particulars? The judge has held that it turns the contract with the farmer, so far as the seed merchant is concerned, into an illegal contract. The judge has so held on the authority of *Anderson, Ltd. v. Daniel* (1) and *B. and B. Viennese Fashions v. Losane* (4) and there are, indeed, some observations in those cases which warrant his taking that view. But I do not think they are

correct. There can be no doubt that the contract between the seed merchants and the farmer was not unlawful when it was made. If the farmer had repudiated it before the time for delivery arrived, the seed merchants could certainly have sued him for damages. Nor was the contract rendered unlawful simply because the seed was delivered without the prescribed particulars. If it were unlawful, the farmer himself could not have sued on it as he has done. The truth is that it was not the contract itself which was unlawful, but only the performance of it. The seed merchants performed it in an illegal way in that they omitted to furnish the prescribed particulars. That renders the contract unenforceable by them, but it does not render the contract illegal. ATKIN, L.J., expressed the position with his usual accuracy in *Anderson, Ltd. v. Daniel* (1) when he said simply ([1924] 1 K.B. 149) that the contract was unenforceable. I do not think the law has ever countenanced the idea that a transaction, lawful when done, can be rendered unlawful by the doctrine of relation back: see *Elliott v. Boynton* (7). A transaction which is unlawful when done can be rendered lawful by relation back: *Howell v. Falmouth Boat Construction, Ltd.* (8); but not vice versa.

Once rid of the notion that the contract with the farmer was itself illegal, the question becomes: What is the effect of the admitted illegality in performance? It certainly prevents the seed merchants from suing the farmer for the price, but does it prevent their suing their supplier for damages? I think not. There was nothing unlawful in the contract between the seed merchants and their supplier, neither in the formation of it, nor in the performance of it. The seed merchants must, therefore, be entitled to damages for the breach of it. So far so good, but the difficulty comes when they seek to prove their damages. They want to be indemnified for the damages they have to pay to the farmer. In order to prove those damages they have to prove the contract with the farmer and the circumstances in which the damages were awarded. It is said that once they begin to rely on their deliveries to the farmer, they seek aid from their own illegality; and that is a thing they are not allowed to do. The maxim is invoked *ex turpi causa non oritur actio*. That maxim must not, however, be carried too far. LORD WRIGHT, M.R., gave a warning about it fifteen years ago in *Beresford v. Royal Insurance Co., Ltd.* (9) when he said ([1937] 2 All E.R. 254):

"The maxim itself, notwithstanding the dignity of a learned language, is, like most maxims, lacking in precise definition. In these days, there are many statutory offences which are the subject of the criminal law, and in that sense are crimes, but which would, it seems, afford no moral justification for a court to apply the maxim. There are, likewise, some crimes of inadvertence which, it is true, involve *mens rea* in the legal sense, but are not deliberate, or, as people would say, intentional."

Those observations apply with especial force in this case. The omission by the seed merchants to deliver the prescribed particulars was an act of inadvertence. It was not a deliberate breach of the law. I venture to assert that there is no moral justification for the court to apply the maxim in this case. But is there any legal justification? A distinction must be drawn, I think, between an illegality which destroys the cause of action and an illegality which affects only the damages recoverable.

So far as the cause of action itself is concerned, the principle is well settled that, if the plaintiff requires any aid from an illegal transaction to establish his cause of action, then he shall not have any aid from the court. That appears in all the books from *Simpson v. Bloss* (2) down to *Berg v. Sadler* (10) and *Dennis & Co., Ltd. v. Munn* (11). In my opinion, those cases have no application to this case, because the seed merchants here can make out their cause of action perfectly well without any recourse to the illegality at all. All they need do is to prove the contract by which the supplier agreed to supply

Fylgia seed, and then show that he in fact supplied Vilmorin. That is sufficient to entitle them, by way of damages, to the estimated loss directly and naturally resulting, in the ordinary course of events, from that breach of contract: see *Cory v. Thames Ironworks Co.* (12) and s. 53 (2) of the Sale of Goods Act, 1893. There was no need for them to claim the particular loss arising from the sub-contract, and so long as they refrained from claiming that loss, there could be no possible objection to the claim: see *Gordon v. Metropolitan Police Chief Comr.* (13).

The difficulty only arises because the seed merchants claim the special loss resulting from the sub-contract. The supplier says in effect to the seed merchants: "I have discovered that you have been guilty of an illegality. You did not deliver the prescribed particulars to the farmers who bought from you. Therefore, you cannot recover your loss". It is to be noticed that the omission to deliver the particulars does not make any practical difference in this case. Even if the seed merchants had delivered the prescribed particulars, the position would have been the same. The seed would have been described as Fylgia, and the farmers would have recovered their damages just the same. Nevertheless, the supplier says he is entitled in law to be relieved of liability.

So far as this question of damages is concerned, the civil courts act on the principle that they will not lend their aid to a man so as to enable him to get a benefit from his own crime, nor will they help him to get reparation for the consequences of his own culpable criminal act. Thus, when a man committed suicide in order to obtain the insurance moneys payable on his death, his representatives were not allowed to recover the amount: *Beresford v. Royal Insurance Co., Ltd.* (9).

When a solicitor sought to be indemnified by his insurers against the consequences of his own champerty, his action failed: *Haseldine v. Hosken* (14). When a wholesale wine merchant bought from a manufacturer liquor which he should have known was contaminated, and re-sold it without lawful excuse to his customers, he was not allowed to recover from the manufacturers the damages which he had to pay to his customers: *Askey v. Golden Wine Co., Ltd.* (15). In those cases the plaintiff was, undoubtedly, seeking to

get reparation for the consequences of his own culpable crime. But there are cases nowadays where a man can be guilty of a crime without any moral culpability at all. Thus, a man who is induced by fraud to do a criminal act, will have a cause of action against the deceiver if he himself had no knowledge of the circumstances which rendered it criminal: *Burrows v. Rhodes* (16).

And a provision merchant who relies on a warranty by his supplier, but subsequently is convicted for selling bad food, will be able to recover any damage he suffers by reason of re-selling it to his customers: see *Crage v. Fry* (17); *Cointat v. Myham & Son* (18); *Weld-Blundell v. Stephens* (19); provided, of course, the damages claimed are not too remote: *Simon v. Pawson & Leafs* (20). It has been held that a motorist who has to pay damages for negligence can recover an indemnity from his insurers even though the

negligence was so gross as to amount to manslaughter: *Tinline v. White Cross Insurance* (21); *James v. British General Insurance Co.* (22). I think those cases were rightly decided. The right to indemnity for negligence should not depend on the chance whether a man is prosecuted, or the further chance whether he is convicted. Those cases were stronger than the present case. If public policy did not prevent recovery in those cases, it should not prevent

recovery here.

One further point. It was said that the seed merchants had only themselves to thank for their loss, for this reason. If they had delivered the prescribed particulars, naming the variety Fylgia, the farmers would have had no cause of action against the seed merchants, because under s. 6 (1) of the Seeds Act, 1920, the particulars would be deemed to be true. I cannot think that is the right construction of s. 6 (1). It cannot be that Parliament intended to deprive the farmers of their remedy. In my judgment, the section must be confined

to cases where a buyer is forced to rely on the prescribed particulars for his cause of action. It does not apply to any conditions or warranties which he can prove without recourse to the particulars. The farmer in this case could do that. He would have been entitled to his damages even if the particulars had been delivered giving the description Fylgia.

In my opinion, therefore, the loss suffered by the defendants was due to the breach of contract by the supplier, and they are entitled to recover it, notwithstanding their omission to deliver the particulars. I agree with my Lord that the appeal should be allowed.

HODSON, L.J.: I would have dismissed this appeal. In the action between the plaintiff and the defendants the learned judge found that the plaintiff was entitled to judgment against the defendants for damages for breach of contract. The plaintiff is a farmer, and he had bought from the defendants, who are seed merchants, wheat seed which had been bought by the defendants from the third party, the farmer who had grown the seed. The seed contracted to be sold by the defendants to the plaintiff was Fylgia, a spring seed proper to be sown in March or April, whereas what was delivered was Vilmorin, a winter wheat proper to be sown in October or November. The plaintiff sowed the wheat in March and suffered damage because he lost substantially the whole value of the crop, and had been put to the cost of growing and removal thereof and of cleaning the land. The defendants had bought the seed from the third party and relied, as they were entitled to do, on the description given by the third party on selling the seed. The defendants claim that there is a clear breach of contract in respect of which they are entitled to damages, the measure of which is what they have to pay to the plaintiff under the judgment given against them.

The case would be clear but for the difficulty presented by the Seeds Act, 1920. My Lord has already read s. 1 (1) (3) and (5), s. 2 (1) and s. 8, and I would only add to what he has already read by reading s. 7 (1):

“The Minister may, after consultation with representatives of the interests concerned (and, as respects forest tree seeds, after consultation also with the Forestry Commissioners), make regulations generally for the purpose of carrying this Act into effect and in particular and without prejudice to the generality of the foregoing provisions for prescribing—(a) the seeds, whether agricultural, vegetable or forest tree, to which this Act is to apply: (b) the manner in which samples are to be taken and dealt with: (c) any matter which under this Act is to be prescribed.”

By the Seeds Regulations, 1922 (S.R. & O., 1922, No. 915), reg. 2:

“The seeds to which the Seeds Act, 1920, shall apply, are as follows . . . wheat”;

and by reg. 3:

“The particulars to be stated in the case of a sale or exposure for sale of seeds or seed potatoes as required by s. 1 of the Seeds Act, 1920, are as follows:—(a) in all cases the name and address of the seller; (b) in all cases (except in relation to seed potatoes) that the seeds have been tested in accordance with the provisions of the Seeds Act, 1920; (c) in all cases the kind of seeds sold or exposed for sale, and in the case of cereals, red clover, white clover, crimson clover and sainfoin, the distinctive name of the variety of the seeds, or if the distinctive name of the variety is not known, or the stock is mixed, a statement to that effect.”

The defendants were in breach of their statutory duty because, although they had the seeds tested for germination and could have given the whole of the particulars required by the Act, they failed to do so. It is clearly settled by authority that in these circumstances the defendants could not have recovered

A the price of the seed from the plaintiff: see *Anderson, Ltd. v. Daniel* (1); because the contract, although legal in its inception, was illegally performed by the defendants, so that although the buyer's rights against the vendors were preserved, the vendors could not enforce their contract against the buyer. The contention of the third party, which was accepted by the learned judge, was that, a contract having been performed by the defendants in an illegal manner, they cannot put forward that contract as the basis of any claim against the third party. The claim against the third party is as follows:

B "By reason of the premises the defendants have suffered and will suffer loss and damage. They have re-sold the said wheat to the plaintiff and to other customers as Fylgia spring wheat. The defendants claim against the third party (i) a declaration that they are entitled to be indemnified against the amount of any damages and/or costs for which the plaintiff may recover judgment; (ii) judgment for any amount that may be found to be due from the defendants to the plaintiff; (iii) judgment for the amount, if any, of costs they may be adjudged to pay to the plaintiff and for the amount of their own costs of their defence to the plaintiff's claim and of proceedings against the third party herein; (iv) damages for breach of contract or warranty."

C The learned judge said:

D "The whole of that claim is based on re-sale of the wheat. Before the defendants can substantiate their right to claim against the third party they have to set up this contract with the plaintiff in order to show that the damages which they have to pay the plaintiff flowed from the breach of contract . . . by the third party . . . it seems to me that they (i.e., the defendants) cannot set up a contract, being an illegal contract unlawfully performed by them, in support of their claim against the third party."

E It is true that the contract was not illegal in its inception, nor did it ever become void for illegality. The consequence is that the plaintiff can enforce it against the defendants, but it seems to me, as it did to the learned judge, that the defendants are in precisely the same difficulty in seeking to recover from the third party as they would be if they sought to enforce the contract against the plaintiff. They could not recover the price of the seed from the plaintiff because of the illegality whether the plaintiff relied on breach of warranty or not. Similarly, I think that they cannot rely on the breach of warranty by the third party to prove their damage when that damage is to be measured by reference to a contract illegally performed by them.

F Accepting, as I do, that the contract between the defendants and the third party was a legal contract from beginning to end, and that the third party was in breach of warranty, there is no question but that the defendants are entitled to nominal damages for such breach. Indeed, counsel for the third party G conceded that this was so. Counsel for the defendants argued that he should be entitled, not only to nominal damages, but to the full damages claimed since, he said, the point was not precisely covered by the decision in *Anderson, Ltd. v. Daniel* (1) and it would work an injustice to extend the scope of that decision.

H I agree that the members of this court who decided *Anderson, Ltd. v. Daniel* (1) had not this situation in mind, and, therefore, I do not pray in aid any passages from their judgments which would seem to support any conclusion which would seem to extend the area of their actual decision. Nevertheless, it seems to me impossible, in view of the actual decision in that case, to allow a party who cannot rely on the illegality of performance of his contract for one purpose, to rely on it for another. So far as injustice is concerned, the actual decision in *Anderson, Ltd. v. Daniel* (1) worked an injustice, since the buyer there was enabled to retain fertiliser he had bought from the purchaser and escape payment.

The same situation arises in all cases of illegal contracts. When work is done without a licence authorising the same, it is clear that the person who has obtained the benefit of the work may avoid payment, although he may have no merits. I do not lose sight of the distinction between contracts void for illegality and contracts such as that which is here in question, which is illegal only in its performance so as to disentitle the perpetrator of the illegality to recover. However, I think that in principle it is impossible to hold that the perpetrator of the illegality should recover from a third party damages which arise from the performance of a contract when he could not himself sue on that contract because of his illegal performance thereof. I think, therefore, that when the defendants argue that their claim against the third party is founded, not on illegality, but on breach of a legal contract, the answer is that the argument only carries with it their claim to nominal damages and not those which followed from the performance of their contract with the plaintiff.

Counsel for the defendants put forward the alternative argument that he was entitled to damages to be assessed by reference to what he had to pay to the plaintiff apart altogether from the contract which had been illegally performed. These damages, he said, could be recovered as general damages which flowed naturally from the breach of warranty by the third party, because any farmer who sowed Vilmorin thinking he was sowing Fylgia would naturally suffer the damage suffered by the plaintiff. In my opinion, it is inadmissible to award general damages on this footing, since this would enable the defendants to reach by a circuitous route the goal from which they are barred by the illegal performance of their contract with the plaintiff. General damages other than nominal are not, I think, proved in any other way in this case, and, indeed, it appears that no attempt was made at the trial by counsel then representing the defendants to prove substantial damage except on the footing that he was entitled to recover such sum as he might have to pay to the plaintiff.

I reach a conclusion adverse to the defendants with regret since it may fairly be said that the illegality in the performance of their contract with the plaintiff is in a sense irrelevant to the question whether the defendants have suffered damage from the breach by the third party of his contract with them. I do not, however, see any escape from the consequences of the decision in *Anderson, Ltd. v. Daniel* (1), which seems to me to lead inevitably to the conclusion at which *LYNSKEY, J.*, arrived. Although the defendants have a good cause of action against the third party, they cannot prove the substantial damage which they seek to claim without proving their own illegal act. The relief sought depends on proof of the illegal act, and, therefore, I do not think the defendants can recover. I would only add on this part of the case that I do not think the defendants gain assistance from the decisions in the cases of *Tinline v. White Cross Insurance* (21) and *James v. British General Insurance Co.* (22), in which motorists who had to pay damages for negligence so gross as to amount to manslaughter were held to be able to recover on an indemnity from the insurers. In *Haseldine v. Hosken* (14), where a solicitor sought to be indemnified by his insurer against the consequences of his own champerty and failed, the authority of those cases was doubted. I share those doubts in so far as those cases may tend to support the proposition that an assured can get indemnity from his insurers against his own intentional acts of illegality.

The third party also relies on s. 6 (1) of the Seeds Act, which provides:

“For the purpose of any legal proceedings on a contract for the sale of seeds, being a sale to which this Act applies, the particulars contained in the statement delivered in pursuance of this Act on the sale shall be deemed to be true unless it is made to appear on a test made subject to the provisions of this section that the particulars were untrue and, in the case of particulars relating to purity or germination, that the actual percentage

of purity or germination differs from the percentage appearing in the particulars by more than the prescribed limit of variation."

A On the plain reading of the section, the plaintiff would have had no cause of action if the particulars required by s. 1 (1) had been delivered, since those particulars, including a statement as to the warranty of the seed, would have been deemed to be true. Therefore, the claim against the third party could never have been made if the plaintiff did not have the seed tested himself. If the plaintiff, on the other hand, had ascertained, as a result of a test, that the seed was not Fylgia but Vilmorin, he would not have suffered the damage. So, again, the claim would not have been made. This result is said to be unreasonable, since there appears, so far as the evidence in this case goes, to be no sure test of variety except by growth, which would take so long as to be practically useless except for the purpose of obtaining material for litigation. Section 6 (1) was, no doubt, inserted in the Act for the protection of the seed merchant, and if it has unexpected results I think it is for Parliament to amend the law, and that the court cannot ignore the provisions. On this ground also I should have thought that the appeal failed.

Appeal allowed.

C Solicitors: *C. G. Metson & Co.* (for the defendants); *Moon, Gilks & Moon*, agents for *Anstey & Thompson*, Exeter (for the third party).

[*Reported by F. A. AMES, Esq., Barrister-at-Law.*]

D

WEBSTER v. GENERAL ACCIDENT FIRE AND LIFE ASSURANCE CORPORATION, LTD.

[QUEEN'S BENCH DIVISION (Parker, J.), February 10, 11, 1953.]

E *Insurance—Motor insurance—"Loss" of car—Car sold contrary to owner's authority and proceeds of sale retained.*

By a general comprehensive motor car policy it was provided in s. 1: "The corporation will indemnify the policy holder against loss of . . . any motor car described in the schedule . . ." There was also an arbitration clause in the usual form.

F The claimant, who was the owner of the motor car covered by the policy, took it to a car auction conducted under the auspices of a limited company. The car was put up for sale subject to a reserve price which was not reached. One, T., a director of the company, told the claimant that he had had a private bid of £335 for the car and the claimant agreed to accept that sum and allowed possession of the car to remain either with T. or the company. G T. sent the car to another auction, signing the entry form in his own name. It was sold for a sum less than the £335 and the proceeds of sale were paid into the private banking account of T. The claimant took no steps to recover the car from the ultimate purchaser, having been advised that it was hopeless for him to do so.

H HELD: (i) that if the owner of a chattel was induced to part with its possession as a result of a representation, whether true or not, that there was a buyer, and if the chattel were sold otherwise than in accordance with the representation, such a dealing amounted to conversion and there was a loss.

(ii) it was not necessary for the claimant to prove that in all circumstances the chattel was irrecoverable; the test was whether, the claimant not having failed to take reasonable steps, recovery was uncertain.

(iii) the claimant was consequently entitled to recover under the policy.

AS TO WHAT CONSTITUTES A LOSS UNDER AN INSURANCE POLICY, see HALSBURY, Hailsham Edn., Vol. 18, p. 516, para. 812; and FOR CASES, see DIGEST, Vol. 29, pp. 420, 421, Nos. 3280-3282.

Cases referred to:

- (1) *Holmes v. Payne*, [1930] 2 K.B. 301; 99 L.J.K.B. 441; 143 L.T. 349; Digest Supp.
- (2) *Moore v. Evans*, [1917] 1 K.B. 458; on appeal, [1918] A.C. 185; 87 A L.J.K.B. 207; 117 L.T. 761; 29 Digest 421, 3282.
- (3) *London & Provincial Leather Processes, Ltd. v. Hudson*, [1939] 3 All E.R. 857; [1939] 2 K.B. 724; Digest Supp.

AWARD in the form of a Special Case stated by an arbitrator.

The claimant, who was the owner of a Standard motor car, held a general comprehensive motor car insurance policy issued by the respondents. On Feb. 22, 1952, he saw an advertisement in the "Oxford Times" advertising motor auctions at Calcot, near Reading. On Feb. 26 he took his car to the auction and entered it for sale at a reserve price which was not reached. The director of the auction company, one Taylor, told the claimant that he had got a private bid of £335 for the car which the claimant agreed to accept and allowed possession of the car to remain either with Taylor or the company. Taylor then sent the car to an auction at Shepton Mallet, signing the entry form in his own name. It was sold to a Mr. Allis for £285 and eventually came into the possession of a Mr. Fry. A cheque for the net proceeds of sale was sent to Taylor who paid the cheque into his own private banking account. Various cheques drawn on the account of the auction company and signed by Taylor were sent to the claimant but they were not met. The claimant made a claim on the respondents alleging that there had been a loss of his motor car under the terms of the policy, but the respondents repudiated liability. The dispute was referred to an arbitrator who, by his award, left three questions for the opinion of the court, the only question calling for report being: "Did the claimant sustain a loss of his motor car within the meaning of the policy?"

Colin Duncan for the claimant (the assured).

Beney, Q.C., and *John Thompson* for the insurance company.

PARKER, J.: This is an award in the form of a Special Case stated by an arbitrator under a submission in a dispute arising on a policy of insurance. [His LORDSHIP stated the facts and continued:] The arbitrator held, so far as it is material on the first question, that it was untrue that Taylor had a private bid or a private buyer for the car at £335. There was no bid or buyer at that or at any price. He also said:

"I am forced to the conclusion that from the moment I have indicated, Taylor had made up his mind that he was going to get the claimant's car into his control so that he could turn it to his own benefit without paying for it."

He then considered what, if any, offence had been committed in connection with the obtaining of possession of this car, and found that there had been no larceny by a trick and no larceny as a bailee, but that the true position, from the point of view of the criminal law, was that Taylor, by his false pretences as to the existence of a private buyer, caused the claimant to continue to accord to the company the possession of the car instead of exercising his immediate right to resume possession of the car on its not being sold at the auction. The arbitrator went on:

"After considering such authorities as there are, it seems to me that 'loss' can be fairly defined as 'an effective deprivation in circumstances making recovery uncertain'."

He referred to *Holmes v. Payne* (1) and *Moore v. Evans* (2) and continued:

A "On the other hand there can, I conceive, be an effective deprivation, even where the chattel itself physically exists, if the title to it has been impaired or if uncertainty exists whether the title remains unimpaired. Approaching the matter on the basis of this test, the facts have to be considered closely. On my interpretation of them, Taylor had formed the fraudulent intention of getting his hands on the claimant's car, turning it into cash and putting the proceeds into his own pocket . . . In ordinary, every-day parlance that seems to me to be a loss to the claimant in the sense I have suggested. It was not merely that Taylor fraudulently deprived the claimant of the proceeds of sale of a car he had undertaken, by his company, to sell on his behalf. The essence of the matter was that the claimant was swindled out of his car in the sense that he would never have parted with his car but for the fraudulent inducements held out to him by Taylor. The claimant was deprived of his car on Feb. 26, 1952, and, judging by the knowledge we now have of the intention underlying the deprivation, I should for my part regard it as reasonably clear that it was there and then uncertain whether he would ever be able to recover it."

C Having considered the chances of recovery, he said:

"Accordingly, in my view it was not unreasonable . . . for the claimant to refrain from claiming the car from the person ascertained to be in possession."

D Counsel for the insurance company has criticised the definition by the arbitrator to which I have referred, and particularly the passage where he said:

" . . . there can, I conceive, be an effective deprivation, even where the chattel itself physically exists, if the title to it has been impaired or if uncertainty exists whether the title remains unimpaired."

E Counsel says that for there to be a loss there must be a *de facto* loss and not an impairment of title. He draws a distinction between cases where the chattel is taken against the will of the owner, whether from himself or from a bailee holding it on his behalf, and cases where an owner voluntarily hands the chattel over to another, albeit as a result of that other's fraudulent misrepresentation. He contends that it is only in the former case that there is a "loss" under the policy. I conceive it is almost impossible to lay down any accurate test which will fit all circumstances. Indeed, in *Holmes v. Payne* (1), ROCHE, J., said ([1930] 2 K.B. 310):

F "It would be as unwise, as it is unnecessary, that I should attempt a definition of the word 'loss' under a policy such as this",

G which was an almost similar policy. Some help is, I think, to be obtained from a passage, to which ROCHE, J., referred, in the judgment of BANKES, L.J., in *Moore v. Evans* (2), where he said ([1917] 1 K.B. 471):

H "Mere temporary deprivation would not under ordinary circumstances constitute a loss. On the other hand complete deprivation amounting to a certainty that the goods could never be recovered is not necessary to constitute a loss. It is between these two extremes that the difficult cases lie, and no assistance can be derived from putting cases which are clearly on the one side or the other of the dividing line between the two. If assistance is to be obtained at all from considering a hypothetical case it can only be done by taking one which raises somewhat similar considerations to the case which we have to decide."

I find myself unable to accept the test suggested by counsel for the insurers. I agree that where a chattel is handed over voluntarily by the owner to another it may make it difficult for him thereafter to prove a loss; it may be that in

such a case what is lost is, not the chattel, but the proceeds if the chattel was handed over for sale. No one would suggest, I think—to take a concrete example—that, if the owner of a chattel handed it to X for sale, X honestly representing (if you like) that he had a buyer, and the chattel was duly sold, but X misappropriated the proceeds and never paid them over, there had been a loss of the chattel. What had been lost there was the proceeds of sale, but equally it seems to me that, if a chattel is handed over to an agent, whether as a result or not of a fraudulent misrepresentation, and the agent proceeds to deal with the chattel in a way which amounts to a conversion of the chattel, there may be a loss. In that connection I rely on the judgment of GODDARD, L.J., in *London & Provincial Leather Processes, Ltd. v. Hudson* (3), where an English company, the owners of skins, sent them to a firm in Germany to be processed, voluntarily parting with possession of the chattels and there being no question of fraudulent representation. The German firm kept some of the goods to process themselves and sub-contracted the rest out to sub-contractors. The German firm got into difficulties, and the sub-contractors wrongfully claimed to retain the chattels of the English company as against money owing to them by the German firm. Clearly they had no lien on the goods and in German law that was a delict. When asked for them, they refused to hand them over, claiming them under a lien—clearly a tort both in German law and in English law. The German firm went into bankruptcy, and the administrator wrongfully proceeded to sell the plaintiffs' goods and refused to account either for the goods or for the money. GODDARD, L.J., said ([1939] 3 All E.R. 862):

“Here we have the fact that the plaintiffs have been deprived of their goods. They have suffered a loss in the sense that they cannot get their goods. With regard to the Moebis & Dieter goods, it seems clear that Moebis & Dieter converted these goods. They committed the wrong or tort which, in English law, we should call conversion, because, having a demand made upon them to deliver up the goods, they refused to do so, and have asserted a right to retain the goods which was bad in law, a right which they had no right to enforce against the goods. Therefore that was a conversion. For my part I am unable to see why, if goods which are insured against all risks are converted so that the true owner, the assured, is deprived of the possession of the goods, he is any the less entitled to recover under the policy than he would be if the goods were stolen. He is deprived of the possession in one case by theft; he is deprived under circumstances which would render the spoliator liable to the criminal law. It is a matter of the state of mind, whether there was a felonious mind. In the case of conversion he is equally deprived of his goods and equally wrongfully deprived, but wrongfully only in the sense that a civil tort is committed and not a criminal wrong.”

I find it unnecessary to go in detail into the facts as found here in order to decide—and it is sometimes a very fine and difficult question—whether the offence of larceny by a trick was committed, whether there was larceny by a bailee, or whether possession of the goods was retained by Taylor's company as a result of fraudulent representation. As I said, the arbitrator has found the latter. Even on that view, it seems to me that there was *prima facie* a loss at the latest, at any rate, when this motor car was sent to Shepton Mallet in Taylor's name. I think it is conceded that, if the offence of larceny by a trick or larceny by a bailee was established, there would *prima facie* be a loss.

A somewhat different point is, however, made that, even if what happened could constitute a loss, there is, on the facts of this case, no loss proved because the claimant has at all times known where the chattel is and could have recovered it if he had taken the necessary steps, or, at any rate, he has not shown that it is irrecoverable. In this connection it is important to bear in mind that we are dealing here with a non-marine policy and no questions of

constructive total loss and such principles of marine insurance apply. At the same time it appears clear from the passage I have read in the judgment of BANKES, L.J., in *Moore v. Evans* (2) that it is never necessary for a claimant to prove that in all circumstances the chattel is irrecoverable. Every case depends on its own facts. An assured is not entitled to sit by and do nothing. Equally, he is not bound to launch into legal proceedings, or, if necessary, carry them to the House of Lords. The test is whether he has taken all reasonable steps, and, he having taken all reasonable steps, whether recovery is uncertain. In the present case one of the things which strikes me forcibly is that after the cheques had finally been returned, marked "Account closed", the claimant tried to get the assistance of the police. The arbitrator found this:

A

B

"The subsequent facts, so far as the first issue is concerned, are that on three occasions after the return of the third cheque the claimant saw the police at three different police stations about his position and received the advice that it was hopeless for him to try to recover the car if it had been left with a motor dealer."

C

D

Having received that advice, and, no doubt, partly because of it and partly as the result of legal advice which he received, he has, I understand, taken no steps to obtain his car back from this Mr. Fry. So far as the legal considerations are concerned, it is not unlikely, and in fact the arbitrator is satisfied, that the sale at any rate to Mr. Allis was made by the company as a mercantile agent, in which case Mr. Allis, and probably Mr. Fry, got a good title to the car. Be that as it may, I am satisfied in this case that in all the circumstances the claimant took all reasonable steps—or, putting it the other way, did not fail to do anything which a reasonable man should have done—and that, to say the least, recovery of the car was uncertain. In those circumstances, I am satisfied that there was a loss within the meaning of this policy.

Award affirmed.

E

Solicitors: *Reynolds, Gorst & Porter* (for the assured); *Dennes & Co.* (for the insurers).

[*Reported by G. A. KIDNER, Esq., Barrister-at-Law.*]

Re BROOKE'S WILL TRUSTS. JUBBER v. BROOKE AND OTHERS.

[CHANCERY DIVISION (Upjohn, J.), February 11, 12, 13, 1953.]

Will—Class gift—Gift postponed to life interest—Substituted gift for children of member of class dead at decease of life tenant—Vesting of gift on testator's death—Children of member living at date of will, but not children of member then dead, entitled to share as joint tenants.

By his will, dated Jan. 16, 1919, a testator, who died on Feb. 15, 1926, bequeathed to his wife the interest on £1,000 for the term of her natural life, and directed his executors to stand possessed of his residuary estate on trust to pay and divide the same between his three sisters in equal shares "the children of any sister being then dead taking the share their parent would have taken if living". The testator further provided: "And from and after the decease of my said wife I give and bequeath the said sum of £1,000 or the investments representing the same and after payment of all expenses connected with the same including any expenses of realisation unto and equally between all my brothers and sisters the children of any being then dead taking the share their parent would have taken if living."

HELD: the gift of the £1,000 to the testator's brothers and sisters vested at the date of the testator's death; the class of beneficiaries entitled to share in that gift extended to the children of brothers and sisters who were living at the date of the will, but did not extend to the children of brothers and sisters who were dead at the date of the will; and the children entitled to take took as joint tenants.

Greenwood v. Greenwood ([1939] 2 All E.R. 150), applied.

Dictum of SIR RICHARD KINDERSLEY, V.-C., in *Loring v. Thomas* (1861) (1 Drew. & Sm. 510) and dictum of LORD DU PARCQ in *Mackintosh or Miller v. Gerrard* ([1947] A.C. 483), applied.

Re Froy ([1938] 2 All E.R. 316), distinguished.

AS TO GIFT TO CLASS OF PARENTS AND CHILDREN, see HALSBURY, Hailsbury Edn., Vol. 34, pp. 287-290, paras. 338-340; and FOR CASES, see DIGEST, Vol. 44, pp. 792-805, Nos. 6497-6589.

Cases referred to:

- (1) *Greenwood v. Greenwood*, [1939] 2 All E.R. 150; Digest Supp.
- (2) *Loring v. Thomas*, (1861), 1 Drew. & Sm. 497; 30 L.J.Ch. 789; 5 L.T. 269; 62 E.R. 469; 44 Digest 796, 6528.
- (3) *Barraclough v. Cooper*, (1905), [1908] 2 Ch. 121, n; 77 L.J.Ch. 555, n; 98 L.T. 852; 44 Digest 532, 3483.
- (4) *Re Lambert*, [1908] 2 Ch. 117; 77 L.J.Ch. 553; 98 L.T. 851; 44 Digest 798, 6537.
- (5) *Mackintosh (or Miller) v. Gerrard*, [1947] A.C. 461; [1948] L.J.R. 692; 176 L.T. 262; 2nd Digest Supp.
- (6) *Wardlaw's Trustees v. Lennox's Executors*, 1940 S.C. 286.
- (7) *Re Cope*, [1908] 2 Ch. 1; 77 L.J.Ch. 558; 99 L.T. 374; 44 Digest 796, 6526.
- (8) *Re Froy*, [1938] 2 All E.R. 316; [1938] Ch. 566; 107 L.J.Ch. 342; 158 L.T. 518; Digest Supp.
- (9) *Penny v. Clarke*, (1860), 1 De G.F. & J. 425; 29 L.J.Ch. 370; 1 L.T. 537; 45 E.R. 423; 44 Digest 778, 6359.
- (10) *Re Sibley's Trusts*, (1877), 5 Ch.D. 494; 46 L.J.Ch. 387; 37 L.T. 180; 44 Digest 1001, 8583.
- (11) *Crosthwaite v. Dean*, (1879), 40 L.T. 837; 44 Digest 981, 8368.

ADJOURNED SUMMONS to determine whether on the true construction of the will of William Brooke, deceased, and in the events which had happened (i) a

share of the investments representing the sum of £1,000 given by the said will after the death of the widow of the testator equally between all his brothers and sisters (the children of any being then dead taking the share their parent would have taken if living) had fallen into the estate of the testator's deceased sister Naomi Brooke; (ii) the class of brothers and sisters of the testator whose children were entitled to participate in the distribution of the said investments consisted of (a) brothers and sisters who survived the testator but predeceased his widow; or (b) those who were living at the date of the will but predeceased the widow; or (c) all his brothers and sisters who predeceased his widow and whether alive or dead at the date of his will; (iii) the children entitled to a share took such share as joint tenants or tenants in common.

By his will, dated Jan. 16, 1919, the testator gave a specific legacy to his wife, Mary Elizabeth Brooke, and provided:

"I also give and bequeath to my said wife the interest on £1,000 the one half part of the sum invested by us under our marriage settlement for the term of her natural life I direct my said executors to stand possessed of all my residuary estate upon trust after payment of my just debts funeral and testamentary expenses to pay and divide the balance then remaining unto and equally between my three sisters Thirza Naomi and Mahala in equal shares and to whom I give and bequeath the same the children of any sister being then dead taking the share their parent would have taken if living And from and after the decease of my said wife I give and bequeath the said sum of £1,000 or the investments representing the same and after payment of all expenses connected with the same including any expenses of realisation unto and equally between all my brothers and sisters the children of any being then dead taking the share their parent would have taken if living."

On Feb. 15, 1926, the testator died, and on Apr. 17, 1926, his will was proved by the executors named therein. The testator had two brothers and seven sisters of whom (a) four sisters (Susan Hazell, Mary Jane Temple, Sarah Elizabeth Brooke and Bertha Rix) were dead at the date of his will, (b) the two brothers (Henry and John) and another sister (Thirza Brooke) were living at such date, but predeceased the testator, and (c) two sisters (Naomi Brooke and Mahala Jubber) survived the testator, and of these only one, Mahala Jubber, survived the testator's widow who died on Feb. 9, 1945. Of the testator's four sisters who were dead at the date of his will, one (Susan Hazell) had ten children of whom two predeceased and eight survived the testator; another (Mary Jane Temple) had two children of whom one predeceased the testator, nothing being known of the other; Sarah Elizabeth Brooke died a spinster; and Bertha Rix had three children of whom one died in 1918, nothing being known of the others. Of the testator's two brothers and Thirza Brooke, one brother (Henry) had three children all of whom survived the testator; John Brooke had ten children of whom six survived the testator, but it was not known whether the other four had so survived or not; and Thirza Brooke died a spinster. Naomi Brooke died a spinster on Apr. 3, 1936, and Mahala Jubber, whose only child, Albert Henry Ward Jubber, was the plaintiff, died on Apr. 2, 1945.

Robert S. Lazarus for the plaintiff, Albert Henry Ward Jubber.

M. J. Albery for the first defendant, William Brooke, son of the testator's brother, Henry Brooke.

Winterbotham for the second defendant, Frederick Hazell, son of the testator's sister, Susan.

Eley for the third defendant, Ethel Selina Mary Brooke, personal representative of the testator's nephew, Henry Lee Brooke, who died on May 16, 1950.

UPJOHN, J. (having stated the facts): The first question which I have to consider is whether the gift "equally between all my brothers and sisters" is a gift to such brothers and sisters contingently on their surviving the widow or whether it is a gift which vested at the death of the testator. Counsel for the plaintiff argues that it is a vested gift. His client is interested indirectly in the estate of Naomi Brooke who survived the testator and subsequently died a spinster. On the other hand, counsel for the first defendant submits that, on its true construction, the gift is contingent on the brothers and sisters surviving the widow. The gift in terms is "equally between my brothers and sisters" and that *prima facie* would vest at the death of the testator, but it continues: "... the children of any being then dead taking the share their parent would have taken if living". Counsel for the first defendant submits that those words show that the real truth of the matter is that the gift to the brothers and sisters was intended to be contingent on their surviving the widow. I feel unable to accept that submission. In my judgment, the case is governed by the decision of the Privy Council in *Greenwood v. Greenwood* (1). Apart from that authority, I should have come to the same conclusion, viz., that this gift was *prima facie* vested, and the subsequent words are not sufficient to turn that vested gift into a gift contingent on surviving the widow.

Much greater difficulty arises on that part of the gift which is in favour of the children of the brothers and sisters who do not survive the widow. There are three classes of claimants. The first class of claimants, represented by the plaintiff, submits that, on the true construction of this will, it is a gift to the brothers and sisters who survive the testator with a gift in favour of the children of the brothers and sisters so surviving the testator who died before the tenant for life. In other words, it is a true clause of substitution. The original class comprises the brothers and sisters who survive the testator, and the persons in the class are divested of their previously vested gifts if they die in the lifetime of the widow leaving children. The second class of claimants represented by the first defendant, contend that the gift should be read as a gift to all the brothers and sisters alive at the date of the will, but, if any of them die before the date of the death of the tenant for life leaving children, those children step into their parents' shoes. That is what has been called a partly substitutional gift. Mr. HAWKINS, in his book on wills, has described that type of gift (HAWKINS ON WILLS, 3rd ed., p. 297):

"Besides gifts to issue purely substitutional, engrafted on a gift to children as a class, and independent gifts to children and issue of children concurrently, there is a third class of cases, in which the substitution, if it can be called such, takes place before the members of the primary class are ascertained, but on the other hand takes place only as regards those who at the date of the will had the capacity of becoming members of the class. Thus the issue of children dying in the testator's lifetime are entitled, but the issue of children dead at the date of the will are excluded."

The third class of claimants, represented by the second defendant, contend that, on the true construction of the will, there are here two original gifts in the relevant passage, i.e., the gift is to brothers and sisters alive at the death of the testator and an independent gift to the children of those brothers and sisters who are not alive at the date of distribution, that class comprising brothers and sisters who have died at any time, whether before or after the date of the will or during the subsistence of the life interest. These classes of gifts have been the subject-matter of discussion in a very large number of authorities, several of which, very properly, have been cited to me. It is only necessary to refer to one or two. The first is the well-known case of *Loring v. Thomas* (2). In the course of his judgment, SIR RICHARD KINDERSLEY, V.-C., said (1 Drew. & Sm. 510):

"Now, of course, the question is one entirely of intention, and it is

obvious that in cases of this kind a testator may mean to *include* as objects of his bounty, or he may mean to *exclude*, the issue of the predeceased children."

He had already defined the term "predeceased children" as signifying those of the first generation, "who were dead at the date of the will". He continues (*ibid.*):

A "When a testator directs that issue shall represent or stand in the place
of or be substituted for a deceased child, and take the share which their
parent would have taken if living, he may intend such representation or
substitution to apply only to the case of a child dying subsequently to the
B of the will. The solution of the question, which of the two he intended,
must of course depend on the language he has used in directing such
representation or substitution. He may use language of such restricted
import as to be inapplicable to any children but such as were living at
the date of the will. But if he uses language so wide and general as to
C be no less applicable to a predeceased child than to a child living at the
date of the will, then the direction as to such representation or substitution
must be held to embrace both."

The whole of that passage was cited with approval by LORD MACNAGHTEN
in the House of Lords in *Barracough v. Cooper* (3), that case being reported
only as a note to *Re Lambert* (4). The judgment of the Vice-Chancellor continues
D (*ibid.*, 511):

"Before I proceed to examine in detail the language of this will, I will
make one or two preliminary observations which (although they are little
better than truisms) it will be useful to bear in mind, not only in con-
sidering the terms of this will but also with reference to some of the decided
cases bearing on the question. And, first, I would observe that, with
E reference to a bequest to the children of A., there is this obvious distinction
between a child of A. living at the date of the will and a predeceased child
of A., that the former is one of those whom the testator intends to benefit
by the bequest, whereas the latter not only cannot take under such a
bequest but he is not intended by the testator to benefit, for no one intends
to make a bequest in favor [sic] of a dead person. If, therefore, a testator,
F in directing that the issue of a deceased child shall represent or stand in
the place of their parent, uses language importing that they shall take
the share which he intended for the parent, of course the issue of a pre-
deceased child cannot be included, because the testator could not have
intended to give any share to a child then already dead. On the other
G hand, I would observe that a predeceased child of A. and a child of A.
living at the date of the will stand upon the same footing in this respect:
that not only they are both equally children of A., but they both equally
answer the description of children of A. who would, if they were living
at the testator's death, have been entitled to a share under a bequest
to the children of A. That description is merely hypothetical, it speaks not
of what will happen, or even of what may happen, but only of what would
H have happened upon a certain hypothesis; and of course putting a hypo-
thetical case does not at all involve the assumption that the hypothesis
is true, or even that it is possible. Suppose a testator, having by his will
made a bequest to the children of A., were to add this: one child of A.
(Thomas) is already dead, and I direct that his issue shall represent him
and stand in his place, and shall be entitled to the same share which Thomas
would have been entitled to if living at my decease. Surely that language
would be perfectly correct and appropriate. Thomas, though already dead,

and therefore incapable of taking a share, and not intended to take a share, would, upon the hypothesis of his being alive at the testator's death, have been entitled to a share under the bequest to the children of A., and the testator would be correctly speaking of the share which Thomas would have been entitled to upon that hypothesis, although the hypothesis is impossible."

The only other authority to which I desire to refer on this part of the case is the more recent case in the House of Lords of *Mackintosh (or Miller) v. Gerrard* (5). A testatrix died in 1944, having by her trust disposition and settlement, made in 1942, directed her trustees to divide the residue of her estate

"equally between my sisters . . . : And it is hereby declared that in the event of any of my said sisters . . . who may have predeceased me, leaving lawful issue, such issue shall be entitled to the share or shares original and accruing which their parent would have taken by survivorship, and the share of any of my said sisters . . . dying without leaving lawful issue shall be divided among the survivors of them and the lawful issue of any of them as may have died before me leaving such issue in equal shares per stirpes."

At the date of the execution of this document the testatrix had six sisters living. A seventh had died leaving a daughter who survived the testatrix. It was held (per VISCOUNT SIMON, LORD MACMILLAN and LORD DU PARCQ, LORD THANKERTON and LORD SIMONDS dissenting) that the daughter of the deceased sister was not entitled to a share of the residue, since, on the true construction of the trust disposition and settlement, the class referred to was that of the sisters alive at the date of its execution. That was a Scottish case and a Scottish will, but the applicable law was treated in the House of Lords as being equally appropriate to the Scottish will or an English will. It appears that the majority of the House, influenced, I think, by the presence of the words "said sisters" in two places, decided that the testatrix was intending to benefit a class of sisters alive at the date of the will, that class, of course, being subject to diminution by death before the death of the testatrix, and that the gift over was only of those shares intended for the original class of sisters alive at the date of the will, and that the testatrix did not intend to benefit any sisters dead at the date of her will. Therefore, the issue of sisters dead at the date of the will could not claim under the second branch of the gift. LORD MACMILLAN read ([1947] A.C. 474) with approval part of the passage from the judgment of SIR RICHARD KINDERSLEY, V.-C. (1 Drew. & Sm. 510), which I have already read. I think the only other passage to which I need refer is that in the opinion of LORD DU PARCQ, who, after referring to a passage in JARMAN ON WILLS, vol. 2, 7th ed., p. 1311, which, I may note, has been excised from the eighth edition, says ([1947] A.C. 483):

"I am happy to think that no 'rule' is laid down in *Loring v. Thomas* (2) which prevents a judge from arriving at a testator's meaning by considering the words which the testator has used, read as a whole, or from giving effect to clear language in a will. My noble and learned friend LORD MACMILLAN has already quoted from the judgment of KINDERSLEY, V.-C., the one proposition for which *Loring v. Thomas* (2) is an authority. In the case of *Wardlaw's Trustees v. Lennox's Executors* (6) the Lord President concisely and accurately stated the effect of the Vice-Chancellor's judgment when he said: 'The pith and substance of the observations of the learned Vice-Chancellor are that you must take the language of the testator in its natural sense and discover from it whether the issue of a parent who predeceased the execution of the will are excluded; or whether the language is wide enough to include them.' So understood, the rule (if rule

it should be called) in *Loring v. Thomas* (2) need never strain the judicial conscience, and will not conflict with what has so often been declared to be the paramount rule of construction: it is, as LORD FLEMING said in *Wardlaw's* case (6), 'just an example of the more general rule that the intention of the testator must be derived from the actual language used by him.' I will only add that when the decision of your Lordships' House in *Barraclough's* case (3) was cited to the Court of Appeal in England, perhaps for the first time, and while it was as yet unreported, in the case of *Re Cope* (7), the court (COZENS-HARDY, M.R., BUCKLEY and KENNEDY, L.JJ.) rightly held themselves free to decide the particular question before them upon the precise words of the will, and reversed a decision founded upon a similarity of language to that of the will in *Loring v. Thomas* (2). 'It would be erroneous', said BUCKLEY, L.J., 'or misleading, to deal with this case by reading first the will in *Loring v. Thomas* (2) and then seeing how this will differs from that will'."

With those observations of SIR RICHARD KINDERSLEY, V.-C., and their Lordships in the House of Lords to guide me, I return to a consideration of this will. It seems to me that there would have been much to be said for the contention of counsel for the plaintiff that this is a gift to the brothers and sisters who survive the testator with a strictly substitutional gift in favour of the issue of those brothers and sisters who survive the testator but die before the tenant for life, but for one consideration. The words "the children of any being then dead" plainly mean—and there is no doubt about it—dead at the date of distribution, at the death of the widow. Then come the words "taking the share their parent would have taken if living." If the construction of counsel for the plaintiff is right, it would have been quite unnecessary to use any words of condition. If the gift be limited to brothers and sisters who survive the testator, there is no need to use the words "if living". It would have been sufficient to say: "The children of any being then dead taking their parents' share." Therefore, it seems to be clear that, having regard to the use of the words "the share their parent would have taken if living", the testator is bringing in as objects of his bounty a class of brothers and sisters who predeceased him, because it is only of them that it can be said that they would have taken if living.

The real problem—and it is one of great difficulty—which I have to consider is whether the class of predeceasing brothers and sisters includes those who died before the date of the will. I confine myself entirely to the language of this will, and it seems to me that that problem is answered entirely by the words which the testator has used. This will may mean one of two things. The bequest is made "equally between all my brothers and sisters", and the words "the children of any" may be interpreted as meaning "the children of any of my said or beforementioned brothers and sisters being dead taking their parent's share". If it is so read, then, in my judgment, the answer must be that the children of brothers and sisters dead at the date of the will do not take because the testator cannot have been intending to benefit the brothers or sisters dead at the date of the will. Therefore, reading the words as meaning "the children of any of the beforementioned brothers and sisters", it necessarily follows that no children who could not predicate of themselves that their parent was in the former class can come into the latter. The alternative construction is to read the gift in this way: "... equally between all my brothers and sisters who survive me and the children of any of my brothers and sisters who are dead at the date of distribution taking the share which their parents would have taken if they had been alive." In other words, the word "any" does not refer back to the word 'all' in the former class, but is a new and more comprehensive class, viz., the children of all brothers and sisters regardless of when they die. Which

of those two views is correct? I confess that common sense would seem to direct that the testator probably intended to indicate the latter, for there seems no good sense in cutting out the nephews and nieces merely because their parents were dead before the date of the will, but I am not sure that that is a safe guide to the construction of this will. The words are ambiguous, and the solution not easy. On the whole, I think that the true way of reading the will is: "All my brothers and sisters, the children of any of my said or beforemen-
 A
 tioned brothers and sisters being then dead", and so on, for two reasons. First, I think the word "any" grammatically refers back to the word "all", and, therefore, the class of children who take can only be derived from the earlier class, that is, the class of all the brothers and sisters in existence at the date of the will. That is only a slight indication. There is another indication, admittedly also only slight, to be found in the earlier gift of residue. That
 B
 gift is to three named sisters with a proviso to "the children of any sister being then dead" and so on. The word "any" in that context is used quite plainly in the sense of "said" or "beforementioned". In my judgment, the testator was using the word "any" in that sense throughout this will. Accordingly, the nephews and nieces being children of brothers and sisters dead at the date of the will do not take.

One further point remains to be decided, and that is whether the class of
 C
 nephews and nieces who take, do so as joint tenants or as tenants in common. There is no doubt that the usual rule where there is a gift to a compound class is that double words of severance are required, and it is claimed that there are no double words of severance here. Reliance has been placed on the decision of SIMONDS, J., in *Re Froy* (8). The learned judge considers a number
 D
 of cases, and then he says ([1938] Ch. 570):

"I must observe that FRY, J., had *Penny v. Clarke* (9) and *Re Sibley's Trusts* (10) before him when he decided as he did the case of *Crosthwaite v. Dean* (11), and I think I am bound to hold, as he did, that double words of severance are not necessary where you have a gift in shorthand such as he had there, and as I have here. It is not a case in which, a com-
 E
 pound class being the object of the testator's bounty, the testator has gone on to say that the children of children, that is to say, the substitutionary class, are to take between them their parents' share. Where that is said, the testator has defined, and is presumed to have defined completely, what is the nature of the interest which they take. He has said they are to take their parents' share; he has not gone on to use words
 F
 which import they are to take as tenants in common and not as joint tenants."

He goes on to consider the words which he had before him which, as the learned judge pointed out, were really in shorthand. Looking at the words of this will, I cannot come to the conclusion that these words can be described as in shorthand in the manner meant by the learned judge. It is perfectly true
 G
 that there is no direct gift to the children, although the word "taken", I think, imports a gift to them. It would have been perfectly easy for the testator to have said: "Equally between all my brothers and sisters the children of any being then dead taking equally between them the share their parents would have taken." I can find no word of severance here in the gift to the children.
 H
 Accordingly, in my judgment, they take as joint tenants.

Therefore, I shall declare in answer to question one of the summons that a share of the investments representing the sum of £1,000 has fallen into the estate of the testator's deceased sister Naomi Brooke. I shall declare that the class of brothers and sisters of the testator whose children are entitled to participate in the said investments consist of those who were living at the date of his will but predeceased the widow. Finally, I declare that the children

of any brother or sister entitled to a share of the investments take such share as joint tenants.

Order accordingly.

Solicitors: *Light & Fulton* (for the plaintiff); *Robbins, Olivey & Lake* (for the first defendant); *Gardiner & Co.*, agents for *Clabburns & Pollard & Crotch*, Norwich (for the second defendant); *D. J. Smalley* (for the third defendant).

[Reported by R. D. H. OSBORNE, Esq., Barrister-at-Law.]

ROTTERDAMSCH E BANK N.V. AND ANOTHER v. BRITISH OVERSEAS AIRWAYS CORPORATION AND ANOTHER.

B [QUEEN'S BENCH DIVISION (Pilcher, J.), February 6, 9, 18, 1953.]

Carriage by Air—Carriage of goods—Carriage by successive carriers—Negligence of carriers not mentioned in consignment note—Competence of court to entertain action for damages—Carriage by Air Act, 1932 (c. 36), sched. I, art. 28 (1), art. 30 (1).

C In a contract, contained in and evidenced by an air consignment note, for the carriage of goods by air between Amsterdam and Djibouti the first plaintiffs were named as consignors and the second plaintiffs as consignees. The note provided that the goods were to be carried between Amsterdam and Cairo on Mar. 25, 1950, by K.L.M. Dutch airlines by service K.L. 829. From Cairo to Asmara the goods were to be carried on Mar. 28 by British Overseas Airways Corporation (the first defendants), by service B.O. 471, and finally on Mar. 29 the goods were to be carried from Asmara to Djibouti by B.O.A.C. by service B.O. 477. By condition 1 of conditions printed on the back of the consignment note "carrier" included all carriers carrying the goods specified in the consignment note and the agents and representatives of any such carrier. By condition 2 (b) (iii) the carriage was made subject to (inter alia) "applicable time-tables" of the carrier, "which are made part hereof and which may be inspected at any of its offices and at airports from which it operates regular services". Aden Airways, Ltd. (the second defendants), in fact operated services B.O. 471 and 477 on behalf of B.O.A.C., but they were not mentioned in the air consignment note. The goods were carried in accordance with the contract of carriage to Asmara, but, by the negligence of Aden Airways, instead of being transferred to service B.O. 477, they were left on the aircraft operating service B.O. 471 and were flown to Aden where they were stolen by some person or persons unknown. The plaintiffs issued a writ against both B.O.A.C. and Aden Airways claiming damages for (inter alia) negligence and/or breach of contract. On a summons by Aden Airways to set aside, as against them, the writ and all further proceedings on the ground that the court had no jurisdiction,

G HELD: as the time-tables of B.O.A.C. made it clear that the services from Cairo to Asmara and Asmara to Djibouti were to be performed by Aden Airways and as these time-tables were incorporated into the contract of carriage by the conditions set out in the consignment note, the carriage of the goods by Aden Airways remained an international carriage within the terms of the original contract, and as such was subject to the provisions of the Warsaw Convention set out in sched. I to the Carriage by Air Act, 1932; by art. 30 (1) of the convention Aden Airways were to be deemed contracting parties and all the provisions of the convention applied to them in respect of the carriage actually carried out by them; by art. 28 (1) an action for damages could only be brought against a carrier before a court having jurisdiction where the carrier was ordinarily resident, had his principal place of business, or had an establishment by which the contract had

been made, or before the court having jurisdiction at the place of destination; and the effect of this article was to oust the jurisdiction of the English courts to deal with the claim against Aden Airways.

Per curiam: assuming that the doctrine of deviation, as known to maritime law, applies to air carriage, the over-carriage or mis-carriage of the goods to Aden was not a deviation which operated to exclude the provisions of the Warsaw Convention.

FOR THE CARRIAGE BY AIR ACT, 1932, sched. I, arts. 28 and 30, see HALSBURY'S STATUTES, Second Edn., Vol. 2, pp. 74 and 75 respectively.

Case referred to:

- (1) *Cunard S.S. Co. v. Buerger*, [1927] A.C. 1; 96 L.J.K.B. 18; 135 L.T. 494; 41 Digest 489, 3192.

SUMMONS by Aden Airways, Ltd., the second defendants, to set aside, as against them, the writ and all subsequent proceedings in an action for damages, on the ground that the court had no jurisdiction.

On Mar. 22, 1950, the first plaintiffs, as consignors, delivered to K.L.M. airlines in Amsterdam a case containing two thousand gold sovereigns for carriage by air from Amsterdam to Djibouti, in French Somaliland, to be delivered there to consignees, who were the second plaintiffs. The contract of carriage was set out in and evidenced by an air consignment note No. 279638, which note provided that on Mar. 25 the goods were to be carried by K.L.M. from Amsterdam to Cairo by service K.L. 829; that on Mar. 28 they were to be carried by British Overseas Airways Corporation, the first defendants, from Cairo to Asmara by service B.O. 471, and that on Mar. 29 they were to be carried to Djibouti by B.O.A.C. by service B.O. 477. Services B.O. 471 and 477 were operated by Aden Airways, Ltd., the second defendants, but there was no mention of them in the consignment note. The goods were carried to Cairo by K.L.M. and were there transferred to an aircraft belonging to Aden Airways and operating service B.O. 471. On arrival at Asmara, the goods, instead of being transferred to a second aircraft of Aden Airways operating service B.O. 477, were, owing to the negligence of Aden Airways, left in the first aircraft and flown to Aden. There the goods were stolen by some person or persons unknown. The plaintiffs issued a writ claiming from B.O.A.C. and Aden Airways as bailees and/or carriers damages for (inter alia) negligence, breach of duty, breach of contract, "wilful misconduct", and conversion. Leave to serve Aden Airways out of the jurisdiction was given under R.S.C., Ord. 11, r. 1, and Aden Airways entered a conditional appearance.

M. R. E. Kerr for the plaintiffs.

Winn for the defendants.

Cur. adv. vult.

Feb. 18. **PILCHER, J.**, stated the facts and continued: The air consignment note, which constitutes the contract of carriage, was between the K.L.M. company and the first plaintiffs. The carriage as described in the consignment note was, on the face of it, an "international carriage", and thus subject to the provisions of the Carriage by Air Act, 1932, which gives effect to the Warsaw Convention for the unification of certain rules relating to international carriage by air. The convention itself is set out in sched. I to the Act, the French text being the authoritative one. Section 1 of the Act of 1932 provides that the provisions of the convention shall, so far as they relate to the rights and liabilities of carriers, consignors and consignees have the force of law in the United Kingdom in relation to any carriage by air to which the convention applies, irrespective of the nationality of the aircraft performing the carriage. Section 3 provides that Her Majesty may by Order in Council apply the provisions of the Act to any colony. I understand that appropriate action

has been taken under this section to apply the provisions of the Act to the colony of Aden. France and Holland are both signatories to the convention.

One of the principal issues between the parties is whether the goods were, in fact, at the material time, on an "international carriage" and thus subject to the convention. In order to render this judgment intelligible it is necessary that I should first set out the material articles of the convention to which reference was made in argument.

A "1 (1) This convention applies to all international carriage of persons, luggage or goods performed by aircraft for reward. It applies equally to gratuitous carriage by aircraft performed by an air transport undertaking. (2) For the purposes of this convention the expression 'international carriage' means any carriage in which, according to the contract made by the parties, the place of departure and the place of destination, whether or not there be a break in the carriage or a transshipment, are situated either within the territories of two high contracting parties, or within the territory of a single high contracting party, if there is an agreed stopping place within a territory subject to the sovereignty, suzerainty, mandate or authority of another Power, even though that Power is not a party to this convention. A carriage without such an agreed stopping place between territories subject to the sovereignty, suzerainty, mandate or authority of the same high contracting party is not deemed to be international for the purposes of this convention. (3) A carriage to be performed by several successive air carriers is deemed, for the purposes of this convention, to be one undivided carriage, if it has been regarded by the parties as a single operation, whether it had been agreed upon under the form of a single contract or of a series of contracts, and it does not lose its international character merely because one contract or a series of contracts is to be performed entirely within a territory subject to the sovereignty, suzerainty, mandate or authority of the same high contracting party.

E "5 (1) Every carrier of goods has the right to require the consignor to make out and hand over to him a document called an 'air consignment note'; every consignor has the right to require the carrier to accept this document.

F "8 The air consignment note shall contain the following particulars . . . (c) the agreed stopping places, provided that the carrier may reserve the right to alter the stopping places in case of necessity, and that if he exercises that right the alteration shall not have the effect of depriving the carriage of its international character.

"11 (1) The air consignment note is prima facie evidence of the conclusion of the contract, of the receipt of the goods and of the conditions of carriage.

G "18 (1) The carrier is liable for damage sustained in the event of the destruction or loss of, or of damage to, any registered luggage or any goods, if the occurrence which caused the damage so sustained took place during the carriage by air. (2) The carriage by air within the meaning of the preceding paragraph comprises the period during which the luggage or goods are in charge of the carrier, whether in an aerodrome or on board an aircraft, or, in the case of a landing outside an aerodrome, in any place whatsoever.

H "22 . . . (2) In the carriage of registered luggage and of goods, the liability of the carrier is limited to a sum of 250 francs per kilogram, unless the consignor has made, at the time when the package was handed over to the carrier, a special declaration of the value at delivery and has paid a supplementary sum if the case so requires. In that case the carrier will be liable to pay a sum not exceeding the declared sum, unless he

proves that that sum is greater than the actual value to the consignor at delivery.

"23 Any provision tending to relieve the carrier of liability or to fix a lower limit than that which is laid down in this convention shall be null and void, but the nullity of any such provision does not involve the nullity of the whole contract, which shall remain subject to the provisions of this convention.

"25 (1) The carrier shall not be entitled to avail himself of the provisions of this convention which exclude or limit his liability, if the damage is caused by his wilful misconduct or by such default on his part as, in accordance with the law of the court seised of the case, is considered to be equivalent to wilful misconduct. (2) Similarly the carrier shall not be entitled to avail himself of the said provisions, if the damage is caused as aforesaid by any agent of the carrier acting within the scope of his employment.

"28 (1) An action for damages must be brought, at the option of the plaintiff, in the territory of one of the high contracting parties, either before the court having jurisdiction where the carrier is ordinarily resident, or has his principal place of business, or has an establishment by which the contract has been made or before the court having jurisdiction at the place of destination. (2) Questions of procedure shall be governed by the law of the court seised of the case.

"29 (1) The right to damages shall be extinguished if an action is not brought within two years, reckoned from the date of arrival at the destination, or from the date on which the aircraft ought to have arrived, or from the date on which the carriage stopped. (2) The method of calculating the period of limitation shall be determined by the law of the court seised of the case.

"30 (1) In the case of carriage to be performed by various successive carriers and falling within the definition set out in para. (3) of art. 1, each carrier who accepts passengers, luggage or goods is subjected to the rules set out in this convention, and is deemed to be one of the contracting parties to the contract of carriage in so far as the contract deals with that part of the carriage which is performed under his supervision . . . (3) As regards luggage or goods, the passenger or consignor will have a right of action against the first carrier, and the passenger or consignee who is entitled to delivery will have a right of action against the last carrier, and further, each may take action against the carrier who performed the carriage during which the destruction, loss, damage or delay took place. These carriers will be jointly and severally liable to the passenger or to the consignor or consignee.

"32 Any clause contained in the contract and all special agreements entered into before the damage occurred by which the parties purport to infringe the rules laid down by this convention, whether by deciding the law to be applied, or by altering the rules as to jurisdiction, shall be null and void.

"33 Nothing contained in this convention shall prevent the carrier either from refusing to enter into any contract of carriage or from making regulations which do not conflict with the provisions of this convention."

While the contract of carriage made in the air consignment note was, on the face of it, between the first plaintiffs and the K.L.M. company, art. 30 (1) makes it clear that where international air carriage is undertaken by successive carriers, as in this case, each carrier who accepts goods is deemed to be one of the contracting parties to the contract of carriage in so far as the contract deals with that part of the carriage which is performed under his supervision. Accordingly, it would seem on one reading of the air consignment note that British Overseas Airways Corporation are contractually bound under the

terms of the convention to perform their part of the contract of carriage evidenced by the air consignment note, namely, from Cairo to Djibouti. No mention is, however, made in this document of the second defendants, and these defendants, who are a separate legal entity, contend that they are not contractually bound in any fashion and that the portion of the air carriage conducted by them was not subject to the terms of the convention. They point out that the consignment note makes it clear that the British Overseas Airways Corporation undertook the carriage from Cairo to Djibouti and that the whole freight from Cairo to Djibouti was payable to the British Overseas Airways Corporation. They further say that art. 30 (3) gives the consignee a right of action against the last carrier, and they point out that the last carrier named in the consignment note is the British Overseas Airways Corporation and not themselves.

The writ in the action is indorsed in the widest terms and claims against the first and/or second defendants for damages as bailees or carriers for negligence, breach of duty, breach of contract, wilful misconduct, conversion, etc. It was issued on Mar. 20, 1952, and served on the first defendants on the following day just within the limitation period of two years provided by art. 29 of the convention. I was informed by counsel that the plaintiffs were out of time in regard to taking proceedings against the second defendants in the Aden courts.

Counsel for the defendants admitted on behalf of the British Overseas Airways Corporation that they were liable for the limited sum of 250 francs per kilogram on the weight of the goods as provided by art. 22 (2) of the convention. I understand that on this basis the liability of the British Overseas Airways Corporation would be somewhat over £100 on goods admittedly worth about £8,000. One of the issues to be determined between the plaintiffs and British Overseas Airways Corporation on the trial of the action will be whether the loss was due to their "wilful misconduct" under art. 25, in which case they would not be entitled to take advantage of the provisions of art. 22 (2) referred to above. As regards the second defendants, counsel conceded that they were "necessary" parties to the action under R.S.C., Ord. 11, r. 1 (g), and further conceded that, if the courts of this country had jurisdiction to entertain the plaintiffs' claim against them, they were also "proper" parties within that sub-rule. He contended, however, that the terms of the convention, which have the force of law in this country, precluded this or any English court from entertaining a claim against the second defendants in this particular case.

His argument ran along these lines. On the face of the air consignment note (which is the contractual document) there is no contract of carriage between the plaintiffs and the second defendants, so that the plaintiffs cannot sue the second defendants in contract at common law. Article 30 (1) of the convention, which enacts that every carrier who accepts goods for international carriage "... is deemed to be one of the contracting parties to the contract of carriage in so far as the contract deals with that part of the carriage which is performed under his supervision", provides the necessary contractual link between the plaintiffs and the second defendants in respect of that part of the carriage which was in fact performed by the second defendants. He also pointed to the fact that the services B.O. 471, from Cairo to Asmara, and B.O. 477, from Asmara to Djibouti, which are the services specifically provided for in the air consignment note, were services advertised by British Overseas Airways Corporation in their time-table as being operated by Aden Airways, which was a wholly owned subsidiary of British Overseas Airways Corporation, and that, while British Overseas Airways Corporation are described in the portion of the air consignment note devoted to "charges" as being the contemplated carriers from Cairo to Djibouti, this portion of the note is reserved for entries to be made by the carrier alone, whereas a glance at the description of the services which were to be used would inform anyone who looked at the British Overseas

Airways Corporation time-table that the contemplated carriage from Cairo to Asmara and from Asmara to Djibouti was to be performed, not by a British Overseas Airways Corporation aircraft, but by an aircraft operated by Aden Airways. I should here add that opposite the description of the services to be used, there is the note:

"Method of routing—Agreed stopping places; see also time-tables of the carriers and conditions on the reverse hereof."

Counsel for these defendants, accordingly, submitted that these goods were, in fact, lost while being carried on a flight to which all the provisions of the convention applied. He then turned to art. 28 (1), the terms of which I have already set out. He pointed out that under this article, if Aden Airways are to be sued at all, it must be either at Aden where they are admittedly ordinarily resident and have their principal place of business, or at Djibouti which was the contractual place of destination of the goods. He submitted that the effect of this article, which in this country now has the force of law, was to limit the courts in which action could be brought to those set out in the article, and thus, in the circumstances of this case, to oust the jurisdiction of the courts of this country to entertain a claim against the second defendants. There is no doubt that Ord. 11, r. 1, is only procedural in the sense that it deals with the circumstances in which leave may be given to serve a writ or notice of the writ out of the jurisdiction. It is, perhaps, unnecessary to say that the order does not purport to enlarge or restrict the inherent jurisdiction of the courts of this country.

Counsel for the plaintiffs argued that, inasmuch as Aden Airways are nowhere mentioned in the contractual document, namely, the air consignment note, they are not parties to the contract of carriage nor are they deemed to be so under art. 30 (1), because the article only provides that a subsequent carrier shall be deemed to be a party

"... in so far as the contract deals with that part of the carriage which is performed under his supervision."

He points out that the portion of the air consignment note which deals with "charges" provides for carriage from Cairo to Djibouti by British Overseas Airways Corporation, and that British Overseas Airways Corporation were to receive the freight for this portion of the carriage. In my view, the matter must be looked at more broadly. The actual services by which the whole carriage was to be performed are clearly set out in the air consignment note under the heading "Type of service". If these services are read in conjunction with the British Overseas Airways Corporation time-table it must have been clear to all interested parties that, while freight from Cairo to Asmara was to be paid to British Overseas Airways Corporation, this portion of the carriage was being undertaken by British Overseas Airways Corporation's subsidiary Aden Airways Dakota service. The carriage clearly started as an international carriage to be performed by successive carriers as one individual carriage, and I cannot think that when the goods were transferred at Cairo to an Aden Airways plane the carriage ceased to be an international carriage as defined by art. I (2) of the convention and ceased to be subject to the conditions of the convention. What was being done was, in my view, exactly what the plaintiffs contemplated would be done or would have contemplated if they had directed their minds to the matter. I am, accordingly, of opinion that the whole contractual carriage from Amsterdam to Djibouti as evidenced by the air consignment note was on the face of it an international carriage by air and as such subject to the terms of the convention.

In arriving at this conclusion I have been influenced by certain "Conditions" which are printed on the back of the air consignment note:

"(1) As used in this contract 'air waybill' is equivalent to 'air consignment note', 'shipper' is equivalent to 'consignor', 'carriage' is

equivalent to 'transportation', 'carrier' includes the air carrier issuing this air waybill and all air carriers that carry the goods hereunder or perform any other services related to such air carriage. For the purposes of the exemption from and limitation of liability provisions set forth or referred to herein, 'carrier' includes agents, servants or representatives of any such air carrier. Carriage to be performed hereunder by several successive carriers is regarded as a single operation. (2) (a) Carriage hereunder is subject to the rules relating to liability established by the Convention for the Unification of Certain Rules relating to International Carriage by Air, signed at Warsaw, Oct. 12, 1929 (hereinafter called 'the convention'), unless such carriage is not 'international carriage' as defined by the convention: see carrier's tariffs for such definition. (b) To the extent not in conflict with the foregoing, carriage hereunder and other services performed by each carrier are subject to (i) applicable laws (including national laws implementing the convention), government regulations, orders, and requirements, (ii) provisions herein set forth, and (iii) applicable tariffs, rules, regulations and time-tables (but not the times of departure and arrival therein) of such carrier, which are made part hereof and which may be inspected at any of its offices and at airports from which it operates regular services... (5) It is agreed that no time is fixed for the completion of carriage hereunder and that carrier may without notice substitute alternate carriers or aircraft. Carrier assumes no obligation to carry the goods by any specified aircraft or over any particular route or routes or to make connection at any point according to any particular schedule, and carrier is hereby authorised to select, or deviate from the route or routes of shipment, notwithstanding that the same may be stated on the face hereof. The shipper guarantees payment of all charges and advances."

These conditions are presumably valid and form part of the contract of carriage in so far as they do not conflict with the terms of the convention. The definition of "carrier" in Condition 1 strongly supports the view that the second defendants were to be considered as carriers although not mentioned in the air consignment note. Condition 2 (b) (iii) shows that time-tables are to be incorporated as part of the contract of carriage, and the time-table published by British Overseas Airways Corporation makes it clear that the portion of the carriage from Cairo to Djibouti was to be performed by Aden Airways Dakota service. The conditions to which I have referred do not, on their face, appear to conflict with any of the provisions of the convention. If they are to be regarded as incorporated in the contract of carriage, they support the view which I have expressed, namely, that the mere fact that the portion of the carriage from Cairo to Djibouti was performed by Aden Airways does not deprive the carriage of its international character and thus remove it from the scope of the convention. Article 32 of the convention, which I have set out earlier, provides in terms that any clause in the contract of carriage which purports to infringe the rules laid down by the convention, whether by deciding the law to be applied or by altering the rules as to jurisdiction, shall be null and void. This article appears to reinforce the view that art. 28 (1) of the convention, which deals with jurisdiction, was intended to be applied strictly, and I, accordingly, conclude that the effect of art. 28 (1) is to oust the jurisdiction of the courts of this country to entertain a claim by the plaintiffs against the second defendants.

Counsel for the plaintiffs took a further point based on the doctrine of deviation as applied in maritime law. He contended that when the second defendants failed to discharge the goods at Asmara and negligently permitted them to go on to Aden there was a deviation from the contractual voyage. He submitted that this fundamental departure from the contractual voyage entitled the plaintiffs to repudiate the contract of carriage which thus became

deprived of its international character and so no longer subject to the terms of the convention. He contended in substance that wherever the word "carriage" occurred in the convention it must be taken to refer to carriage by the service provided for in the air consignment note, and that, as soon as there was, as in this case, an over-carriage or mis-carriage not provided for in the air consignment note and factually linked with the loss of the goods, the whole nature of the carriage was changed and ceased to be the contractual carriage covered by the convention. For a case of over-carriage by sea which was held to amount to a deviation depriving the carrier of the benefit of exception clauses, see *Cunard S.S. Co. v. Buerger* (1). While I was at one moment attracted by this argument, I do not think that it is sound. While over-carriage or mis-carriage with resulting loss, such as here occurred, might constitute such wilful misconduct as would render the carrier liable for the full value of the goods lost if he is sued in the appropriate jurisdiction, I cannot see anything in the Act or the convention which enables me to say that such over-carriage or mis-carriage of the goods as here occurred deprives the carriage of its international character so as to remove it entirely from the ambit of the convention.

Interesting questions will, no doubt, arise at the trial as to the extent of the liability of British Overseas Airways Corporation on the facts of the case. All I am here concerned with is, however, the issue whether the courts of this country have jurisdiction to entertain a claim of any kind against the second defendants. For the reasons which I have set out above, I am satisfied that the plaintiffs' goods were lost on an international carriage which was subject to the terms of the convention. I am also satisfied that art. 28 (1) of the convention ousts the jurisdiction of the courts of this country to entertain any claim against the second defendants. Even assuming that the doctrine of deviation, as known in maritime law, applies to air carriage, and assuming that the over-carriage or mis-carriage, which here occurred, amounted to an unjustifiable deviation from the contractual voyage, I can find nothing in the Carriage by Air Act, 1932, or the convention, which justifies the conclusion that what occurred in this case served to remove the carriage from the ambit of the convention or to disentitle the second defendants from relying on the provisions of art. 28 (1) of the convention.

I am of opinion that the court has no jurisdiction to entertain the plaintiffs' claim against the second defendants, and I direct that the writ and all subsequent proceedings in the action against the second defendants be set aside. The second defendants will have the costs of the hearing of the summons before me.

Order that writ and all subsequent proceedings be set aside as against second defendants.

Solicitors: *Ince, Roscoe, Wilson & Griggs* (for the plaintiffs); *Beaumont & Son* (for the defendants).

[Reported by MICHAEL MALONEY, ESQ., Barrister-at-Law.]

KLUCINSKI v. KLUCINSKI.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Lord Merriman, P., and Collingwood, J.), February 13, 1953.]

Justices—Husband and wife—Maintenance—Amount of—Earning capacity of husband—Overtime pay.

A On a summons taken out by a wife against her husband under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1949, the husband admitted that he was guilty of adultery and desertion and evidence was given that his average weekly earnings were between £11 8s. and £12 16s. The justices found that his basic wage, excluding overtime pay, was between £9 and £10, and on that basis awarded the wife the sum of £1 10s. a week for her maintenance.

B HELD: in assessing the amount of maintenance justices ought to take into account, not merely the husband's basic wage, but also his earning capacity, and to eliminate from their calculations overtime pay or the capacity to earn it was a misdirection in law.

C AS TO ORDERS FOR MAINTENANCE IN COURTS OF SUMMARY JURISDICTION, see HALSBURY, Hailsham Edn., Vol. 10, p. 840, para. 1342; and FOR CASES, see DIGEST, Replacement Vol. 27, pp. 705-708, Nos. 6729-6755.

APPEAL by the wife against an order of Mansfield borough justices made on Oct. 22, 1952, whereby they awarded her the sum of £1 10s. per week for her maintenance. The wife appealed, inter alia, on the ground of the inadequacy of the award, and this report deals only with that point.

D A. B. Hollis (*Syms* with him) for the wife.
The husband did not appear.

E LORD MERRIMAN, P., stated the facts and continued: The question is whether the £1 10s. for the wife is sufficient. A statement of the wages resulting from the husband's employment in a colliery in the East Midlands Division of the National Coal Board was put in evidence, which shows that, after scaling down the gross wage to the net—that is, by deducting income tax and the National Health contribution—his wages during the period from July to October, 1952, were between £11 8s. and £12 16s. On the face of it, I am bound to say it does not strike me that for an injured wife, a woman who has been treated as this woman has been treated, £1 10s. is a very lavish award.

F The justices explain their award by saying that those figures include considerable earnings in respect of overtime, and that the husband's basic wage is between £9 and £10 a week. That may or may not be so, but I will assume that it is right.

In my opinion, the justices have gone wrong on a matter of principle, and we must make that clear. They say:

G “Experience in dealing with such cases has shown us that, if we base the amount of our order on such figures, the man more often than not stops working overtime, as he feels he has no longer any incentive to do so.”

That is a plain misdirection in law. It is elementary law that, in assessing the amount of maintenance, justices ought to take into account, just as we are bound to do here, not merely the husband's basic wage, but his earning capacity. Therefore, to make a deduction from wages actually earned because a part of those wages represents overtime, on the ground that if that part is taken into account the husband will cease to work overtime, is, in effect, to say: “We will not take any account, not merely of his earning capacity, but of the fact that he has chosen to exercise his capacity to earn”. That must be wrong, and on that account I think it is clearly open to us to interfere with this order. The only question is: What is the best way to do it? [His

LORDSHIP said that it would not be satisfactory to send the case back for a re-hearing of the facts as at Oct. 22, 1952, and that at present there was not sufficient evidence for the court to decide the proper amount to be awarded, and continued:] The obvious solution is to leave the wife, if it proves that she has not sufficient to live on under the order, to apply to the justices for a revision, in which event I hope that they will take note of the view I am expressing, namely, that it is wrong to eliminate from their calculations overtime pay or the capacity to earn it.

COLLINGWOOD, J.: I agree.

Solicitors: *Peacock & Goddard*, agents for *Rothera, Sons & Langham*, Nottingham (for the wife).

[Reported by A. T. HOOLAHAN, Esq., Barrister-at-Law.]

R. v. CAMPBELL. *Ex parte* HOY.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Byrne and Gerrard, JJ.), February 23, 1953.]

Justices—Withdrawal of plea of Guilty—Defendant sentenced—Subsequent application that plea be amended to "Not Guilty".

On Dec. 18, 1952, the respondent was charged with an offence under s. 186 of the Customs Consolidation Act, 1876, and asked for the case to be dealt with summarily. The clerk of the court explained the meaning of the charge and the respondent pleaded Guilty. The magistrate then heard the facts and sentenced the respondent to four months' imprisonment. Later the same day, the magistrate granted an application that the respondent be allowed to change the plea, and directed the case to be heard by another magistrate.

HELD: the magistrate, having heard and determined the case by passing a sentence, was functus officio and had no power to allow the respondent's plea to be changed, and an order would go to prohibit the magistrate from further proceeding in the case save to sign a warrant of commitment.

R. v. Sheridan ([1936] 2 All E.R. 883) and *R. v. Manchester JJ. Ex p. Lever* ([1937] 3 All E.R. 4), applied.

Cases referred to:

- (1) *R. v. Manchester JJ. Ex p. Lever*, [1937] 3 All E.R. 4; [1937] 2 K.B. 96; 106 L.J.K.B. 519; 157 L.T. 68; 101 J.P. 407; Digest Supp.
- (2) *R. v. Sheridan*, [1936] 2 All E.R. 883; [1937] 1 K.B. 223; 106 L.J.K.B. 6; 155 L.T. 207; 100 J.P. 319; Digest Supp.
- (3) *R. v. Miles*, (1890), 24 Q.B.D. 423; 59 L.J.M.C. 56; 62 L.T. 572; 54 J.P. 549; 14 Digest 341, 2594.
- (4) *R. v. Blakemore*, (1948), 33 Cr. App. Rep. 49; 2nd Digest Supp.
- (5) *R. v. West Kent Quarter Sessions Appeal Committee. Ex p. Files*, [1951] 2 All E.R. 728; 115 J.P. 522; 2nd Digest Supp.
- (6) *Jones v. Williams*, (1877), 46 L.J.M.C. 270; 36 L.T. 559; 41 J.P. 614; 33 Digest 357, 669.

MOTION for an order of prohibition against Miss SYBIL CAMPBELL, a metropolitan magistrate, from further proceeding (otherwise than by issuing a committal warrant) in the matter of a charge preferred on Dec. 18, 1952, by the applicant, Sydney Harold Hoy, an investigation officer of Customs and Excise, against the respondent, Rose Lilian Lawford, married woman.

On Dec. 18, 1952, at Tower Bridge Magistrate's Court, the applicant charged the respondent:

"For that she on Dec. 10, 1952, at Pynfolds House, Jamaica Road, S.E. 16, knowingly harboured certain uncustomed goods, to wit, two

hundred and sixty-two pairs of American nylon stockings with intent to defraud Her Majesty of the duties due thereon, contrary to s. 186 of the Customs Consolidation Act, 1876."

The respondent asked for the case to be dealt with by the magistrate. The clerk of the court thereupon read the charge and explained to the respondent that the charge meant that she was in possession of these goods which she well knew had been smuggled, or that she had them well knowing that customs duty had not been paid on them. He asked her if she understood that, and the respondent replied that she did. The clerk asked the respondent if she pleaded Guilty or Not Guilty. She pleaded Guilty, and the magistrate was informed of the facts of the case. The respondent bore a good character, and the magistrate sentenced her to four months' imprisonment. Later the same day a solicitor appeared on behalf of the respondent before the magistrate, said that he was satisfied, as a result of his instructions, that the respondent should not have pleaded Guilty, and applied to the magistrate to amend the plea of Guilty to a plea of Not Guilty. The magistrate granted the application and remanded the respondent on bail until Jan. 7, 1953, so that the case could be heard by another magistrate. On Jan. 7, 1953, the applicant submitted that the case had been heard and determined and that there was no jurisdiction to re-hear it, and the magistrate before whom the case then was adjourned it until Jan. 30, 1953; to enable that submission to be repeated to Miss Campbell. On Jan. 30, 1953, the submission was repeated and Miss Campbell was requested to sign a committal warrant, which she declined to do.

J. P. Ashworth for the applicant.

J. C. Mathew for the respondent.

LORD GODDARD, C.J., stated the facts and continued: It would, perhaps, have been more satisfactory if the magistrate had asked the solicitor why his client desired to withdraw her plea, but, in any case, the court is of opinion that, once the learned magistrate had convicted the respondent she was *functus officio* and had no power to allow the plea to be changed.

This was an offence in respect of which the respondent had the right to go for trial by jury, or to be tried, if she and the prosecution consented, by the magistrate sitting as a court of summary jurisdiction. It is elementary that the magistrate's duties are entirely different in the one case from what they are in the other. If a prisoner elects to go for trial, or the offence is one which must go for trial, or is one in which, until some of it has been heard, the magistrate cannot make up his mind whether he will give the option of going for trial, he sits as an examining justice to take depositions and decide whether there is a *prima facie* case, but, once jurisdiction is assumed to sit as a court of summary jurisdiction to hear and determine the case, the learned magistrate is sitting in exactly the same way as does a judge with a jury.

The respondent having pleaded Guilty, the magistrate proceeded to determine the case by passing sentence. A court of summary jurisdiction is not a court of record where there is a requirement that a minute is to be kept of decisions, but, the case having been heard and determined by the magistrate, there was a conviction, and, there being a conviction, the respondent could never be put on trial again for the same offence. The magistrate, having heard the application by the solicitor, had the respondent brought back, admitted her to bail, and directed that the case should be heard before another magistrate. There is no question, it seems to the court, since *R. v. Manchester JJ. Ex p. Lever* (1), that, if the respondent had been brought before another magistrate, that magistrate could have been prevented from hearing the case by her saying: "I have already been convicted and sentenced". The fact that the magistrate announces in court that there is a conviction amounts to a conviction. That was laid down in this court in *R. v. Sheridan* (2), where as prisoner, having been given the option and

having elected to be tried by the justices, the justices completed the case and announced that they had convicted. Thereupon, the prisoner's record was placed before the justices; they thought it was a case in which their powers of punishment were not adequate and so they purported to recall the conviction and to commit the prisoner for trial. When the case got to quarter sessions the prisoner's counsel pleaded autrefois convict, and it was held that there was no answer to that plea. He had been convicted by a court of competent jurisdiction, namely, the justices who, under the Criminal Justice Act, 1925, s. 24 (1), had power to try the case. The fact that the bench announced that they convicted the prisoner amounted to a conviction. As HUMPHREYS, J., said in *R. v. Manchester JJ. Ex p. Lever* (1) ([1937] 3 All E.R. 7):

"I find it difficult to treat seriously the argument that a statement by magistrates who are a court of competent jurisdiction that a person who has been tried before them is guilty, followed by a statement that he is to pay certain penalties, does not form a conviction, and that there is no conviction unless and until some clerk has made a record of that finding and sentence in a book which the court is required to keep."

If the magistrate announces a conviction, there is a conviction.

It seems to me that, if we give effect to the argument which has been addressed to us by counsel for the respondent and uphold what the magistrate did, many curious circumstances might result. Supposing this matter had come before another magistrate and the solicitor had said to the respondent: "I think we are in difficulties here because Mr. So-and-so, the magistrate, is known to take very serious views in customs cases and his sentences are generally six months. You only got four months before Miss Campbell. You may get six months if somebody else is sitting." Could the solicitor then have made the plea of autrefois convict? If he had done so, I do not see what the answer would have been. Supposing that point had not been taken, but the magistrate had passed a sentence of six months instead of four months, would there have been a remedy for the respondent? I think the court would say that the second conviction was a nullity because she had already been convicted. In *R. v. Miles* (3) CHARLES, J., referred (24 Q.B.D. 438) to

"... the well-established rule at common law that where a person has been convicted for an offence by a court of competent jurisdiction, the conviction is a bar to all further criminal proceedings for the same offence. This rule has been acted on again and again . . ."

In this case, therefore, if the magistrate convicted the respondent on her own confession and passed sentence, the respondent could never be brought before any other court charged with that offence. I think, therefore, that the magistrate, in purporting to remand the respondent on bail so that she might be brought before another magistrate, exceeded her jurisdiction, and that, having pronounced sentence, it was her duty to make out a warrant of commitment. I have a certain sympathy with the view that the learned magistrate took, but we have to apply well-settled principles of law and not make law to fit the hardship of any particular case. So far as the conviction is concerned, it seems to me that the only remedy available to the respondent, if she has any real defence, is to apply for the prerogative of mercy to be exercised.

Having given the fullest consideration to this case, I think that *R. v. Manchester JJ. Ex p. Lever* (1) is binding on this court. It was a different case in some respects, but the ratio decidendi is obviously applicable here, and we cannot depart from it. *R. v. Manchester JJ. Ex p. Lever* (1) and *R. v. Sheridan* (2) prevent us from interfering in this case, and, therefore, the order of prohibition must go.

BYRNE, J.: I have every sympathy with the view taken by the magistrate, but I agree with my Lord that *R. v. Sheridan* (2) and *R. v. Manchester JJ. Ex p. Lever* (1) are conclusive and completely cover the matter which has been argued before this court.

GERRARD, J.: I agree.

Motion allowed.

A Solicitors: *M. G. Whittome* (for the applicant); *Hawker & Wheatley* (for the respondent).

[Reported by F. GUTTMAN, ESQ., Barrister-at-Law.]

B *R. v. WESTMINSTER COMPENSATION APPEAL TRIBUNAL AND ANOTHER. Ex parte ROAD HAULAGE EXECUTIVE.*

[COURT OF APPEAL (Denning and Romer, L.JJ.), February 10, 11, 12, 23, 1953.]

British Transport Commission—Transferred undertaking—Compensation to discharged employee—"Right to payment of compensation"—Right to damages for wrongful dismissal—"Existing officer or servant"—Transferred Undertakings (Compensation to Employees) Regulations, 1950 (S.I., 1950, No. 1083), sched. II, para. 4 (1) (i).

C A "right to the payment of compensation" under the Transferred Undertakings (Compensation to Employees) Regulations, 1950, sched. II, para. 4 (1) (i), does not include a right to damages for wrongful dismissal.

D The respondent was, under a service agreement due to expire on Feb. 28, 1950, the managing director of a company which operated certain road transport undertakings. On Apr. 12, 1949, the undertakings of the company were acquired by the Road Haulage Executive, and the respondent's employment was thereupon terminated and he claimed compensation for the unexpired portion of his service agreement. It was admitted that the respondent had a right to claim damages for wrongful dismissal, and on Apr. 7, 1952, the tribunal appointed by the Minister of Labour and National Service assessed compensation on the basis that the respondent had a "right . . . to the payment of compensation" within the meaning of the Transferred Undertakings (Compensation to Employees) Regulations, 1950, sched. II, para. 4 (1) (i). On an appeal from the dismissal by the Divisional Court of a motion for an order of certiorari to quash the award,

F HELD: "compensation" in para. 4 (1) (i) meant compensation in the event of lawful discharge and did not include damages for wrongful dismissal.

Decision of the DIVISIONAL COURT, sub nom. *R. v. Minister of Labour and National Service. Ex p. Road Haulage Executive* ([1952] 2 All E.R. 764), reversed.

G Case referred to:

(1) *R. v. Northumberland Compensation Appeal Tribunal. Ex p. Shaw*, [1952] 1 All E.R. 122; [1952] 1 K.B. 338; 116 J.P. 54.

APPEAL from a judgment of the Divisional Court, dated Oct. 21, 1952, and reported sub nom. *R. v. Minister of Labour and National Service. Ex p. Road Haulage Executive* [1952] 2 All E.R. 764, dismissing a motion for an order of certiorari.

H On Apr. 7, 1952, the second respondent, George James Sell, was awarded by the tribunal appointed by the Minister of Labour and National Service compensation for the loss of emoluments suffered by him when certain transport undertakings of which he was a servant, were acquired by the applicants, the Road Haulage Executive, under the Transport Act, 1947. The amount of compensation was calculated in accordance with the provisions of the

Transferred Undertakings (Compensation to Employees) Regulations, 1950, sched. II, para. 5 (2), on the ground that the respondent had a "right . . . to the payment of compensation in the event of discharge" within the meaning of para. 4 (1) (i) of the schedule. The applicants admitted that the respondent had a right to claim damages for wrongful dismissal, but they contended that such a right was not included in the phrase "compensation in the event of discharge". Their motion for an order of certiorari to quash the award was dismissed by the Divisional Court from whose judgment they appealed.

*Sir Frank Soskice, Q.C., and Southall for the Road Haulage Executive.
Leonard Caplan for the second respondent, George James Sell.*

Cur. adv. vult.

Feb. 23. The following judgments were read.

DENNING, L.J.: This is, we are told, a test case about the compensation payable to men who lose their employment owing to the nationalisation of road transport. It arises in this way. A Mr. Sell was the managing director of a holding company called Hauliers, Ltd., which held all the shares in eight road transport companies, but did not itself operate any road transport. In 1949 the Road Haulage Executive acquired the businesses of the eight subsidiary companies. In consequence, Mr. Sell, the managing director, lost his office on Apr. 12, 1949, but he had a service agreement with Hauliers, Ltd. which gave him security of tenure until Feb. 28, 1950, at a salary and emoluments of £3,250 a year. Hauliers, Ltd. went into voluntary liquidation and Mr. Sell claims compensation for his loss of office. He was not strictly entitled to compensation under the Transport Act, 1947, because Hauliers, Ltd. was not itself carrying on a road transport undertaking, but it was agreed between the parties that he should be treated as if he was a person entitled to compensation. The case has to be treated, therefore, on a hypothetical basis as if Hauliers, Ltd. themselves operated the road transport undertakings of the eight subsidiaries and as if Mr. Sell was the managing director of one large operating company. I am not sure that this hypothetical state of affairs has not been the cause of some of the difficulties that have arisen in this case. At any rate, Mr. Sell claimed compensation for the unexpired portion of his service agreement, that is the 10½ months from Apr. 12, 1949, to Feb. 28, 1950. The British Transport Commission, who are the compensating authority, decided that compensation should only be payable for six months at most. Mr. Sell appealed to the compensation appeal tribunal who decided that it should be payable for the 10½ months as claimed. The Road Haulage Executive then applied to the High Court for an order of certiorari to quash the award of the tribunal on the ground that it contained an error of law on the face of it: *R. v. Northumberland Compensation Appeal Tribunal. Ex p. Shaw* (1). The Divisional Court found that there was no error and refused to quash the award. The Road Haulage Executive now appeal to this court.

The real question involved in this appeal is what is the proper basis of assessing compensation? The Transferred Undertakings (Compensation to Employees) Regulations, 1950, sched. II, para. 4 (1), lay down three scales. Mr. Sell says he is entitled to compensation on the second scale; the Road Haulage Executive say he is entitled to compensation on the third scale. In order to make these scales intelligible, I must describe the way in which the regulations work. When the road haulage system was nationalised, the British Transport Commission took over the contracts which the hauliers had made for the purpose of carrying on their undertakings. These contracts included all the contracts for personal service which the hauliers had made with the men who worked in the business including all the working staff from the managing director at the top to the lorry drivers and garage hands at the bottom. The commission could not be expected to give every man precisely the same work as he had

A done before, but they had to give him work which was reasonably comparable to it; the commission were to select the work and the man had no choice but to accept it, provided, of course, that it was reasonably comparable to what he had done previously. It sometimes happened that the commission had no such work available for a man and they could then dispense with his services, but, if they did so, they had to pay him compensation. In dispensing with his services, they had either to give him the proper notice required by his contract or pay him damages, but, even if they did give him proper notice, they still had to pay him compensation for his loss of employment.

B The Minister of Transport made regulations under the Transport Act, 1947, s. 101 (1) and (3), which divide the men into three categories: The first category (no one now suggests that Mr. Sell was in this category) consists of those men who, under their previous employment, in the event of discharge, had a
C “(i) . . . right or expectation under customary practice to the payment of compensation . . .” this compensation being payable “until the normal maximum retiring age” of sixty-five. If a man in this category be discharged by the commission he is entitled to be compensated with an annual sum until he reaches sixty-five, the amount depending on his length of service, but not more than two-thirds of his current emoluments. The second category (the one in which Mr. Sell claims to be) consists of those men who, under their previous employment, had, in the event of discharge, a “(ii) . . . right or expectation under customary practice to the payment of compensation . . .” This category differs from the first in that, instead of the compensation being payable until normal maximum retiring age, it is payable “otherwise than until normal maximum retiring age”. If a man in this category be discharged
D by the commission, he is entitled to be compensated with a weekly sum for an indefinite period, not less, however, than thirteen weeks and not after he reaches the age of sixty-five. The amount is not to be more than two-thirds of his weekly wages and payment is to stop when he “ceases to suffer loss of emoluments”. The third category (the one which the Road Haulage Executive says applies to Mr. Sell) consists of those men who had no such right or
E expectation as those in the first two categories. If a man in this category be discharged by the commission, he is entitled to be compensated with a weekly sum for a period of not less than thirteen weeks and not more than twenty-six weeks, the actual period depending on his age and length of service. The amount is not to be more than two-thirds of his weekly wages.

F We are not here concerned with the amount of compensation. I can see that that will involve some difficult questions for somebody. We are concerned only with placing the men in their appropriate categories. The first category gives rise to no difficulty. It applies only to those men who, under their previous employment, had they been discharged before reaching the age of sixty-five would have received compensation until they reached that age. “Compensation” in this connection obviously means a periodic sum payable, every week,
G month, or year, as the case may be, until the man reaches sixty-five. It does not include a right to damages at law for wrongful dismissal, because that is never payable “until normal maximum retiring age”. The second category gives rise to the question in this case. Counsel on behalf of the Road Haulage Executive says that it includes only those men who, under their previous
H employment, in the event of discharge, would have received a definite or ascertainable sum by way of compensation for loss of office or employment, such sum being payable either in a lump sum, or in periodic instalments until some age short of sixty-five years. But counsel on behalf of Mr. Sell says that it includes all those men who under their previous employment, in the event of discharge without notice, would have had a right at law to damages for wrongful dismissal. In short, counsel for Mr. Sell says that “compensation in the event of discharge” includes damages for wrongful dismissal whereas

counsel for the Road Haulage Executive says it includes only a definite or ascertainable sum or sums.

I feel compelled to reject the contention of counsel for Mr. Sell for the simple reason that, if it were right, every man would come into the first or second categories and no one into the third category at all. I say this because the regulations themselves apply only to men who have been continuously engaged from Jan. 1, 1940, in whole-time service for a road haulier. In order to be "whole-time service" the employment must have been such that the man was "required to devote on the average not less than thirty hours per week" to his work. Every one of the men so engaged would be entitled to reasonable notice, which would be at least a week's notice; and, in the event of discharge without notice, he would be entitled to damages for wrongful dismissal. Every one of them would, therefore, in the contention of counsel for Mr. Sell, have a right "to the payment of compensation in the event of discharge" and would come into the first or second category. That cannot be right because it gives no content to the third category at all. In order to give it any meaning, it must consist of all those men who, under their previous employment, in the event of discharge, would have had no right to be paid any compensation (i.e., a definite or ascertainable sum or sums) but only at most to damages for wrongful dismissal. Another reason why I reject the contention is because the regulations themselves show that "compensation" does not include a right to damages for wrongful dismissal. In assessing compensation, the compensating authority is directed to have regard, in para. 4 (1) (i), to a right to "compensation in the event of discharge", and in para. 4 (1) (ii), to the

"conditions upon which he held his appointment, including in particular its security of tenure, whether by law or by practice".

A right to damages for wrongful dismissal clearly comes under para. 4 (1) (ii) and not para. 4 (1) (i); in other words it is not "compensation". Again, in para. 17 it is provided that there shall be set-off against the compensation "any payment for breach of contract" arising out of any service agreement or contract. That shows that payments for breach of contract are not regarded as "compensation". Finally, in the first category of men, "compensation" clearly does not include damages for breach of contract.

Counsel for Mr. Sell said that injustice would result if we adopted any view other than that for which he contended, but I cannot see this. He admits that there would be no injustice in the case of men whose contracts of service are taken over by the commission. If such a man is given proper notice, he has, of course, no claim to damages, but he gets compensation. If he is not given proper notice, he gets damages or compensation, whichever is the greater. Counsel urged, however, that there would be injustice in the case of a man whose contract of service was not taken over by the commission. I find it difficult to visualise such a case. I should have thought that, in the case of every whole-time man, there would always be some work which was reasonably comparable to what he had done before, and that the commission would be bound to take him over and provide it for him under s. 45 (3) (f) of the Transport Act, 1947. The only men whom I can visualise as not being taken over are those who are engaged by a composite company partly in the haulage business and partly in some other business. Their contracts of personal service might not vest in the commission because the terms or subject-matter might make it impossible for them to have effect with the commission (see the opening words of s. 45 (3)). But in that case the contracts would remain in force with the composite company. They would not be frustrated, and if a man were dismissed in breach of his contract, he would have an action for damages against the composite company. He would not, therefore, suffer injustice. But if there were any cases where injustice might be done (and I can at present

see none) I think they are so few that we ought not to allow them to affect our judgment as to the true construction of the regulations.

A My conclusion is, therefore, that "compensation in the event of discharge" means compensation in the event of lawful discharge and does not include damages for wrongful dismissal. I realise, of course, that in this particular case Mr. Sell may not have a claim to damages either against the commission or against Hauliers, Ltd., but that is because this case is being treated on a hypothetical basis. It has been argued on the assumption that Hauliers, Ltd. were engaged in the road haulage business themselves and that Mr. Sell was the managing director of that business. Had that been true, the contract with Mr. Sell would have been taken over by the commission and he would have had a right to damages against them. The reason why this contract has not, in fact, been taken over is that Hauliers, Ltd. is only a holding company which is not itself engaged in the road haulage business. Looking at the decision of the tribunal in the light of this regulation, I think that there is an error of law on the face of it. The tribunal say that the appellant Mr. Sell

B

C

"had the legal right of a servant whose service agreement is prematurely determined by a voluntary liquidation, namely, in the absence of special circumstances, to damages for breach of contract. Such damages are comprehended in the term 'compensation' in those regulations."

D I think that is erroneous. I am of opinion that damages for breach of contract are not comprehended in the term "compensation", and that Mr. Sell is not entitled to compensation on the second, but only on the third, scale. I need hardly say that I differ from the Divisional Court with much hesitation, but I gather that the case was much more fully argued before us than it was before that court. Indeed, the reasoning of that court contains no reference to the argument which has found favour with us. I think, therefore, the appeal should be allowed, and the award of the tribunal quashed.

E

F

G

ROMER, L.J.: The question at issue on this appeal is whether the phrase "any right . . . to the payment of compensation in the event of discharge" in para. 4 (1) of sched. II to the Transferred Undertakings (Compensation to Employees) Regulations, 1950, is referable only to a right to compensation contractually payable to an employee when his employment is lawfully determined or whether it includes also his inchoate right to damages in the event of his being wrongfully dismissed. This question appears to me to be purely one of construction of the regulations in question, read, as they must be, in the light of the Transport Act, 1947. I find no assistance in the solution of this problem from previous cases in which the courts have been called on to construe the word "compensation"; suffice it to say that in some contexts it has been held to include damages, whilst in others it has been held not to include them, and that none of the contexts was comparable to that in which the word appears in the present case.

H

Counsel for the appellants, in his argument before us, drew our attention to a very material fact which does not seem to have been emphasised before the Divisional Court. Mr. Sell's claim to compensation was (or has been treated as being) that of an "existing officer or servant" who had, in consequence of the transfer to the commission of a haulage undertaking by a notice of acquisition, suffered direct pecuniary loss by reason of the commission dispensing with his services (reg. 3); and it is, indeed, only to "existing officers or servants" that para. 4 of sched. II is applicable at all. By virtue of reg. 1, no employee of a haulage undertaking could qualify as an "existing officer or servant" unless he had been employed since Jan. 1, 1940, in employment to which he was required to devote on the average not less than thirty hours per week during which he was not at liberty to undertake other work for remuneration. It appears to me to be of the highest importance to bear in mind that it is

only officers or servants who possess these qualifications who are entitled to an award under para. 4. This paragraph divides such officers and servants into two categories, viz., those who had any right or expectation under customary practice to the payment of compensation in the event of discharge and those who had not, and the award in favour of members of the first of these categories varies according to whether their right or expectation is to the payment of compensation until normal maximum retiring age, on the one hand, or otherwise than until normal maximum retiring age, on the other. How, then, do these various provisions fit in with the conception presented by the respondent that the "right" referred to in para. 4 includes the right of the officers and servants in question to receive payment of compensation in the event of wrongful dismissal?

In my judgment, it is difficult, if not impossible, to reconcile the provisions with any such idea. Having regard to the definition of "whole-time service" in reg. 1 (3), every officer and servant capable of qualifying for an award was necessarily employed under a contract of service which could only lawfully be determined by the employers' giving at least one week's notice of discharge. Every one of such officers and servants, accordingly, had, during the subsistence of his contract, an inchoate right to damages in the event of his dismissal without notice. On this view, para. 4 of sched. II was, on the respondent's contention, attributing to some only of the officers and servants the possession of a right which was, in fact, enjoyed by all, and, if it was enjoyed by all, no effect could, apparently, be given to para. 4 (2) (ii) or to its satellite para. 5 (3). Counsel for the respondent sought to evade this result by arguing that these latter provisions were introduced to sweep up any contracts of a special character under which employees, while satisfying the "whole time service" requirement, could yet be summarily discharged without any right to damages. He was unable, however, to give any satisfactory illustration of such a contract and I am unable to accept the argument. Assuming that the word "discharge" may in general include both lawful discharge and unlawful dismissal, full effect can be given to the whole of para. 4 only by confining the scope of the word as therein used to lawful discharge excluding wrongful dismissal, and the fact that the wider construction renders, as, in my opinion, it does render, nugatory and ineffective the provisions of para. 4 (1) (ii) and para. 5 (3) of sched. II affords, in my judgment, a very sufficient reason for rejecting it. It is further to be observed, as my Lord has pointed out, that the word "right" in para. 4 (2) (i) (a) cannot, on any reasonable view, include a right to damages.

For the above reasons, even if they stood alone, I should be disposed to conclude that the right to compensation envisaged by para. 4 means a contractual right and nothing else. The matter does not, however, rest there. It is provided by para. 17 of sched. II that

"There shall be set off against the interim compensation payment or the compensation award made to a claimant any payments for breach of contract to which he may be entitled arising out of any service agreement or contract."

It is clear, I think, that the payments for breach of contract to which this paragraph refers are, or at all events include, sums paid or recovered by way of damages by an officer or servant for wrongful dismissal. If so, certain conclusions necessarily follow. The first is that the regulations were visualising that the operation of the Transport Act, 1947, might in some cases give rise to claims by employees for the wrongful determination of their service contracts. The second is that the existence of such claims was regarded as an element wholly apart from the considerations specified and enumerated in para. 4 (1) (i) to (vii) as being relevant to the question whether an award should be made at all, and, if so, of its amount. The third is that a clear distinction was being

drawn in para. 17 between compensation awarded under the Act and regulations, on the one hand, and damages paid for the wrongful determination of service contracts, on the other. These factors strongly confirm, as I think, that a right to damages for wrongful dismissal was altogether outside the purview of the "right . . . to the payment of compensation in the event of discharge" referred to in para. 4. If a man's contract were determined without notice, then his right to compensation from the commission or (possibly) from his former employers was left unaffected by the regulations, subject to the stipulation that if, whether by action or negotiation, he received a payment in satisfaction of his claim, the payment was to be brought into account in quantifying an award made to him under the Act. But to say that such right as he might have to a payment of this nature is included in the rights referred to in para. 4 is, in my opinion, to adopt a view which is irreconcilable with the provisions of that paragraph, when taken as a whole, and is in conflict with the language of para. 17.

For the above reasons, I am unable to arrive at the same conclusion on this matter as that which commended itself to the Divisional Court. Counsel for Mr. Sell urged on us that if the appellant's argument be accepted manifest hardships would result. He instanced the case of a manager who lost his job without notice by reason of his contract of service not being taken over by the commission. Such a man, it was said, would have no remedy against the commission nor could he proceed against his former employer who, having lost his undertaking through force majeure, would be exonerated by the "frustration" principle from being answerable to his manager. Unless, so it was argued, his right to damages was provided for by para. 4, he would lose it altogether and merely receive the lowest form of compensation under the regulations. It may be that such a case might possibly arise. None, however, so far as I know, has occurred up to now and I venture to think that it is unlikely that one will arise, principally because it is very difficult to think of a service contract the terms or subject-matter of which "make it impossible that it should have effect as modified in the manner provided by" s. 45 (3) of the Act and would yet result in the servant losing his employment if his contract were not taken over by the commission. Counsel also suggested further hardships and anomalies which would arise if we were to accede to the appellant's argument. I do not propose to consider them in detail for, assuming their existence, I think that there is a twofold answer to any submission founded on them. In the first place, if the language in which the legislature has expressed itself leads with reasonable certainty to a particular result, that result cannot be displaced merely because it gives rise to anomalies, and, secondly, if anomalies or hardships emerge which call for redress I know of no reason why the Minister should not, if he thinks proper, provide for them by issuing further regulations under s. 101 of the Act. For the above reasons and those stated by my Lord I agree that this appeal should be allowed, and the award of the tribunal quashed.

Appeal allowed.

Solicitors: *M. H. B. Gilmour* (for the Road Haulage Executive); *Carr, Sandelson & Co.* (for the second respondent).

[*Reported by MISS PHILIPPA PRICE, Barrister-at-Law.*]

WINGROVE v. PRESTIGE & CO., LTD.

[QUEEN'S BENCH DIVISION (Hilbery, J.), January 26, 27, 28, 29, 1953.]

Building—Building regulations—Safe means of access to work—Injury to person not working on scaffold—Building (Safety, Health and Welfare) Regulations, 1948 (S.I., 1948, No. 1145), reg. 4 (i), reg. 5.

By the Building (Safety, Health and Welfare) Regulations, 1948, reg. 4 (i): " . . . it shall be the duty of every contractor and employer of workmen who erects or alters any scaffold to comply with such of the requirements of regs. 5-30 as relate to the erection or alteration of scaffolds having regard to the purpose or purposes for which the scaffold is designed at the time of erection or alteration . . ." By reg. 5 (which applies primarily to scaffolds): " . . . sufficient safe means of access shall so far as is reasonably practicable be provided to every place at which any person has at any time to work."

The plaintiff was employed as clerk of works by a county council to supervise work by the defendant contractors who were engaged by the council to build a primary school. An opening between two walls was used as a means of access to the site. Across that opening passed two horizontal scaffold poles at a height of five feet seven-and-a-half inches from the ground. The poles were part of scaffolding which had been in position with the knowledge of the plaintiff for two-three months. On passing through the opening on one occasion the plaintiff struck his head, injured his eye, and became blind. In an action for damages for, inter alia, breach of the statutory duty imposed on the defendants by regs. 4 (1) and 5 of the regulations of 1948,

Held: the regulations, which must be construed strictly, were designed primarily to safeguard from danger a person using the scaffold for the purpose for which it was erected; reg. 5 imposed a duty on the erector of a scaffold only to provide sufficient safe means of access to the scaffolds themselves and could not be construed as imposing a general duty not to restrict or interfere with safe means of access to or from work on a whole building site; and, therefore, the defendants were not in breach of their duty to the plaintiff under regs. 4 and 5.

AS TO DUTY OF OCCUPIERS OF PREMISES TO INVITEES, see HALSBURY, Hailsham Edn., Vol. 23, pp. 604-609, paras. 853-858; and FOR CASES, see DIGEST, Vol. 36, pp. 35-45, Nos. 208-281.

FOR THE BUILDING (SAFETY, HEALTH AND WELFARE) REGULATIONS, 1948, reg. 4 and reg. 5, see HALSBURY'S STATUTORY INSTRUMENTS, Vol. 8, pp. 212, 213.

Cases referred to:

- (1) *London Graving Dock Co., Ltd. v. Horton*, [1951] 2 All E.R. 1; [1951] A.C. 737; 2nd Digest Supp.
- (2) *Indermaur v. Dames*, (1866), L.R. 1 C.P. 274; 35 L.J.C.P. 184; 14 L.T. 484; *affd.* Ex. Ch., (1867), L.R. 2 C.P. 311; 36 L.J.C.P. 181; 16 L.T. 293; 31 J.P. 390; 36 Digest 35, 208.

ACTION by the plaintiff, Henry James Wingrove, claiming from the defendants damages for personal injuries.

The plaintiff, who had been blind in one eye since 1912 and had had fifty years' experience of the building trade, was employed by the Middlesex County Council as clerk of works to supervise the defendants' work as building contractors in connection with the erection of a primary school at Weald Rise, Harrow.

At the south side of the site there was an opening nine feet nine inches wide between the wall of one of the school buildings and the wall of the playground. The opening was made narrower by scaffolding which had been erected by

A the defendants alongside the walls and two horizontal bridle or ledger poles crossed the opening between the two scaffolds at a height of five feet seven and a half inches from the ground. The scaffolds had originally been erected by the defendants to facilitate the building of the walls, but after that work had been done the scaffolds had been left in position to provide platforms for the building of a pier from the playground wall and for the placing of roof girders. During the course of the building the opening between the two walls had been used as a means of access to and exit from the site. On June 29, 1950, the scaffolds and the horizontal poles across the opening had been in position for between two and three months. The plaintiff knew this, but for six or seven weeks he had been supervising work at the north side of the site and during that time had had little occasion to visit the south side. On or about June 26, B however, the defendants' workmen were moved to work on the southern part of the site. On June 29, at about 10 a.m., the plaintiff was inside one of the uncompleted buildings close to the opening between the two walls, and was engaged in inspecting window frames, when he saw two workmen apparently about to leave their work. He hurried to intercept them, and, forgetting there was a horizontal pole across the opening, he knocked hard against it with the C left side of his forehead. As a result, the retina of his eye was detached, and some weeks later he lost the sight of his eye, and became totally blind.

Bassett, Q.C., and W. G. Wingate for the plaintiff.

Berryman, Q.C., Marven Everett, Q.C., and Tudor Evans for the defendants.

D **HILBERY, J.**, stated the facts and, following the rules laid down in *London Graving Dock Co., Ltd. v. Horton* (1), held that the defendants, as inviters, were not in breach of their common law duty of care to the plaintiff as an invitee, as the horizontal scaffold pole was not an unusual danger and the plaintiff had full knowledge of its position, and continued: I now turn to the claim under the Building (Safety, Health and Welfare) Regulations, 1948. E There is a complaint that there was a failure to comply with reg. 5, enforceable, it is said, against the defendant company by virtue of reg. 4 of the regulations. This is a matter of construction of the regulations and by no means an easy one, although I think that what emerges eventually is plain. It is right to say that in these regulations there is a definition regulation (reg. 3) and a scaffold is there said to mean:

F " . . . any temporary^a structure on or from which persons perform work in connection with an operation to which these regulations apply, and any temporary structure which enables persons to obtain access to or which enables materials to be taken to any place at which such work is performed, and includes any working platform, gangway, run, ladder or step-ladder (other than an independent ladder or step-ladder which does G not form part of such a structure) together with any guard-rail, toe-board or other safeguards and all fixings, but does not include a lifting appliance or a structure used merely to support such an appliance or to support other machinery or plant."

Regulation 4 is headed "Obligations under regulations". It reads:

I "It shall be the duty of every contractor and employer of workmen who is undertaking any of the operations to which these regulations apply (i) to comply with such of the requirements of regs. 5-30 . . . as affect any workman employed by him . . ."

It is conceded, as it is bound to be conceded, that the plaintiff, not being employed by the defendants, was not a "workman employed by" the defendants who would be affected by a non-compliance by the defendants with the requirements of

regs. 5-30 under this provision. The plaintiff relies on the further words of reg. 4, which are as follows:

" . . . it shall be the duty of every contractor and employer of workmen who erects or alters any scaffold to comply with such of the requirements of regs. 5-30 as relate to the erection or alteration of scaffolds having regard to the purpose or purposes for which the scaffold is designed at the time of erection or alteration . . . "

It is said that those words, being in the form they are and not limited in a way which would confine their operation to the situation as it would exist between a contractor and his servant, give a right, as against a contractor who erects or alters a scaffold, to any person who suffers through a non-compliance with any of regs. 5-30.

Regulation 5 reads in this way:

" Suitable and sufficient scaffolds shall be provided for all work that cannot safely be done on or from the ground or from part of the building, or from part of a permanent structure or from a ladder or other available means of support, and sufficient safe means of access shall so far as is reasonably practicable be provided to every place at which any person has at any time to work. "

Reliance, for the plaintiff's case, was put on the last words of that regulation, and it is said that the defendants, in erecting this scaffold, broke that regulation in so far as it requires that

" sufficient safe means of access shall so far as is reasonably practicable be provided to every place at which any person has at any time to work. "

Counsel for the plaintiff submitted that those words have to be connected with the subject-matter of regs. 5-30, particularly with regard to the erection or alteration which is dealt with in the first part of reg. 5, that is to say, the scaffold must not be erected at a point where it is sited so as to interfere with a safe means of access.

I find myself quite unable to give that construction to these regulations as they are worded. In the first place, it appears to me that the words relied on in reg. 4 indicate the limit, and, indeed, define the limit, of the general duty imposed on the person erecting or altering a scaffold, and it is expressly said there:

" . . . it shall be the duty of every contractor and employer of workmen who erects or alters any scaffold to comply with such of the requirements of regs. 5-30 as relate to the erection or alteration of scaffolds having regard to the purpose or purposes for which the scaffold is designed . . . "

Regulations 5-30 are designed to protect from danger so far as possible a man who is using a scaffold, and in so far as reg. 5 says

" . . . and sufficient safe means of access shall so far as is reasonably practicable be provided to every place at which any person has at any time to work ",

it either means, it seems to me, a safe means of access to a place where men have to work on the scaffold or else it has no relation to the purpose or purposes for which the scaffold is erected or designed. The duty owed by the erector of the scaffold is to comply with such of the requirements of regs. 5-30 as relate to the erection or alteration of scaffolds having regard to the purpose or purposes for which the scaffold is designed. Those words cannot be intended to put on a contractor who merely erects a scaffold on a site, which may be very extensive with many places where there have to be means of access to the work, the duty to provide safe means of access to every form of work at every part of that site. He is there to construct a scaffold, and to construct a scaffold which shall comply

with the regulations having regard to the purpose for which it is being erected. That is his positive duty. When it is said, if I may put it shortly, that he must site the scaffold so that he does not interfere with the means of access or obstruct the means of access, I call attention to the fact that these latter words of reg. 5 impose a positive duty. They are mandatory—"...sufficient safe means of access shall so far as is reasonably practicable be provided . . ." Those words

A safe means of access. The provision of a safe means of access is positive; the interference with what is a safe means and has been provided as a safe means is an act, and to forbid the doing of that is to forbid an interference with what is already provided. But these words do not do that. That may seem to be a nice point, but one is trying to discover what these words are really intended to mean and what is the extent of the duty which they are intended to impose.

B Lastly, they are words which are embedded in and part of regulations which in detail deal with the construction of a scaffold. If they had been intended to put on the builder of a scaffold on any site the duty to provide safe means of access to work quite apart from the scaffold, but adjacent to the scaffold, or in any way leading up to the scaffold, then s. 26 (1) of the Factories Act, 1937, is a model of how it could have been done. That sub-section provides:

C "There shall, so far as is reasonably practicable, be provided and maintained safe means of access to every place at which any person has at any time to work."

If this regulation had been intended to extend the duty placed on a contractor erecting a scaffold in the way that counsel for the plaintiff has argued it should be interpreted, then it could have been said quite simply that the scaffold must be so erected or placed as not to interfere with safe means of access to or from work on the site. The regulation does not say that.

D This is a hard case because of the disastrous consequences to the plaintiff, but I am quite unable to find in the circumstances that the plaintiff can succeed on either branch of the law on which reliance has been placed. If it had been

E held or could be held that there was a breach of the regulations or a failure on the part of the defendants to discharge the obligations placed on them at common law on the principle of *Indermaur v. Dames* (2), then I should, I am bound to say, have assessed the plaintiff's damages in gross, if it had been found that he had a clear success, at £3,500; but I should have felt, in face of his evidence, that it was impossible to say that he was not at least as much

F at fault in not looking out for what was plain and apparent right on his eye-line and in front of him when he went down that slope, and in not avoiding it as all the other men had done and went on doing, and that in consequence he must take half of the responsibility. I should, therefore, have said, if I had been able to find for him, that he should recover £1,750. As it is, I am bound to give judgment for the defendants.

G *Judgment for defendants.*

Solicitors: *Philcox, Sons & Edwards* (for the plaintiff); *Barlow, Lyde & Gilbert* (for the defendants).

[Reported by MICHAEL MALONEY, Esq., Barrister-at-Law.]

LAWSON *v.* TIGER.

[CHANCERY DIVISION (Vaisey, J.), February 24, 1953.]

Counsel—Fees—Refresher fees—“Total time occupied by trial”—Time spent by counsel with judge in private room and discussing settlement—R.S.C., Ord. 65, r. 27 (48).

In computing “the total time occupied by the trial” for the purposes of R.S.C., Ord. 65, r. 27 (48), the taxing master has a discretion to bring into computation the whole or such part as he thinks fit of the time spent by counsel in interviewing the judge at his invitation in his private room and of the time spent in discussions between themselves during normal court hours to discuss a possible compromise or settlement of the action.

AS TO COSTS ON TAXATION (REFRESHER FEES), see HALSBURY, Hailsham Edn., Vol. 26, pp. 102, 103, paras. 192, 193; and FOR CASES, see DIGEST, Practice, pp. 934-937, Nos. 4740-4760.

Case referred to:

- (1) *Wright v. Bennett*, [1947] 2 All E.R. 61; [1947] K.B. 828; *on appeal* C.A., [1948] 1 All E.R. 410; [1948] 1 K.B. 601; [1948] L.J.R. 1019; 2nd Digest Supp.

ADJOURNED SUMMONS for an order that the objections of the applicant to the taxation of costs be allowed and that the matter be referred back to the taxing master to vary the certificate.

Dare for the applicant, the defendant in the action.

C. Lawson for the respondent, the plaintiff in the action.

VAISEY, J.: This is a point which arises on the question of the computation of refresher fees payable to counsel. The matter depends on the Rules of the Supreme Court, Ord. 65, r. 27 (48), which is in these terms:

“As to refresher fees, when any cause or matter is to be tried or heard upon viva voce evidence in open court, if the total time occupied by the trial whether wholly on the first day or partly on that day and partly on any subsequent day or days shall exceed a period of five hours the taxing master may in respect of the excess allow for every complete period of five hours (if any) and for any less period not included in any such complete period the following fees . . .”

Then the quantum of the refresher fees is set out.

The short point which arises here is whether or not the “total time occupied by the trial” includes, first, any time spent by counsel in interviewing the judge at his invitation in his private room, or, secondly, time spent by counsel during the hours normally occupied by the trial in discussing a possible compromise or settlement of the action. In the present case the taxing master has allowed the refresher fee on a computation of time which included, first, time spent by counsel in discussions, which, I understand, means within the precincts of the court, either in the court itself in the absence of the judge or in the corridor, and also forty minutes in the judge’s chambers, which means his private room. Those two periods of time have been allowed by the taxing master in arriving at the amount properly to be allowed in respect of the refresher fees.

I have been referred to a judgment of DENNING, J., in *Wright v. Bennett* (1). The point decided in that case was whether or not the time actually occupied on each day included the time occupied by the midday adjournment, and it was held that the time occupied by that adjournment should not be brought into computation and that it was not “time occupied by the trial”. In my judgment, that case is really no kind of guide to what I should decide in the present case. It is to be observed that the words of the rule, “when

any cause or matter is to be tried or heard", are in direct contrast to the expression in the next line, "total time occupied by the trial". I think the first-cited words merely indicate the kind of cause or matter to which the rule applies and are calling attention to the fact that normally a case tried without witnesses is not covered by this rule. It must always be remembered that this is a rule which gives the taxing master a discretion—"the taxing master *may* allow" certain fees.

- A What I have to decide is whether the taxing master either had no discretion to allow these fees on the footing on which he did allow them or whether he exercised his discretion wrongly. In my judgment, so long as the judge is in court, either in open court or in his private room with the registrar in attendance waiting in court for the judge's return, and no other case or cause is being tried in the court or receiving the attention of the judge, the whole of the time in ordinary court hours may be said to be occupied by the trial even if some part of that time is not being employed for the purposes of argument or the hearing of evidence of witnesses. I think that this case is far removed from the judgment of DENNING, J., in the case to which I have referred. It seems to me that under this rule the taxing master has a discretion to bring into computation the whole or such part as he thinks proper of the time spent in either of the ways I have mentioned, and, therefore, the objections to the allowance of these fees cannot be sustained and this summons must be dismissed. I think the taxing master proceeded on the right footing and there is no ground whatever to interfere with the conclusion at which he arrived.

Summons dismissed.

- D Solicitors: *Kennedy, Genese & Syson* (for the applicant); *Thornton, Lynne & Lawson* (for the respondent).

[*Reported by MISS PHILIPPA PRICE, Barrister-at-Law.*]

E *Re* No. 39 CARR LANE, ACOMB. STEVENS v. HUTCHINSON AND ANOTHER.

[CHANCERY DIVISION (Upjohn, J.), February 24, 25, 1953.]

Trust and Trustee—Trust for sale of land—Trustees' refusal to sell—Vesting order—"Person interested"—Receiver of trustee's interest appointed by way of equitable execution—Equitable interest in land—Law of Property Act, 1925 (c. 20), s. 30, s. 195 (1), s. 205 (x).

- F A testator, who died on Dec. 15, 1945, devised a freehold dwelling-house to A. and A.'s wife, B., in equal shares as tenants in common, and appointed A. and B. to be his executors. On Sept. 4, 1946, A. and B. assented to the vesting of the house in themselves in fee simple on trust to sell the same, with power to postpone such sale, and to hold the net proceeds of sale on trust for themselves as tenants in common in equal shares. On Jan. 2, 1951, C. obtained judgment against A. for £2,008 and costs, and on Jan. 25, 1951, C. obtained an order for the appointment of himself as receiver by way of equitable execution of A.'s interest in the house, which was occupied by A. and B. as the matrimonial home. C. applied under the Law of Property Act, 1925, s. 30, for an order for the sale of the house.

- H HELD: C., as receiver, had no proprietary right under the trust relating to the house and so was not a "person interested" therein within s. 30 and was not entitled to an order for sale under that section; nor did he have a charge on the property under s. 195 of the Act (under which a judgment operates as an equitable charge on every estate or interest, whether legal or equitable, in all land to which the judgment debtor is entitled) because, notwithstanding the definition of "equitable interests"

in s. 205 (x), an interest in the proceeds of sale of land was not an equitable interest in land; and, therefore, the application must be dismissed.

Dictum of KEKEWICH, J., in *Ideal Bedding Co., Ltd. v. Holland* ([1907] 2 Ch. 169), applied.

AS TO EFFECT OF APPOINTMENT OF A RECEIVER, see HALSBURY, Hailsham Edn., Vol. 14, pp. 146-148, paras. 227-229; and FOR CASES, see DIGEST, Vol. 21, pp. 672, 673, Nos. 2515-2527.

Cases referred to:

- (1) *Ideal Bedding Co., Ltd. v. Holland*, [1907] 2 Ch. 157; 76 L.J.Ch. 441; 96 L.T. 774; 39 Digest 63, 730.
- (2) *Flegg v. Prentis*, [1892] 2 Ch. 428; 61 L.J.Ch. 705; 67 L.T. 107; 21 Digest 673, 2524.
- (3) *Re Potts. Ex p. Taylor*, [1893] 1 Q.B. 648; 62 L.J.Q.B. 392; 69 L.T. 74; 21 Digest 671, 2508.
- (4) *Tyrrell v. Painton*, [1895] 1 Q.B. 202; 64 L.J.P. 33; 71 L.T. 687; 21 Digest 561, 1378.
- (5) *Re Anglesey (Marquis)*, [1903] 2 Ch. 727; 72 L.J.Ch. 782; 89 L.T. 584; 21 Digest 657, 2356.
- (6) *Levasseur v. Mason & Barry*, [1891] 2 Q.B. 73; 60 L.J.Q.B. 659; 64 L.T. 761; 21 Digest 664, 2449.
- (7) *Thomas v. Cross*, (1865), 2 Drew & Sm. 423; 34 L.J.Ch. 580; 12 L.T. 293; 62 E.R. 682; 21 Digest 661, 2416.

ADJOURNED SUMMONS for an order pursuant to the Law of Property Act, 1925, s. 30, directing the defendants to sell the freehold property, No. 39 Carr Lane, Acomb, York, with vacant possession on such terms and in such manner as the court should think fit.

K. J. T. Elphinstone for the plaintiff, the judgment creditor.

M. J. Albery for the second defendant, the wife, one of the trustees for sale of the property.

The first defendant, the husband and the second trustee, did not appear.

UPJOHN, J.: The plaintiff is a judgment creditor of the first defendant. He obtained judgment in the King's Bench Division of the High Court on Jan. 2, 1951, against the first defendant for £2,008 17s. 3d. and £9 16s. costs. On Jan. 3, 1951, he sued out a writ of fieri facias and recovered under that £189 11s. 10d., so that there remains due to the plaintiff as judgment creditor over £1,800. On Jan. 25, 1951, the plaintiff obtained an order for the appointment of himself as receiver of the male defendant's interest in the property, 39 Carr Lane, i.e., an order appointing a receiver by way of equitable execution, as it is usually called.

The property in question was given to the two defendants by the will, dated May 18, 1944, of the first defendant's father, and he gave it to them as trustees on trust for themselves in equal shares as tenants in common. On Dec. 15, 1945, the father died, and on Sept. 4, 1946, the defendants assented to the vesting of the property in themselves

"for an estate in fee simple upon trust to sell the same with power to postpone the sale thereof and to hold the net proceeds of sale and the net income till sale in trust for ourselves as tenants in common in equal shares."

The plaintiff claims to be entitled to an order for sale of the property, which is in the occupation of the second defendant and, as I gather from the evidence, from time to time of her husband, the first defendant. The plaintiff says that he is a person "interested" within the Law of Property Act, 1925, s. 30, which provides:

"If the trustees for sale refuse to sell or to exercise any of the powers

conferred by either of the last two sections, or any requisite consent cannot be obtained, any person interested may apply to the court for a vesting or other order for giving effect to the proposed transaction or for an order directing the trustees for sale to give effect thereto, and the court may make such order as it thinks fit."

A Counsel puts his case in two ways. First, he says that, the plaintiff having been appointed receiver by the order I have already mentioned, although, admittedly, it does not create a charge on the property, it makes the plaintiff a person interested for the purposes of s. 30 and, therefore, gives him a title to come before this court.

B The position of a receiver appointed by way of equitable execution is well set out in *Ideal Bedding Co., Ltd. v. Holland* (1) where KEKEWICH, J., said ([1907] 2 Ch. 169):

C "It was established in *Flegg v. Prentis* (2) that no declaration of charge can be made on a judgment debtor's reversionary personalty in favour of a judgment creditor who has obtained such an appointment [i.e., of a receiver by way of equitable execution] and it follows that the judgment creditor has no right to have his debt raised by sale or mortgage of that subjected to the receiver. And it was decided in *Re Potts. Ex p. Taylor* (3) that the order appointing a receiver does not make the judgment creditor a secured creditor within the meaning of the Bankruptcy Act, 1883. What then is the utility of such appointment indicated by LINDLEY, L.J., in *Tyrrell v. Painton* (4)? The lord justice, to some extent, answers the question himself. He says ([1895] 1 Q.B. 206): 'The appointment of a receiver does not create a charge, but it operates as an injunction to restrain the defendant from himself receiving the proceeds of sale'. And in *Re Marquis of Anglesey* (5) SWINFEN EADY, J., explains ([1903] 2 Ch. 731) by reference to *Levasseur v. Mason & Barry* (6), the advantage of obtaining such an order. The same learned judge in the same case, in a passage immediately preceding that to which I have just referred, says (ibid.): 'In my opinion it prevents the debtor from dealing with the moneys to the prejudice of the judgment creditor; and it also prevents any subsequent judgment creditor from gaining priority over the creditor obtaining the order, if at the date when obtained the property of the judgment debtor cannot be taken in execution or made available by any other legal process'. It was urged in argument that this statement by SWINFEN EADY, J., that the appointment of a receiver prevents the debtor from dealing with the moneys to the prejudice of the judgment creditor goes beyond, and indeed contravenes, other judicial expressions on the same point. That may be so, but I venture to think that this statement of the law will eventually prove to be sound. I do not myself see how the court, after restraining the defendant from himself receiving the property, can stop short of granting whatever injunction is necessary to prevent its being received by others."

H The effect, then, of the appointment of a receiver is that it does not create a charge on the property. It operates as an injunction restraining the judgment debtor from receiving the income, and it may, although that appears to be a matter of greater doubt, also give the right to the judgment creditor to obtain an injunction against third parties receiving that income. Nevertheless, it confers on the judgment creditor purely personal rights and gives him no right over the rents and profits themselves in rem. In my judgment, a receiver so appointed is not a "person interested" for the purposes of s. 30. In my judgment, a "person interested" there means a person interested in some proprietary right under the trust and does not include a person who may have some purely personal rights such as a judgment creditor who has appointed a receiver.

The second way in which the plaintiff puts his case is that under the Law of Property Act, 1925, s. 195, he says he has a charge on the property. Before examining that section it may be useful to say that it had been decided in *Thomas v. Cross* (7) that the charge created by the Judgments Act, 1838, s. 13—which I will not read, because the words were somewhat different from s. 195—did not include a charge on the proceeds of sale of land where the interest of the judgment debtor was solely in the proceeds of sale of land. Section 195, which substantially re-enacted s. 13 of the Act of 1838, although in rather different words, provides:

“(1) Subject as hereinafter mentioned a judgment entered up in the Supreme Court (whether before or after the commencement of this Act) against any person (in this section called a ‘judgment debtor’) shall operate as an equitable charge upon every estate or interest (whether legal or equitable) in all land to or over which the judgment debtor at the date of entry or at any time thereafter is or becomes—(a) beneficially entitled; or (b) entitled to exercise a power of disposition for his own benefit without the assent of any other person . . . (2) Every judgment creditor shall have the same remedies against the estate or interest in the land so charged or any part thereof as he would have been entitled to if the judgment debtor had power to charge the same, and had by writing, under his hand, agreed to charge the same, with the amount of the judgment debt and interest thereon. (3) . . . (i) A judgment, whether obtained (on behalf of the Crown or otherwise) before or after the commencement of this Act, shall not operate as a charge on any interest in land or on the unpaid purchase money for any land unless or until a writ or order, for the purpose of enforcing it, is registered in the register of writs and orders at the Land Registry.”

It was conceded that, apart from the definition clause, to which I must refer in a moment, an interest in the proceeds of sale of land is not aptly described as an equitable interest in land, but it is said that the definition to be found in s. 205 (x) of the Act of 1925 makes an interest in the proceeds of sale come to be included in the definition of an equitable interest in land. Paragraph (x) provides:

“‘Legal estates’ mean the estates, interests and charges, in or over land (subsisting or created at law) which are by this Act authorised to subsist or to be created as legal estates; ‘equitable interests’ mean all the other interests and charges in or over land or in the proceeds of sale thereof; an equitable interest ‘capable of subsisting as a legal estate’ means such as could validly subsist or be created as a legal estate under this Act.”

When that definition section is carefully examined, in my judgment, it does not operate so as to make an equitable interest in land include an equitable interest in the proceeds of sale. The definition is not of an “equitable interest in land” but of an “equitable interest”, and I can see nothing in para. (x) which makes “interest in the proceeds of sale of land” mean “equitable interest in land”. The definition relates to equitable interests. The words in s. 195 (1) refer only to equitable interests in land. Accordingly, in my judgment, s. 195 does not create a charge on the proceeds of sale of land.

That view is, I think, supported by an examination of the Land Charges Act, 1925. It will be recalled that under the Law of Property Act, 1925, s. 195 (3) (i), which I have read, before the charge operates a writ or order must be registered in the register of writs and orders at the Land Registry. When the Land Charges Act, 1925, s. 6 and s. 7, are examined, it seems to me that those sections are only appropriate to the registration of writs and

orders affecting land and not those affecting the proceeds of the sale of land. Section 6 (1) provides:

“There may be registered in the register of writs and orders—(a) any writ or order affecting land . . . (b) any order appointing a receiver or sequestrator of land; (c) any receiving order in bankruptcy made after the commencement of this Act, whether or not it is known to affect land.”

- A** In the Land Charges Act, 1925, s. 20, “land” is defined in such a way as not to include the proceeds of sale of land. Accordingly, it seems to me that the legislature contemplated that there would only be registered writs and orders affecting land and not those affecting the proceeds of sale of land. That would seem to be clearly for the reason that the whole object of the provisions of the Land Charges Act, 1925, was to protect purchasers of land, but, of course, they
- B** would not be concerned in any way with the proceeds of sale of land. Accordingly, in my judgment, the Law of Property Act, 1925, s. 195, does not create a charge on the proceeds of sale of land in this case. Hence, the plaintiff’s case here fails in limine.

- I should, however, add that, even supposing the plaintiff established that he had an interest in land, I can see no reason why he should obtain, in
- C** the circumstances of this case, an order for the sale of the land. I do not propose to refer in any detail to the evidence, but this much is clear, that both the plaintiff and the second defendant have suffered from the first defendant, the husband, who has treated the plaintiff very badly and who appears to have treated his wife extremely badly for many years. He is a ne’er-do-well and a waster, but this is the matrimonial home and the wife
- D** is living there. Her husband appears to be there occasionally, though at the present time he is not. I do not see how the judgment creditor can have any better rights against the wife than her husband would have, and plainly the latter would not obtain an order for sale. I can see no ground on which it would be right or proper for the court, in these circumstances, to order a sale of the property in order that the judgment creditor may now be satisfied.
- E** No doubt, one day a sale will take place, and the plaintiff, as receiver, will receive the husband’s share. I can see no ground at the present time for making an order which would have the effect of turning the innocent wife out of the matrimonial home, of which she is in equity the owner of a half, and it would be most unjust to make such an order. However, as, in my judgment, the plaintiff does not establish his case at law, I need say no more about that.
- F** In the circumstances, I shall dismiss this application, and I must do so with costs.

Order accordingly.

Solicitors: *Field, Roscoe & Co.*, agents for *A. Cotterell & Co.*, Walsall (for the plaintiff); *Arnold Carter & Co.*, agents for *H. Gillings & Walker*, York (for the second defendant).

[*Reported by R. D. H. OSBORNE, Esq., Barrister-at-Law.*]

PRACTICE NOTE.

CLARK v. CLARK.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Karminski, J.), February 24, 1953.]

Divorce—Practice—Notice to produce and admit documents—Undefended suit.

In undefended suits for divorce the petitioner should serve on the respondent notice to produce and admit documents.

AS TO NOTICES TO PRODUCE AND ADMIT DOCUMENTS IN MATRIMONIAL CAUSES, see HALSBURY, Hailsham Edn., Vol. 10, p. 728, para. 1118; and FOR CASES, see DIGEST, Replacement Vol. 27, pp. 511, 512, Nos. 4535-4540.

UNDEFENDED PETITION by the husband for a dissolution of marriage on the ground of the wife's desertion.

The husband stated in evidence that his wife went to Australia on Jan. 5, 1950, and had not since returned; that they had corresponded, but he had not kept any letters written by the wife; and that he had written to her asking when she was coming back to England. No notice to produce and admit these letters had been served on the wife. Another witness was called to give evidence as to the wife's intentions before she left England.

Lester for the husband.

KARMINSKI, J., during the hearing asked if notice to produce had been given and observed that the petitioner's intentions were sometimes important. There was such a thing as consensual separation. At the conclusion of the husband's case HIS LORDSHIP said: The giving of notice to produce is not, in my view, an academic exercise. I am perfectly well aware that in nine undefended cases out of ten it may not have any result whatsoever, but in the tenth case people do produce and sometimes there is before the court the complete correspondence as in a defended case. Why should I not, at any rate, know whether the wife was willing to produce any letters? I do not know what the husband was writing to her. Accepting the last witness's evidence, as I do, I think I can form a final view of the case on the rather incomplete evidence before me, but I want it to be clearly understood that, save for that very helpful evidence, I should have been compelled to adjourn this case and incur additional expense. However, I propose to grant a decree nisi.

Solicitors: *Conway & Conway* (for the husband).

Decree nisi.

A.T.H.

SURREY COUNTY COUNCIL v. MINISTRY OF EDUCATION.

[QUEEN'S BENCH DIVISION (Lynskey, J.), February 23, 1953.]

Education—Transport to and from school—Payment of public transport to point within three miles of destination—"Suitable arrangements"—
A "Reasonable travelling expenses"—*Education Act, 1944 (c. 31), s. 39 (2) (c), s. 55 (2) (as amended by Education (Miscellaneous Provisions) Act, 1948 (c. 40), s. 11, sched. I, Part I).*

The S. county council, as education authority, adopted a scheme whereby the full cost of transport by public conveyance of secondary school children who lived more than three miles from their school to and from school should no longer be paid by the council and that payment should be limited in such a way that no child had to travel a longer distance than three miles to, and three miles from, school unaided.

B HELD: for arrangements under which a local education authority paid the expenses of children travelling to school to be within the powers conferred on the authority by s. 55 (2) of the Education Act, 1944, as amended by the Education (Miscellaneous Provisions) Act, 1948, s. 11, C sched. I, Part I, they must be "suitable arrangements" within s. 39 (2) (c) of the Act of 1944; under s. 39 (2) (c), if a child lived more than three miles from the school, provision must be made for his transport for the full distance between his home and the school and vice versa; and, therefore, the arrangements made by the S. county council were not "suitable" within s. 39 (2) (c) and not within the powers conferred on the council D by s. 55 (2) (as amended).

FOR THE EDUCATION ACT, 1944, s. 39 (2) (c) and s. 55, see HALSBURY'S STATUTES, Second Edn., Vol. 8, p. 183 and p. 198, respectively.

ORIGINATING SUMMONS to determine whether a scheme put into operation by the Surrey County Council for the transport of children to school was suitable and within their authority under s. 39 (2) (c) of the Education Act, 1944, and s. 55 of the Act of 1944, as amended by the Education (Miscellaneous Provisions) Act, 1948, s. 11 and sched. I, Part I.

E ,Up to March, 1952, the Surrey County Council, in fulfilment of their obligations under the Education Act, 1944, had provided transport to school for children living more than three miles away from their schools or had paid for the cost of such transport under s. 55 (2) of the Act. In March, 1952, following F a circular letter from the Minister of Education of December, 1951, urging education authorities to curtail expenditure on the transport of children to school so far as possible, the council adopted three schemes to effect a reduction of such expenditure. Two of the schemes were approved by the Minister, and the third, which arose for consideration by the court, was that the full cost of G transport by public conveyance to and from school should no longer be paid for secondary school children, that expenditure should be limited to partial payment of fares in such a way that no child had a longer distance than three miles to, and three miles from, school to travel unaided, and that the council should pay the parents in advance a sum equal to the cost of the fare necessary to bring the child within the three miles' limit. Provisions were made for H deductions for absence and for special treatment of hard cases.

On being approached by the council the Minister took the view that this scheme was not a proper or lawful one within the Education Act, 1944. The council, therefore, submitted for the consideration of the court two questions: (i) Whether, on the true construction of s. 55 (2) of the Education Act, 1944 (as amended by the Education (Miscellaneous Provisions) Act, 1948), the council was authorised to make such arrangements as those described, and (ii) Whether it was a question of fact in each individual case whether such arrangements

were suitable arrangements, within the meaning of s. 39 (2) (c) of the Act, for the transport of a child to and from the school at which he was a registered pupil.

Harold Williams, Q.C., and *S. B. R. Cooke* for the county council.

J. P. Ashworth for the Ministry.

LYNSKEY, J., stated the facts and continued: The answer to the questions put to me depends on the construction of s. 55 of the Education Act, 1944, as amended by the Education (Miscellaneous Provisions) Act, 1948, s. 11 and sched. I, Part I, and that of s. 39 of the Act of 1944, and, in addition, the general scheme of the latter Act as indicated by its terms. As I follow the Act, it imposes on an education authority the obligation to provide education of different standards. I am concerned here particularly with primary education, the council having to provide primary education within the confines of its jurisdiction. That is a mandatory obligation imposed on the local education authority. Under the terms of the Act the local education authority originally had to submit schemes for the approval of the Minister. Under s. 11 (2) (g) of the Act of 1944 such schemes must include particulars of information as to

" . . . measures which the authority propose to take in fulfilment of their duty to secure the provision of schools for providing primary and secondary education, such as the making of general arrangements for the transport of pupils to and from school."

That, apparently, is one of the primary obligations imposed on the education authority. There is an equal duty imposed on parents to see that their children take advantage of the educational facilities provided. Section 36 of the Act provides:

" It shall be the duty of the parent of every child of compulsory school age to cause him to receive efficient full-time education suitable to his age, ability, and aptitude, either by regular attendance at school or otherwise."

Then provision is made by s. 37, if the child is not at school, for the making of a school attendance order, and then there is imposed on the parent the obligation of sending the child to the school of which such school attendance order requires him to be a registered pupil.

Section 39 deals with the question of the obligation of the parent to send his child to school. It provides:

" (1) If any child of compulsory school age who is a registered pupil at a school fails to attend regularly thereat, the parent of the child shall be guilty of an offence against this section. (2) In any proceedings for an offence against this section in respect of a child who is not a boarder at the school at which he is a registered pupil, the child shall not be deemed to have failed to attend regularly at the school by reason of his absence therefrom with leave . . . "

After mentioning prevention of attendance by reason of sickness and non-attendance on religious holidays, s. 39 (2) continues:

" (c) if the parent proves that the school at which the child is a registered pupil is not within walking distance of the child's home, and that no suitable arrangements have been made by the local education authority either for his transport to and from the school or for boarding accommodation for him at or near the school or for enabling him to become a registered pupil at a school nearer to his home."

Then by s. 39 (5) " walking distance " is defined:

" . . . the expression ' walking distance ' means, in relation to a child, who has not attained the age of eight years two miles, and in the case of any other child three miles, measured by the nearest available route."

So that, on the face of s. 39, if a parent did not send his child to school, and the child lived outside the three miles' radius of the school and no transport was provided for him, the parent would be excused for the child's non-attendance.

It is said on behalf of the county council that their obligation is imposed by s. 55 and not by s. 39. Section 55 as amended runs:

- A " (1) A local education authority shall make such arrangements for the provision of transport and otherwise as they consider necessary or as the Minister may direct for the purpose of facilitating the attendance of pupils at schools or county colleges or at any course or class provided in pursuance of a scheme of further education in force for their area, and any transport provided in pursuance of such arrangements shall be provided free of charge. (2) A local education authority may pay the whole or any part,
- B as the authority think fit, of the reasonable travelling expenses of any pupil in attendance at any school or county college or at any such course or class as aforesaid for whose transport no arrangements are made under this section."

- C The county council argue that they have not made arrangements under s. 55 (1) because the arrangements under that sub-section are "arrangements for the provision of transport and otherwise"—not "or otherwise"—and I think it is conceded by the council (if not, it is clearly my view) that s. 55 (1) relates to the actual provision of transport as such either with hired vehicles or their own vehicles or by other means—maybe by providing a short cut over some obstacle which would otherwise make the distance more than three
- D miles and so reduce it to under three miles. This scheme is not providing transport in the sense required by s. 55 (1). The scheme here is for the provision of the cost of a child using public transport. It is a provision made under s. 55 (2); and it can only be made in the case of a child for whose transport no arrangements are made under s. 55 (1). It seems clear that no transport has been provided in the case of the children for whom this scheme is intended
- E to provide, but the scheme is to pay the reasonable travelling expenses, either in whole or in part, of the children who live more than three miles away from the school at which they are registered pupils.

- The county council are saying, in effect, that they have a discretion as to what they shall pay. They have to make arrangements for facilitating the attendance of pupils at school, and the argument on behalf of the council is
- F that by their scheme they are providing payment in respect of the child's transport which will enable the child to reach the school by walking less than three miles. It will be taken from outside the three miles' area, or will go into the three miles' area and join some form of public transport there. The council, therefore, say that they are providing reasonable arrangements for the provision of transport or substitution for the provision of transport by payment.
- G The case put forward on behalf of the Minister is that, if s. 55 stood alone and apart from anything else in the Act, that is a possible construction and a possible view, but, it is argued, if that view is adopted, one will get a scheme which will not prevent the parent taking advantage of the provisions of s. 39 (2) (c) if proceedings are taken against him for "truancy", and, says the Minister: "If you are going to provide a scheme for making arrangements
- H of that sort, that is obviously not a suitable arrangement within the words of s. 39 (2) (c)". I gather counsel for the Surrey County Council agrees that if his scheme would leave it open to the parent of a child residing outside the area to take advantage of that excuse, then his scheme could not be considered a proper scheme within the meaning of s. 55.

In my view, this case turns on the interpretation of s. 39 (2) (c) and s. 39 (5). The question is: Has the council made suitable arrangements for the transport to and from the school of a child who lives more than three miles from the

school—and “to and from the school” in that context means to and from the child’s home to the school. I should have thought that could have only one meaning because the English of it is too clear. Provision has to be made, if the child lives more than three miles distant from his school, for transport to and from the school and the home. It seems to me that to suggest that transport to a point three miles away from the school—which would mean not transport to the school, but transport part of the way to the school—cannot be read into those words. In this case the scheme is to provide a substitute for transport by payment, but, in my view, the reasoning applicable to the provision of transport must apply equally to the reason for payment as a substitute for transport. If, in fact, the obligation is to provide transport to and from the school when the child is resident more than three miles away from the school, then equally I am satisfied that the substitute for transport in the shape of payment for public transport must be of the same character and must provide for payment of the sum which will cover the cost of taking the child by public transport from a point reasonably near his home to a point reasonably near the school—I do not say to the school door, but reasonably near thereto. In those circumstances, on my view of the law, the answer I must give to the first question is “No”. In my opinion, on the true construction of s. 55 of the Education Act, 1944, as amended by the Act of 1948, the council are not authorised to make such arrangements as they propose. On the second question, I accept the answer which has been suggested to me by counsel for the Ministry that the proposed arrangements as a matter of law are not “suitable arrangements” within the meaning of s. 39 (2) (c).

Solicitors: *Wyatt, Jeffery & Co.*, agents for *W. W. Ruff*, Kingston-on-Thames (for the county council); *Treasury Solicitor* (for the Ministry).

[Reported by MICHAEL MALONEY, Esq., *Barrister-at-Law.*]

NEWBORNE v. SENSOLID (GREAT BRITAIN), LTD.

[COURT OF APPEAL (Lord Goddard, C.J., Morris and Romer, L.JJ.), February 18, 19, 1953.]

Company—Contract—Company not registered—Contract signed in company’s name with prospective director’s signature—Contract a nullity—Action by prospective director—Competency.

Contract—Parties—Company not registered—Contract signed in company’s name with prospective director’s signature—Contract a nullity.

The plaintiff was the promoter and prospective director of a limited company, Leopold Newborne (London), Ltd., which at the material time had not been registered. A contract for the supply of goods to the defendants was signed: “Leopold Newborne (London), Ltd.” and the plaintiff’s name, “Leopold Newborne”, was written underneath. In an action for breach of the contract brought by the plaintiff against the defendants,

HELD: the contract was made, not with the plaintiff, whether as agent or as principal, but with a limited company which at the date of the making of the contract was non-existent, and, therefore, it was a nullity and the plaintiff could not adopt it or sue on it as his contract.

Kelner (Kelmer) v. Baxter (1866) (L.R. 2 C.P. 174), and *Schmalz (Schmaltz) v. Avery* (1851) (16 Q.B. 655), distinguished.

AS TO CONTRACTS MADE FOR A LIMITED COMPANY BEFORE INCORPORATION, see HALSBURY, 1949 Edn., Vol. 5, pp. 479-481, paras. 763, 764; and *ibid.*, Vol. 7, p. 70, para. 89; and FOR CASES, see DIGEST, Vol. 9, pp. 634-640, Nos. 4194-4227; and *ibid.*, Replacement Vol. 12, p. 26, Nos. 31, 32.

Cases referred to:

- (1) *Kelner (Kelmer) v. Baxter*, (1866), L.R. 2 C.P. 174; 36 L.J.C.P. 94; 15 L.T. 213; 1 Digest 653, 2712.

(2) *Schmalz (Schmaltz) v. Avery*, (1851), 16 Q.B. 655; 20 L.J.Q.B. 228; 17 L.T.O.S. 27; 117 E.R. 1031; 1 Digest 624, 2492.

(3) *Harper & Co. v. Vigers Brothers*, [1909] 2 K.B. 549; 78 L.J.K.B. 867; 100 L.T. 887; 1 Digest 624, 2493.

A APPEAL by the plaintiff against an order of PARKER, J., dated Oct. 23, 1952, dismissing an action for damages for breach of contract on the ground that the contract, being entered into in the name of a limited company which at the material time was non-existent, could not be the subject of proceedings by the plaintiff, who had signed it on behalf of the company.

Diplock, Q.C., and *Littman* for the plaintiff.

Pearl for the defendants.

B LORD GODDARD, C.J.: The plaintiff is a man of foreign extraction, whether a British subject or not, who has an imperfect acquaintance with the English language, and, I suppose, does not understand the implications of English company law. At the material time he had decided that he would go into the provision trade on his own account, and he had formed a company bearing his name, Leopold Newborne (London), Ltd., which he was on the point of registering. Apparently, he thought that there would be no objection C to his using without further delay the stationery which he had had prepared in anticipation of the conduct of the business by the company, possibly because he did not think it mattered whether or not the company was actually registered. On Mar. 13, 1951, having discovered that he could buy a quantity of tinned ham from apother company, J. C. Gilbert, Ltd., he found a customer, the D defendants, to whom he could sell it. His method of business was to buy and sell at the same price, his profit being represented by the discount he received. On Mar. 13, 1951, a contract form, headed "Contract No. S.117" and bearing the name and address of Leopold Newborne (London), Ltd., 321, High Holborn, London, W.C.1, and giving as directors Leopold Newborne and M. Newborne, was addressed to Messrs. Sensolid (Great Britain), Ltd. It was as follows: E "We have this day sold to you two hundred cases each containing six tins whole cooked boneless shoulders". It sets out the price and terms of delivery, etc., and is signed: "Yours faithfully, Leopold Newborne (London), Ltd.". Underneath is written a hieroglyphic, which is interpreted in type as being "Leopold Newborne". An acceptance slip was attached to the document:

F "Received from Leopold Newborne (London), Limited, 321, High Holborn, London: Sale contract No. S.117 for two hundred cases each containing six tins whole cooked boneless shoulders."

The market went down and the defendants refused to take delivery of the goods when tendered on the ground that the contract was a sale by sample and no sample had been submitted. It was not a sale by sample, there is no word about samples in the contract, and PARKER, J., found that sale by sample G was no part of the contract. The plaintiff started an action against the defendants for breach of contract, viz., failure to accept the goods, and the defence pleaded was simply a defence of lack of samples.

While, however, the case was in progress the solicitors for the plaintiff discovered that the company had not been registered at the time of the contract, and, therefore, the contract could not be said to have been made by the company. H They took steps to substitute Mr. Leopold Newborne for the company as the plaintiff in the action, and thereupon the defendants pleaded that they had contracted with the company and not with Mr. Leopold Newborne, and so he could not recover. PARKER, J., upheld that contention, and this appeal is against the judgment which he gave for the defendants on that ground. Counsel for the plaintiff has contended that the case is governed by a well-known series of cases of which *Kelner (Kelmer) v. Baxter* (1) is one. The plaintiff in that case intended to sell wine to a company which was to be formed,

but under the contract he agreed to sell it to the proposed directors of the company. The proposed directors intended to buy the wine on behalf of the company, but, as it was not in existence when the contract was made or the goods were delivered, they personally took delivery. It was held that, as they had contracted on behalf of a principal who did not exist, they, having received the wine, must pay for it. It seems to me a very long way from saying that every time a prospective company, not yet in existence, purports to contract everybody who signs for the company makes himself personally liable. Counsel also relied strongly on *Schmalz (Schmaltz) v. Avery* (2), which lays down the principle, acted on in subsequent cases and notably *Harper & Co. v. Vigers Brothers* (3), that where a person purports to contract as agent he may nevertheless disclose himself as being in truth a principal and bring an action in his own name. Those cases are well established and we are not departing in any way from the principle they lay down, but we cannot find that the plaintiff purported to contract as agent or as principal. He was making the contract for the company, and, although counsel has argued that, in signing as he did, he must have signed as agent, for a company can only contract through an agent, that is not the true position. A company makes a contract. No doubt, it must do its physical acts through the directors, but their relationship is not the ordinary one of principal and agent. The company contracts and its contract is authenticated by the signature of one or more of the directors. This contract purports to be made by the company, not by Mr. Newborne. He purports to be selling, not his goods, but the company's goods. The only person who has any contract here is the company, and Mr. Newborne's signature is merely confirming the company's signature. The document is signed: "Yours faithfully, Leopold Newborne (London), Ltd.", and the signature underneath is that of the person authorised to sign on behalf of the company.

In my opinion, as the company were not in existence when the contract was signed, there never was a contract, and the plaintiff cannot come forward and say: "It was my contract". It seems to me, therefore, that the defendants can avail themselves of the defence which they pleaded and the appeal must be dismissed.

MORRIS, L.J.: I entirely agree. Counsel for the plaintiff has emphasised that PARKER, J., found that it did not matter to the defendants whether they were contracting with Mr. Newborne personally or with the company. That is so, but it does not mean that the defendants are not entitled, if they choose to do so, to take the point that they never contracted with Mr. Newborne who is suing them. Counsel has strongly relied on the language of s. 32 (1) (b) of the Companies Act, 1948, but, as I read it, that section merely deals with the way in which a company makes contracts, and I do not find that the contract in the present case was made with Mr. Newborne as agent for the company. It purported to be a contract with the company, and I find myself in full agreement with the way in which this matter was expressed by the learned judge when he said towards the end of his judgment:

"The company was not in existence and that signature on that document, and, indeed, the document itself, was an utter nullity."

I agree, therefore, that the appeal fails.

ROMER, L.J.: I agree entirely.

Appeal dismissed.

Solicitors: *Ashurst, Morris Crisp & Co.* (for the plaintiff); *Godfrey Davis & Foster* (for the defendants).

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

ORMROD AND ANOTHER v. CROSVILLE MOTOR SERVICES, LTD. AND ANOTHER (MURPHIE, Third Party).

[CHESTER ASSIZES (Devlin, J.), February 5, 6, 1953.]

Negligence—Driving of motor vehicle—Liability of owner—Car driven by friend of owner, at owner's request and for his benefit.

- A By an arrangement between the owner of a motor car and a friend, the friend was to use the car to drive from Birkenhead to Monte Carlo, while the owner drove to Monte Carlo, in another car, as a competitor in a motor car rally. It was the intention of the parties that the car driven by the friend should arrive in Monte Carlo before the end of the rally, and that the owner, the friend, and the friend's wife, who was travelling in the car, should then spend a holiday together, using the car for that purpose. Owing to the friend's negligent driving, the car was involved in a collision with a motor omnibus, which was damaged as a result of the accident. On the question of the liability of the owner of the car for the damage,

- C HELD: the arrangement amounted to a request by the owner of the car to the friend to drive it; as the owner had an interest in the arrival of the car at Monte Carlo, the driving was an act done for his benefit, and the friend was under a social or moral obligation to comply with the request; and, therefore, the friend was acting as the owner's agent in driving the car, and the owner was vicariously liable for his negligence.

- D AS TO THE RELATION OF AGENCY, see HALSBURY, Simonds Edn., Vol. 1, p. 145, para. 350; and FOR CASES, see DIGEST, Vol. 1, pp. 267-272, Nos. 1-35.

Case referred to:

- (1) *Hewitt v. Bonvin*, [1940] 1 K.B. 188; 109 L.J.K.B. 223; 161 L.T. 360; 2nd Digest Supp.

- E ACTION by a husband and wife for damages for personal injuries suffered by them and alleged to have been caused by the negligent driving of a motor omnibus owned by the first defendants and driven by their servant or agent, the second defendant. The first defendants counterclaimed in respect of damage to their omnibus, alleging negligent driving of a motor car by the male plaintiff, and they also took third-party proceedings against the owner of the car on the ground that he was vicariously liable for the male plaintiff's negligence.

- F On Jan. 20, 1952, the plaintiffs, Mr. and Mrs. Ormrod, left Birkenhead in a Healey motor car belonging to the third party, who, with another person, was driving from Glasgow, in a Standard Vanguard car, as a competitor in the Monte Carlo motor car rally. It was agreed between the male plaintiff and the third party that the plaintiffs should use the Healey car to drive to Monte Carlo, and that thereafter all three persons would go for a holiday together in Switzerland, using the Healey car for this purpose. A suitcase belonging to the third party was being carried in the Healey car, and it was agreed that the plaintiffs should make the journey to Monte Carlo by driving the Healey car in their own time and manner and that they were to visit friends at Bayeux en route. It was the intention of all that the plaintiffs should arrive with the Healey car at Monte Carlo before the end of the rally. Soon after leaving Birkenhead the plaintiffs in the Healey car came into collision in fog with the first defendants' motor omnibus, both plaintiffs sustaining personal injuries and both vehicles being damaged. DEVLIN, J., found that the accident was caused by the negligence of the male plaintiff. The report deals only with the question of the third party's liability on the first defendants' counterclaim.

H. Edmund Davies, Q.C., and Hoosen for the plaintiffs and the third party. Mars-Jones and Esyr ap Gwilm Lewis for the defendants.

DEVLIN, J., stated the facts in relation to the question of the third party's liability and continued: I have now to decide the question of the liability of the third party, the owner of the Healey car, for the damage arising from the negligent driving of Mr. Ormrod. *Hewitt v. Bonvin* (1) is concerned partly with the question whether the driver of a car was acting as a servant of the owner, and there is no question of Mr. Ormrod being a servant in the present case, but DU PARCQ, L.J., dealt with the question of agency. It is clear that there must be something more than the granting of mere permission in order to create liability in the owner of a motor car for the negligence of the driver to whom it has been lent, but I do not think that it is necessary to show a legal contract of agency. It is in an area between the two that this case is to be found, and it may be described as a case where, in the words of DU PARCQ, L.J., there is a "social or moral" obligation to drive the owner's car. Mr. Ormrod was under such a duty as this, because, if he had not driven the car as arranged, the third party would have had a legitimate grievance. I think that the arrangement amounted to a request to Mr. Ormrod to drive the car. He who complies with such a request is the agent of the owner, since he who makes the request has an interest in its being complied with. In this case the car was wanted for the purpose of a joint holiday. That was enough to give the third party an interest in the arrival of the car, so that the driving of the car became an act done for his benefit. In the case of mere permission, the person permitting has no interest in whether the act is done or not.

Judgment for first defendants against third party.

Solicitors: *Berkson & Berkson*, Birkenhead (for the plaintiffs and the third party); *A. W. Mawer & Co.*, Liverpool (for the defendants).

[Reported by D. T. LLOYD-JONES, ESQ., Barrister-at-Law.]

MAURAY v. DURLEY CHINE (INVESTMENTS), LTD.

[QUEEN'S BENCH DIVISION (Gerrard, J.), February 24, 1953.]

Rent Control—Excessive rent—Requirement to pay—Rent under lease reduced—Option by deed to renew lease at original rent—Validity of option—Furnished Houses (Rent Control) Act, 1946 (c. 34), s. 4 (1) (a).

By a deed, dated Mar. 30, 1949, the plaintiff was given the option of taking as from June 24, 1953, a new lease of a furnished flat at the same rent (£525) as that which he was already paying under a lease, dated Dec. 14, 1946, to which the *Furnished Houses (Rent Control) Act, 1946*, applied. In January, 1950, the rent tribunal set up under s. 1 (2) of the Act, on the plaintiff's application, reduced the rent of the flat to £425 and the reduced rent was entered in the register kept under s. 3 (1) and (2) of the Act. On Dec. 6, 1951, the plaintiff purported to exercise the option and requested the defendants to grant him a new lease, but they refused to do so on the ground that the option had become null and void—and, consequently, the purported exercise of it, a nullity—since, if they granted a new lease under the option at the rent of £525 provided for in the original lease, they would be requiring the plaintiff to pay a sum in excess of the rent entered in the register, contrary to s. 4 (1) (a) of the Act, and would be subject to a penalty under s. 9 (1) of the Act. On a claim by the plaintiff for a declaration that the option was valid and subsisting and had been duly exercised by him,

HELD: (i) under s. 2 (3) of the Act, where a rent had been entered in the register either party to the contract could refer the case to the tribunal for the re-consideration of the rent on the ground of change of circumstances, and so, when the new lease took effect, the rent entered in the register might have been amended to £525 or even more; the court could

not speculate or assume that the renewal of the lease at a rent of £525 would be illegal; and, therefore, the plaintiff was entitled to the declaration which he sought.

(ii) in any event, the effect of a mere covenant to pay a rent in excess of the rent entered in the register was not that the lessor "required" the payment of that excessive rent within s. 4 (1) and s. 9 (1) of the Act, though an attempt to enforce the covenant would be such a requirement, and, therefore, the granting of a new lease at a rent of £525 would not be unlawful under those subsections.

AS TO OPTION TO RENEW LEASES, see HALSBURY, Hailsham Edn., Vol. 20, p. 68, para. 74.

FOR THE FURNISHED HOUSES (RENT CONTROL) ACT, 1946, s. 4 (1) (a), see HALSBURY'S STATUTES, Second Edn., Vol. 13, pp. 1088, 1089.

ACTION for a declaration.

By a lease, dated Dec. 14, 1946, the defendants demised to the plaintiff a furnished flat, No. C.1, Durley Chine Court, Bournemouth, for a term of seven years from June 24, 1946, at an inclusive rent of £525 per annum, with an additional rent of an amount equivalent to any increase in the rates which the defendants might be obliged to pay during the term of the lease. The lease was a contract to which the Furnished Houses (Rent Control) Act, 1946, applied. By a deed, dated Mar. 30, 1949 (which was made as the result of a compromise of a dispute between the parties), the plaintiff was given the option of taking a lease of the flat for a term of seven years from June 24, 1953, at the same inclusive rent of £525 per annum, and there were similar provisions as to an additional rent if the defendants were obliged to pay any increase in rates after June 24, 1946. The option was to be exercised by notice in writing to the defendants on or before June 24, 1952, and, if and when it was so exercised, the defendants were to grant a new lease from June 24, 1953. In January, 1950, as the result of an application by the plaintiff under s. 2 (1) of the Act of 1946, the rent tribunal for Bournemouth (set up under s. 1 (2) of the Act) reduced the rent under the original lease to £425 per annum for the duration of the Act. (By the Expiring Laws Continuance Act, 1952, s. 1 (2) and schedule, Part II, the Act is due to expire on Mar. 31, 1954). The reduced rent was entered in the register kept under s. 3 (1) and (2) of the Act, in February, 1950. On Dec. 6, 1951, the plaintiff sent to the defendants a notice in writing purporting to exercise the option granted to him by the deed of Mar. 30, 1949, but, in view of the reduction in the rent by the rent tribunal, the defendants refused to grant a new lease.

The plaintiff sought a declaration that the option contained in the deed dated Mar. 30, 1949, was valid and subsisting and had been duly exercised by him.

Beney, Q.C., and *P. H. R. Bristow* for the plaintiff.
Salmon, Q.C., and *Plume* for the defendants.

GERRARD, J., stated the facts and continued: There arose a dispute between the plaintiff and the defendants as to the plaintiff's right, in view of the reduction in rent which had been brought about by the tribunal, to exercise the option which he had been given by the deed. As that dispute has not been resolved, the plaintiff claims a declaration that the option is valid and subsisting and that he has duly exercised it under the deed dated Mar. 30, 1949. In answer to that claim the defendants pleaded that, as a result of the decision of the rent tribunal, made on the application of the plaintiff, the rent of £525 per annum which was expressly stipulated in the deed of Mar. 30, 1949, as the rent at which the plaintiff was given the option of taking a further lease of the flat, became, under s. 4 (1) (a) of the Furnished

Houses (Rent Control) Act, 1946, an unlawful rent for the flat which the defendants, under penalties set forth in s. 9 (1) of the Act, were prohibited from requiring or receiving. Therefore, the defendants say, the option became null and void, the purported exercise of it became a nullity, and the plaintiff was not entitled to the declaration claimed.

The determination of this matter depends on the proper interpretation of the Furnished Houses (Rent Control) Act, 1946, and it is necessary for me to refer to some of its terms. Section 1 provides for tribunals being brought into existence. Section 2 (1) provides that:

"Where a contract has, whether before or after the passing of this Act, been entered into whereby one person (hereinafter referred to as the 'lessor') grants to another person (hereinafter referred to as the 'lessee') the right to occupy as a residence a house or part of a house situated in a district in which this Act is in force in consideration of a rent which includes payment for the use of furniture or for services, whether or not, in the case of such a contract with regard to part of a house, the lessee is entitled, in addition to exclusive occupation thereof, to the use in common with any other person of other rooms or accommodation in the house, it shall be lawful for either party to the contract or for the local authority to refer the contract to the tribunal for the district . . ."

It is common ground that the first lease was a contract within that sub-section. By sub-s. (2):

"Where any contract to which this Act applies is referred to a tribunal, then, unless at any time before the tribunal have entered upon consideration of the reference it is withdrawn by the person or authority by whom it was made, the tribunal shall consider it and, after making such inquiry as they think fit, and giving to each party . . . an opportunity of being heard, or, in his option, of submitting representations in writing, shall approve the rent payable under the contract or reduce it to such sum as they may, in all the circumstances, think reasonable, or may, if they think fit in all the circumstances, dismiss the reference, and shall notify the parties and the local authority of their decision in each case."

By sub-s. (5):

"An approval, reduction or increase under this section may be limited to rent payable in respect of a particular period."

By s. 3:

"(1) The local authority shall prepare and keep up to date a register for the purposes of this Act, and shall make the register available for inspection . . . (2) The register shall be so prepared and kept up to date as to contain, with regard to any contract under which a rent is payable that has been approved, reduced or increased under the last foregoing section (being a contract relating to premises situated in the area of the local authority), entries of—(a) the prescribed particulars with regard to the contract; (b) a specification of the premises to which the contract relates; and (c) the rent as approved, reduced or increased by the tribunal, and, in a case in which the approval, reduction or increase is limited to rent payable in respect of a particular period, a specification of that period."

So, we have a provision for the setting up of a register, and, as a condition of that register coming into operation in relation to any particular case, there must have been a contract under which a rent is payable and that rent must have been approved, reduced or increased. The next thing to draw attention to is that, under s. 3 (2) (c), entries have to be made, in the course of keeping the register

up to date, of the results of anything which has happened under s. 2 (3), which I will now read:

A "Where the rent payable for any premises has been entered in the register in accordance with the provisions hereinafter contained, it shall be lawful for the lessor or the lessee or the local authority to refer the case to the tribunal for re-consideration of the rent so entered on the ground of change of circumstances, and the provisions of sub-s. (2) of this section shall apply on any such reference in like manner as they apply on a reference under sub-s. (1) of this section subject to the modification that the tribunal shall have power to increase the rent payable."

B That power seems to me to be an important matter which one has to bear in mind in considering this case. The joint effect of these provisions is that at any time it can be ascertained by inspection of the register what is the rent payable for the premises under the terms of this Act, and the register will show decreases or increases, as the case may be, according to the history of the particular premises. Section 4 (1) provides:

C "Where the rent payable for any premises is entered in the register under the provisions of this Act, it shall not be lawful to require or receive —(a) on account of rent for those premises in respect of any period subsequent to the date of such entry, (or, in a case in which a particular period is specified, in respect of that period) payment of any sum in excess of the rent so entered . . ."

That is carried a stage further by s. 9 (1), which provides that:

D "A person who requires or receives any payment or any consideration in contravention of s. 4 of this Act shall be guilty of an offence . . ." and penalties are provided.

E Counsel for the defendants submits that by the lease of Dec. 14, 1946, the plaintiff is required by the defendants to pay £525 a year, and that to grant another lease in the form of that lease would, at the material time (June 24, 1953), mean that the plaintiff was required to pay a sum in excess of the rent entered in the register, and, therefore, such a requirement would not be lawful, which would subject the defendants to a penalty. He says that the defendants cannot be called on to grant a new lease which involves that illegality, and that, therefore, because of the events which have occurred, the option is null and void and the purported exercise of it is a nullity. He says that the existing lease, despite its requirement (which I mentally put in inverted commas) that the plaintiff shall pay a higher rent than that shown on the register, is not affected by these considerations, because the effect of the tribunal's decision to reduce the rent payable under the lease is as if it were a physical alteration of the figure, and, therefore, the covenant with regard to the payment of £525

G rent is, by the act of the tribunal, no longer a requirement to pay £525 but only a requirement to pay £425. He says that "requirement" has to be used in an ordinary business sense. A covenant in a lease for the payment of rent is clearly a requirement of the lessor, and counsel says that his contention with regard to that point is fortified by the fact that the words of s. 2 (2) of the Act speak of reducing the rent payable under the contract. So, he says, it

H follows that that has become a requirement to pay the lower, and not the higher, rent. But he also says that that matter has no effect on a lease which has not yet come into being and cannot yet come before a tribunal and lead to any alteration in the register.

Counsel for the plaintiff drew my attention to s. 2 (3), to which I have already referred. I think that it would be useful to put that sub-section in this form: "Where at any given date the rent payable for the premises is entered in the register and it is any excess over this that it is not lawful to require or

receive, either party may refer the case to the tribunal for re-consideration of the rent so entered on the ground of change of circumstances." Counsel for the plaintiff, therefore, contends that at the time when the new lease takes effect it is possible that the rent entered in the register will be £525, or, indeed, it might even be more, and, if the lessee is then required to pay £525, s. 4 (1) (a) will not be infringed. That being so, he says, how can the court today say that in next June there will be any unlawful "requirement" so that the option, or the purported exercise of it, is null and void? I think that that contention is right. I do not think that I am entitled to speculate about what the tribunal may do if application is made to it. I cannot find affirmatively that, if the second lease is granted in the terms provided for by the option, any illegality will be involved, and I do not think that I am entitled to make an assumption of illegality.

That is really sufficient to dispose of the case, but I realise that it may not be very helpful to the parties, so I will deal with another aspect of the matter. All I have said up to now assumes that a lease in the form provided for by the option involves a requirement by the defendants of a rent within the meaning of the word "require" or "requires" in s. 4 (1) and s. 9 (1) of the Act. I am by no means satisfied that it does. It may be that at any time during the history of the future lease the rent covenanted to be paid may be in excess of the rent payable for the premises entered in the register. It may be that, from time to time, the two figures may coincide. It may be, as I have said, that on June 24, 1953, the figures may coincide, or the registered figure may be greater than the covenanted figure. It may be that the rent covenanted to be paid may be less than the rent payable for the premises entered in the register. All that depends on unforeseeable circumstances. Can it be said that the intention of the Act is to prevent any such future lease being executed and to prohibit or render ineffective any undertaking under deed or consideration to execute such a lease in futuro? I think that it would be very extraordinary if that were the intention of the Act. The whole matter turns on the meaning to be given to the word "require" in its context in s. 4 (1) of the Act, bearing in mind the general intention of the legislature to be derived from a consideration of it. A mere covenant to pay a rent in excess, even at the instance of the lessor, is not a requirement in the sense in which the word "require" is used in s. 4 (1). Any attempt to enforce that covenant or demand its fulfilment would be to require an excess of rent where the amount covenanted for exceeds the amount in the register, but short of that there is no "requiring" within the section in this case. Further, I do not think that such a covenant would render the whole lease void or of no effect. I have been referred to a number of authorities, but they do not help me. This is an Act of a special and peculiar kind, and one has to try to derive the meaning of the words in the Act from a consideration of the whole of the Act. The result is that the plaintiff is entitled to the declaration in the form in which it is sought.

Declaration accordingly.

Solicitors: *Jacobson, Ridley & Co.* (for the plaintiff); *Evans Baker & Co.* (for the defendants).

[*Reported by G. A. KIDNER, Esq., Barrister-at-Law.*]

BRIESS AND OTHERS v. ROSHER AND ANOTHER.

[COURT OF APPEAL (Lord Goddard, C.J., Morris and Romer, L.J.J.), February 17, 1953.]

Company—Sale of shares—Negotiations by managing director—Shareholders informed of offer—Instruction to managing director to complete transaction—Liability of shareholders for fraudulent misrepresentation by managing director.

A

Under the terms of a licence granted by the Ministry of Food under the Food Substitutes (Control) Order, 1941, para. 2, N.P., Ltd., were authorised to manufacture synthetic cream in accordance with a formula approved by the Ministry, and it was a condition of the licence that no change should be made in the composition of the synthetic cream without the Ministry's written consent. In 1946 the managing director of N.P., Ltd., the first defendant, without the knowledge of his co-directors and fellow shareholders, caused the volume of synthetic cream produced to be increased by adding large quantities of water in excess of that permitted by the approved formula. In 1948, without informing his co-directors or the shareholders, he obtained from the first plaintiff, a director of E.U., Ltd., a company which was also in the provision trade, an intimation that he was interested in acquiring the shares in N.P., Ltd., and would be likely to pay certain prices for them. He thereupon informed his co-directors and the shareholders of N.P., Ltd., that he had received an offer for their shares from the directors of E.U., Ltd., and on Oct. 14, 1948, the shareholders in general meeting resolved that he "should take the matter up further with that company with a view to completing the transaction on the above basis". The shares were subsequently sold to the plaintiffs at the suggested price. In an action in which the first defendant was held liable to the plaintiffs for the fraudulent misrepresentation that the trading profits of N.P., Ltd., had arisen from lawful trading in accordance with the Ministry's licence and the conditions thereof the proceedings against the second and fourth defendants were discontinued.

B

C

D

E

F

G

HELD: the resolution of Oct. 14, 1948, gave the first defendant authority, not to negotiate on behalf of N.P., Ltd., but merely to accept the price which was offered for the shares, and the other directors and shareholders of N.P., Ltd., could not be liable for any misrepresentation previously made by the first defendant; the third defendant (a director and shareholder in N.P., Ltd.) had not authorised the first defendant to act as his agent to negotiate the sale of his shares to the plaintiffs on his behalf and so he was not vicariously liable to the plaintiffs; nor had the third defendant ratified the first defendant's fraudulent misrepresentations (of which the third defendant knew nothing), and, therefore, the third defendant was not liable.

AS TO DIRECTORS ACTING AS AGENTS FOR THE COMPANY, see HALSBURY, 1949 Edn., Vol. 5, p. 328, para. 547, p. 474, para. 754.

APPEAL against an order of BARRY, J., dated July 31, 1952, in an action for damages for fraudulent misrepresentation or fraud by the first defendant on behalf of himself and the other defendants on a sale of shares to the plaintiffs.

H

The first defendant was the managing director and a shareholder and the third defendant was a director and shareholder of Nutrifood Products, Ltd., which carried on business as manufacturers and distributors of synthetic cream. (The action against the second defendant was discontinued before trial and the fourth defendant was not served). The company manufactured the synthetic cream under a licence granted by the Ministry of Food under para. 2 of the Food Substitutes (Control) Order, 1941 (S.R. & O., 1941, No. 1606), made under the Defence (General) Regulations, 1939, reg. 55), which prohibited

the manufacture of food substitutes, including synthetic or artificial cream, except under a licence granted by the Ministry. A formula for the manufacture of the synthetic cream submitted by the company had been approved by the Ministry, and it was a condition of the licence that no change should be made in the composition of the synthetic cream without the written consent of the Ministry and the company were obliged to comply with the requirements of the Ministry as to the price at which the synthetic cream was sold. Owing to a steep rise in prices of ingredients it became uneconomic to manufacture the synthetic cream according to the approved formula and sell it at the controlled price, and from about the middle of 1946 or earlier the company increased the quantity of synthetic cream produced by adding large quantities of water over and above that permitted by the approved formula. The plaintiffs alleged that they had been induced to purchase the shares of the company by the fraudulent misrepresentations of the first defendant, made to Economic Utilities, Ltd., acting on their behalf, that the company were manufacturing and selling synthetic cream under the licence and in accordance with the formula granted by the Minister, and that the profits shown on certain accounts produced to them for the past three years had been made from the manufacture and sale of cream in accordance with the licence and formula and from the lawful manufacture and sale of such synthetic cream. The first defendant denied the fraudulent misrepresentations. The third defendant denied that the first defendant negotiated on his behalf for the sale of the shares or that he (the third defendant) permitted or employed him to act on his behalf in the negotiations, and he contended that he was unaware of the illegal method of manufacturing synthetic cream carried on by the company, and that he knew nothing of the fraudulent misrepresentation or concealment by the first defendant and did not ratify it.

BARRY, J., held that the first defendant had made the false representation that the profits of the company were made substantially by lawful trading and by manufacturing synthetic cream in substantial accordance with the licence issued by the Ministry and the conditions provided for in the licence. He held further that the first defendant had acted as agent for the third defendant in negotiating the sale of the shares and that the third defendant had ratified the negotiations and assumed responsibility for the acts of the first defendant in the course of the negotiations. The executors of the third defendant, who had died, appealed, and the plaintiffs gave notice of a cross-appeal on the question of damages.

Gardiner, Q.C., and N. Lawson for the plaintiffs.

Salmon, Q.C., and Gage for the third defendant.

LORD GODDARD, C.J.: This is an appeal against an order of BARRY, J., whereby he held two shareholders in a company liable in an action for fraud, and one of those shareholders, Sir Charles McRea, the third defendant, being now dead, his executors are the appellants. No suggestion of fraud has been made against the third defendant, but it is said that, by reason of the finding of fraud (which we are not asked to set aside) against a co-director of his, a Mr. Rosher, the first defendant, Sir Charles McRea, and, indeed, every other shareholder in this case, is liable to the plaintiffs in damages on the principle of vicarious liability.

The first defendant, who is a person of advanced age, had a formula for making synthetic cream which seems to have been perfectly wholesome, but the Ministry of Food would not allow people to buy synthetic cream unless it contained a certain fat content. The first defendant had to submit a formula for synthetic cream, and any alteration in the formula, to the Ministry for their approval, and, finally, he obtained their permission for its manufacture according to a formula submitted. At first all went well, but soon after the end of the war prices began to rise steeply, and by 1947 the company could

not get enough of the raw material at a price which would enable them to maintain the necessary output to make the business profitable. The first defendant thereupon proceeded to make the synthetic cream in a different way from the original formula, adding a great deal of water and thus increasing the bulk which was being sold. It is not suggested that the other directors, gentlemen of the highest position and character, knew that the first defendant was producing the synthetic cream by these surreptitious means. They did not go to the factory to observe how manufacture was carried on. They had been told that the formula had been approved by the Ministry of Food, they trusted the first defendant, as they were entitled to do, he being the managing director, and they had no knowledge of the fraudulent manufacture which was going on. In the summer of 1948 the first defendant, partly because he was getting old and partly because he was afraid of being found out (because the third defendant had appointed his nominee as secretary to keep an eye on things), decided to leave the business. He asked business acquaintances in the provision and allied trades whether they would like to buy the business, which, of course, could only be done by buying the shares. These gentlemen were interested. After some negotiation one of them, Mr. Briess, the first plaintiff, told the first defendant that he would be likely to pay 35s. for the preference shares and 15s. for the ordinary shares. On Oct. 14, 1948, there was a board meeting, followed by a general meeting of the company. The board meeting was attended by Sir Charles McRea, who was in the chair, the first defendant, other directors, and the secretary. The minute of the board meeting is:

"[The first defendant] outlined a proposition which had been made to him by Economic Utilities, Ltd., whereby that company would purchase from the shareholders of Nutrifood Products, Ltd., their preference shares for 35s. per share and their ordinary shares for 15s. per share. This was discussed very fully and in view of the difficulties being encountered in consequence of the restricted supply of raw materials it was decided that the above proposition should be placed before the shareholders."

The directors of Nutrifood Products, Ltd., heard that statement from their managing director and decided to put it to the general meeting which was to be held that day. That general meeting was attended by those directors and by Lord Birdwood, Brigadier Barne, Mrs. Emson, Mrs. Smeeton, Mrs. Douglas, Miss Hall and Miss Davis, all shareholders, though whether they were the whole of the shareholders, apart from one in Australia, I do not know. The chairman informed the meeting

"that the directors had received a proposition with regard to the sale of the whole of the company's shares. At the present time great difficulties were being encountered owing to the restricted supplies of raw material with a consequent restriction in output resulting in losses being incurred by the company. There were no prospects in the immediate future of the allocation of raw materials being increased. The proposition referred to had been received from Economic Utilities, Ltd., whereby that company would purchase from the shareholders of Nutrifood Products, Ltd., their preference shares for 35s. per share and their ordinary shares for 15s. per share. This matter was discussed very fully and it was agreed that [the first defendant], who had already been in negotiation with Economic Utilities, Ltd., should take the matter up further with that company with a view to completing the transaction on the above basis."

The actual language of that minute is the language of the secretary who drafted it, and it is signed by the chairman of the next meeting. But what does it mean? Surely it only comes to this, that the shareholders at the meeting are told by their chairman that the company has received information that Economic Utilities, Ltd., were willing to buy their shares at 35s. for the preference shares and

15s. for the ordinary shares, and the shareholders then say: "We accept that price. Will [the first defendant] please complete the transaction." It does not seem to me that the first defendant has either asked for or obtained any authority to negotiate on their behalf. The matter is put forward that a proposition has been received. The shareholders, hearing this and thinking it favourable, say they will accept it. As a matter of fact the firm offer had not then been made. The first offer in writing was made on Oct. 20, after another meeting between the first defendant and one of the plaintiffs. The witnesses called for the plaintiffs were singularly vague as to when the meeting took place and exactly what took place at it.

On Oct. 20 Economic Utilities, Ltd., wrote:

"Dear Sir, We agree to purchase, subject to contract, the whole of your 4,762 £1 participating preference shares at 35s. per share, total £8,333 10s. and the whole of your 4,760 ls. ordinary shares at 15s. per share . . . On your obtaining completed transfers from your shareholders we will hand you in exchange for same £12,000."

It was turned into a firm offer on Nov. 2, when they wrote:

"We agree to purchase from the present holders 4,762 £1 participating preference shares and 4,760 ls. ordinary shares for a total consideration of £12,000. The consideration to include £96 10s. to defray the costs of completing this transaction."

That was accepted by the first defendant on Nov. 4:

"I thank you for your letter of the 2nd inst. agreeing to purchase from the present holders 4,762 £1 participating preference shares and 4,760 ls. ordinary shares for a total consideration of £12,000 which includes £96 10s. towards the cost of completing this transaction. I have approached the shareholders and all have agreed. Transfer forms have been sent to them with a request that they will forward them duly executed to our solicitor together with their share certificates. These are now being received and I hope the whole of them will be to hand during next week with the possible exception of three hundred preference shares held by a shareholder in Australia who, however, has cabled his agreement. I have pleasure in accepting your offer as set forth above and give you my assurance that since June 30, 1948, the company has not entered into any transaction other than in the ordinary course of its business."

Thereupon the transfers were duly executed and the shares passed to the plaintiffs in these proceedings.

It is now said that the shareholders, who were innocent of any fraud, had no knowledge of any misrepresentations made, and were unaware of the defects of the substance which the company were manufacturing, are liable in damages to the purchasers. The learned judge has held that they are so liable on the doctrine of vicarious liability, i.e., because their agent was fraudulent the shareholders were fraudulent. I need not go into the question of what would have happened if after the meeting of Oct. 14 fraudulent misrepresentations had been made by the first defendant. It may be that, if the first defendant had been told to negotiate on their behalf, the shareholders would have been liable. But I think the matter comes to no more than this. The first defendant, who for his own purposes and to serve his own ends had made fraudulent misrepresentations to the plaintiffs, merely told the shareholders that he could procure 35s. for the preference shares and 15s. for the ordinary shares. Thereupon, no matter how exactly the minute is worded, the shareholders said: "We will accept the offer, you get us that amount". I cannot see, therefore, that the shareholders can be made to return this amount, because they were no party to the fraudulent misrepresentations. They did not give any authority to the first defendant to act as their agent to negotiate this purchase. They

were led by him to believe that the matter was a fait accompli to the extent that he had a firm offer and that they would receive this amount if they accepted it.

A An attempt has been made to support the plaintiffs' case on the ground of ratification, but I cannot understand how ratification applies here. The defendants, by taking the money and transferring the shares, have ratified the first defendant's act in procuring the sale of the shares, but I cannot see how they can be said to have ratified his fraudulent misrepresentations of which they knew nothing and could know nothing. It is very unfortunate for the plaintiffs, in that the defendants retain money which they would not have received but for the first defendant's fraudulent misrepresentation, but on the basis of a balance of the merits of the case and of which of two innocent parties should suffer for the fraud of a third person, as the shareholders knew that the business was being sold to a company which was in the trade, it seems to me they are entitled to say: "We imagined the purchasers knew what they were buying. They could have easily found out". They trusted the first defendant and did not, apparently, have an analyst or make any trade inquiry, nor inspect the formula from the Ministry of Food. Everybody in the trade must have known that at that time many regulations required the approval of the Ministry of Food for the manufacture of these substitute foods. I base my judgment on the ground that this minute of Oct. 14 did not give the first defendant authority, or purport to give him authority, to negotiate on behalf of the company. It gave him authority to accept what was being offered, a sum of money which he said he could get for the shares. For these reasons, I think the appeal should succeed.

D MORRIS, L.J.: I am of the same opinion. Economic Utilities, Ltd., had been customers of Nutrifood Products, Ltd., and, so the learned judge held, had been purchasing from Nutrifood Products, Ltd., a very substantial quantity of their output. According to Mr. Fisher, a director of the company, Economic Utilities, Ltd.'s business was that of wholesale distributors for the bakery and ice cream trade and food distributors generally. In 1947 there had been talk of a purchase of the shares in Nutrifood Products, Ltd., and Mr. Fisher had made some tentative approach to the first defendant. Nothing came of that and Mr. Fisher's recollection is that in 1948 the return to the matter was made by the first defendant. Doubtless the reason was that he realised full well what the situation was, and thought that matters could not go on as they were. There were substantial sales of the product, and the figures in the balance sheet and in the accounts were genuine. The real fraud, as my Lord has pointed out, was that the product was not being made in accordance with the formula. In 1948 the first defendant and Mr. Fisher were again in touch with each other, and at a meeting at the first defendant's club, a discussion took place as to a sale of the shares. As held by the learned judge, the other directors of Nutrifood Products, Ltd., were at that time unaware of what was going on. They knew nothing of the meeting, and never knew or suspected that the whole business of the company was carried on in a dishonest manner, viz., by purporting to manufacture in accordance with the formula, but in fact by the addition of water producing goods in such quantity as to yield the profits made. The directors first heard of the offer for the shares in October, 1948. Mr. Fisher said that in the talks that he had had with him, the first defendant made it clear that the shareholders did not then know of the negotiations. It seems to me that, when the matter was put to the directors at the meeting of Oct. 14, it was put to them as a proposition that the shareholders could sell their shares at 35s. for the preference shares and 15s. for the ordinary shares. It is true that various events took place after Oct. 14. There was the meeting of Oct. 20, and the visit to the factory of Oct. 23, but, in my judgment, everything really had been done before Oct. 14, when, after

the directors had first been informed, the shareholders were told that they could sell their shares at the prices named. They never knew that there was anything wrong, or that there had been any fraudulent concealment, and they never authorised any fraudulent concealment. They were merely told of this offer for the shares and, in my judgment, they said they would accept the offer made. I agree with what my Lord has said, that liability for the concealment by the first defendant is not established. I, therefore, agree with the judgment my Lord has delivered. A

ROMER, L.J.: I also agree. So far as I can see, one aspect of the plaintiffs' case here would have very far-reaching consequences, because in cases in which all, or substantially all, the shares of a company are being bought by some third person, the negotiations are often of a very protracted character and are necessarily undertaken by the directors. The reason is that it is inconvenient, if not impossible, for each shareholder to negotiate with a prospective purchaser who wants either all the shares or in the region of ninety per cent. of them. If the plaintiffs were right, the following very serious position would result. The directors of a company, having secured something in the nature of an offer to buy the shares of the company at a certain price, place that before a meeting of shareholders, who authorise the board in charge of the negotiations to carry it to fruition. The directors do so. If it subsequently transpired that one of the board, in the course of the previous negotiations, had made a fraudulent misrepresentation for some purpose of his own, on the plaintiffs' contention, every shareholder would be liable in damages as a result at the suit of the purchaser. No authority is forthcoming to support that proposition, and in the absence of it I am quite unable to accept it. The result would be disastrous. In the present case we have a large bundle of transfers, how many I do not know, and if the plaintiffs are right every one of the transferors would be liable in damages for the whole amount for something he knew nothing about. With some companies far larger numbers of shareholders are concerned than the considerable number in this case. I am wholly unable to accept the argument put forward, and I entirely agree with what my Lords have said. B C D E

Appeal allowed; cross-appeal dismissed.

Solicitors: *Buckeridge & Braune* (for the plaintiffs); *Woolley, Tyler & Bury* (for the third defendant).

[*Reported by F. A. AMIES, Esq., Barrister-at-Law.*]

THE METAMORPHOSIS.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Karminski, J.), February 23, 1953.]

Shipping—Bill of lading—Evidence of contract of carriage—Express incorporation of terms, conditions and exceptions of charterparty—Plaintiffs suing for non-delivery of cargo as consignees, not as charterers.

A *Practice—Service—Service out of jurisdiction—Non-delivery of cargo—Action against shipowners by consignees abroad—Charterparty between foreigners for carriage between foreign countries—Charterparty in English—Signature on behalf of shipowners by English agents—Bill of lading in English signed by master abroad—R.S.C., Ord. 11, r. 1 (e) (ii) (iii).*

B By a charterparty, dated Nov. 11, 1950, and made between the defendants, a Greek firm resident in Greece, owners of the Greek steamship, *Metamorphosis*, and the Netherlands government, it was agreed that the ship should carry a cargo of goods from a port in Sweden to Amsterdam. The charterparty was in English and was signed on behalf of the defendants by the West Hartlepool Steam Navigation Co., Ltd., resident in England. C The goods were loaded on board and the bill of lading, which was signed by the ship's master and was written in English, stated that the goods were to be delivered at Amsterdam to the plaintiffs or their assigns, "they paying freight for same as per charterparty dated Nov. 11, 1950, all the terms, conditions and exceptions of which charterparty are herewith incorporated". On Dec. 2, 1950, the vessel and its cargo were totally lost off the coast of Holland. On Nov. 26, 1951, the plaintiffs issued a writ as D consignees named in the bill of lading, claiming from the defendants damages for non-delivery of the goods. On Aug. 1, 1952, an order was made *ex parte* by the registrar giving leave to serve the writ, or notice of the writ, out of the jurisdiction, namely, in Greece. The defendants entered a conditional appearance. On a motion by the defendants to set aside the service of the writ and all subsequent proceedings,

E HELD: since the plaintiffs were not in fact the charterers, the only evidence of the contract of carriage of the goods was contained in the bill of lading, and that document did not show, by its terms or by implication, any intention by the parties that the contract should be governed by English law, nor was it made by an agent trading or residing within the jurisdiction, and, therefore, neither R.S.C., Ord. 11, r. 1 (e) (ii) nor F r. 1 (e) (iii) applied, the court had no power to make an order for service out of the jurisdiction, and the order of the registrar would be set aside;

The Njegos ([1936] P. 90), distinguished.

G Circumstances in which, *held*, even if the matter had come within R.S.C., Ord. 11, r. 1, this would not have been a proper case for the court to exercise its discretion in the plaintiffs' favour by making the order sought.

AS TO SERVICE OUT OF THE JURISDICTION, see HALSBURY, Hailsham Edn., Vol. 26, pp. 31-36, paras. 44-53; and FOR CASES, see DIGEST, Practice, pp. 336-376, Nos. 547-855.

Cases referred to:

- H (1) *R. v. International Trustee for Protection of Bondholders Aktiengesellschaft*, [1937] 2 All E.R. 164; [1937] A.C. 500; 106 L.J.K.B. 236; 156 L.T. 352; Digest Supp.
 (2) *The Njegos*, [1936] P. 90; 105 L.J.P. 49; 155 L.T. 109; Digest Supp.
 (3) *The Hagen*, [1908] P. 189; 77 L.J.P. 124; 98 L.T. 891; Digest Supp.
 (4) *Société Générale de Paris v. Dreyfus Bros.*, (1885), 29 Ch.D. 239; 54 L.J.Ch. 893; *revsd.* C.A., (1887), 37 Ch.D. 215; 57 L.J.Ch. 276; 58 L.T. 573; Digest, Practice, 339, 574.

MOTION by the defendants to set aside an order of Mr. Registrar MAIN THOMPSON, made ex parte and dated Aug. 1, 1952, giving leave to the plaintiffs to serve the writ or notice of the writ on the defendants in Greece, the service thereof, and all subsequent proceedings.

Bucknill for the plaintiffs.

T. G. Roche for the defendants.

KARMINSKI, J.: On Nov. 26, 1951, a writ was issued in the Admiralty Division on behalf of the plaintiffs, a Dutch company, operating in the kingdom of the Netherlands, in which they claimed as consignees named in the bill of lading for goods shipped on board the Greek steamship *Metamorphosis*, owned by the defendants, a Greek firm or partnership operating in Greece. The claim by the plaintiffs against the defendants is for non-delivery of the goods consigned. After some delay an order was made ex parte on Aug. 1, 1952, whereby it was ordered that the plaintiffs should be given leave to issue and serve the writ, or notice of the writ, out of the jurisdiction, namely, at Piraeus, and the rest of the order was completed as to time for appearance. The defendants entered a conditional appearance in January, 1953, and on Feb. 9, 1953, notice of motion was given to set aside the service and notice of the writ, and it is that motion which I have now to consider.

The claim arises out of a consignment carried by the defendants' vessel. The goods were shipped by a Swedish company called *Bolidens Gruvaktiebolag* from a port in Sweden to Amsterdam. The shipment consisted of a quantity of flotation pyrites amounting to about four thousand tons. The goods were shipped in the defendants' steamship *Metamorphosis*, a vessel registered under the Greek flag and commanded by a Greek master. The bill of lading states that the cargo was to be delivered at the port of Amsterdam to the plaintiffs or their assigns, they paying freight for the same as per charterparty dated Nov. 11, 1950, "all the terms, conditions and exceptions of which charterparty are herewith incorporated". Then it says: "General average payable to York/Antwerp Rules, 1924". The master of the ship signed the bill of lading, which states that the master received from the shippers on account of freight the sum of 8,000 Swedish crs., insurance and interest having been paid. Then there was indorsed on the bill of lading a clause reading as follows:

"All the terms, provisions and conditions of the rules contained in the international convention for the unification of certain rules relating to bills of lading dated Brussels, Aug. 25, 1924, shall apply to the contract in this bill of lading, but if in the country of shipment or delivery of the cargo any special law has been enacted in order to incorporate the rules of the said convention, then all the terms, provisions and conditions of the said convention, with and subject to such modifications and conditions, if any, as are imposed by such special law shall apply."

I have had put before me the Swedish version of the statute of 1936, which purports to apply the convention of 1924, together with an English translation of the Swedish—(I use the word "purports" in no derogatory sense, but the matter was not strictly proved). The cargo was shipped in the vessel, but she was lost near the Dutch coast in the course of her voyage, at or near the port of Ymuiden.

It now becomes necessary to refer to the charterparty, to which in terms reference is made in the bill of lading. The charterparty was entered into between the defendants, as shipowners, on the one side, and the Ministry of Economic Affairs, The Hague, on the other. The charterparty is in English, as, indeed, is the bill of lading. The charterparty has at the top of it: "C. (Ore) 7", and is in the usual form and provides:

"a full and complete cargo of pyrites, about three thousand eight hundred tons (five per cent. more or less at owners' option) not exceeding what

she can reasonably stow and carry . . . and, being so loaded, shall with all convenient speed proceed to Amsterdam",

where the discharge was to take place. Freight was to be paid at the rate of 28s. British sterling per ton "payable as per cl. 28" in sterling in London. Clause 28 says:

"Freight to be paid in cash in sterling in London to West Hartlepool

A Steam Navigation Co., Ltd., London, s.s. Metamorphosis resident account at the National Provincial Bank, 15, Bishopsgate, London, E.C.2."

Payment for discharge was to be at the rate of 92½ Netherlands cents per metric ton, and the ton for the purposes of freight was to be a ton of 1,016 kilos—in other words, an English ton. By cl. 5 of the charterparty the cargo was to be shipped at the rate of one thousand tons and to be discharged at the same

B rate "per clear working day of twenty-four consecutive hours (weather permitting), Sundays and holidays always excepted". Under cl. 8 of the charterparty, demurrage (if any) was to be payable "at the rate of £80 per ton running day, or pro rata", and commission was to be payable, as I understand it, in sterling. Under cl. 30 dispatch money was to be paid to the charterers "at the rate of £40 per day or pro rata for part of a day for all time saved in

C discharging". The charterparty was signed by a representative of the Ministry of Transport, Directorate General of Shipping, for and on behalf of the Ministry of Economic Affairs, and by a director of the West Hartlepool Steam Navigation Co., Ltd., who were acting as brokers only "by telegraphic authority of D.A. & D.D. Psychoyos, of Piraeus" on behalf of the defendants.

D It is said by the plaintiffs that they come within the terms of R.S.C., Ord. 11, r. 1 (e) (ii) and (iii), which deal respectively with a contract made by or through an agent trading or residing within the jurisdiction on behalf of a principal trading or residing out of the jurisdiction, or which by its terms or implication is to be governed by English law. It is, I think, necessary to consider those two matters separately. Counsel for the defendants said that the claim was a claim under a contract contained in the bill of lading. He did not deny that

E a consignee has a right to sue under the provisions of the Bills of Lading Act, 1855, but he emphasised that this claim was a claim under a bill of lading, and, although the bill of lading by express reference incorporates all the terms, conditions and exceptions of the charterparty, yet, he contended, the claim remains one under the bill of lading. He also contended that the order for service made by the learned registrar was wrong because that order was made

F on an ex parte application and the learned registrar did not in fact have the benefit of knowing all the facts which are now known to me, and, also, that he made the order on a short affidavit which alleged that the contract of carriage of the goods was made on behalf of the defendants by or through their agents, the West Hartlepool Steam Navigation Co., Ltd., who reside within the jurisdiction of the court. He further contended that the learned registrar was

G wrong in making the order of Aug. 1, 1952, and was misled into making it.

I have to consider the nature of the contract under which the plaintiffs seek to sue. Counsel for the plaintiffs, in his argument, laid very great stress on the close connection between the bill of lading and the charterparty, and he pointed out with force that, in effect, the ship was chartered to carry this particular consignment of pyrites from Sweden to the consignees and nothing else, and that it was, therefore, a full and complete cargo, and he called my attention to a passage in SCRUTTON ON CHARTERPARTIES, 15th ed., p. 52, which states:

H "Where the charterer is himself the shipper, and receives as such shipper a bill of lading in terms differing from the charter, the proper construction of the two documents taken together is that, prima facie and in the absence of any intention to the contrary, as between the shipowner and the charterer, the bill of lading, although inconsistent with certain parts of the charter, is to be taken only as an acknowledgment of the receipt of the goods."

Counsel argued that the two transactions were so completely identified that, in effect, the consignees, the plaintiffs, were really the charterers. I think the difficulty in that submission is this. The charterers were, in fact, the Netherlands government. Under the regulations, or, perhaps, the law, of the Netherlands at that time, apparently, a charter could only be arranged through the government, and the charter was made by the Netherlands government with the defendants. It is perfectly true that the agents for the defendants were an English company. A

Dealing with this matter as a question of fact, I am quite unable to say that this was a transaction in which really the plaintiffs were the charterers. I do not think they were. Although counsel called my attention to various authorities in support of his contention, I do not think it is necessary for me to go into them in detail. He emphasised that this was a carriage of one cargo, and that, therefore, the true contract was not contained in the bill of lading alone. Up to a point I agree with him, because the bill of lading refers in terms to the terms and conditions of the charterparty, but, as I understand it, I have to look at the bill of lading itself. The principle to be applied has been stated (and has often been referred to since) in the well-known speech of LORD ATKIN in *R. v. International Trustee for Protection of Bondholders Aktiengesellschaft* (1) ([1937] 2 All E.R. 166): B C

"Various questions have been raised in this case, but that which comes first under consideration is what is the proper law of the contract, for if that be answered in one way no further issues remain. I will therefore proceed to discuss that matter. The legal principles which are to guide an English court on the question of the proper law of a contract are now well settled. It is the law which the parties intended to apply. Their intention will be ascertained by the intention expressed in the contract, if any, which will be conclusive. If no intention be expressed, the intention will be presumed by the court from the terms of the contract and the relevant surrounding circumstances. In coming to its conclusion, the court will be guided by rules which indicate that particular facts or conditions lead to a *prima facie* inference, in some cases an almost conclusive inference, as to the intention of the parties to apply a particular law, e.g., the country where the contract is made, the country where the contract is to be performed, if the contract relates to immovables the country where they are situate, the country under whose flag the ship sails in which goods are contracted to be carried. But all these rules only serve to give *prima facie* indications of intention: they are all capable of being overcome by counter indications, however difficult it may be in some cases to find such. The principle of law so stated applies equally to contracts to which a sovereign State is a party as to other contracts." D E

Continuing in search of a principle, my attention was called to the decision in *The Njegos* (2). In that case the plaintiffs were Danish and Norwegian merchants, indorsees of a bill of lading, who were claiming for loss of cargo which was damaged by fire when on board the *Njegos*. It was clearly admitted that, so far as the charterparty was concerned, the proper law to be applied was English, and the issue was the question of the law applicable to the bill of lading. It was held that the arbitration clause was not incorporated in the bill of lading, but that the clauses which were incorporated in it, and particularly the exceptions clause, could not be isolated from their context and incorporated without any indication of the proper law of the contract from which they were taken; that the inference was that business men must have intended that the bills of lading should be read with the English interpretation attaching to the charterparty; and that both on what should be presumed to be the intention of the parties and on the ground of business efficacy the proper law of the contract was English and not Yugo-Slavian law. F G H

I emphasise that there was a vital difference between that case and the present case. In that case there was an arbitration clause in the charterparty which is absent from the charterparty in the present case, and in that case, at, apparently, an early stage in the argument, it was frankly and freely admitted by counsel for the defendants that the law to be applied to the charterparty was English. The matter was dealt with in a considered judgment by SIR BOYD MERRIMAN, P., who commented ([1936] P. 102), I think with approval, on the doctrine set out by PROFESSOR DICEY in the *CONFLICT OF LAWS*, 5th ed., p. 666, where he says:

“ ‘Here, as in other branches of law, an inquiry into the intention of the parties is really an inquiry, not into the actual intention of X and A, for it possibly never had any real existence, but into the intention which would have been formed by sensible persons in the position of X and A if their attention had been directed to contingencies which escaped their notice.’ ”

The learned President said (*ibid.*, 103) that he was confronted

“ with the difficult, but not unfamiliar, problem of deciding what that hypothetical person, the sensible business man, must be taken to intend when he is content to be bound by a contract in writing of which, by commercial usage, he is unable to see the actual terms beforehand, and with which, in practice, as [counsel for the defendants] insisted, he does not really trouble himself in the least ”

—and he came to the conclusion that, having regard to all the circumstances, it was not the law of Yugo-Slavia which applied to the contract but English law.

I have to deal with what I believe to be the realities of the situation. The pyrites were being shipped from a Swedish port to a Dutch port in a Greek ship. The consignees were Dutch and the consignors were Swedish. I think the real point, as counsel for the defendants has argued, is by what law the contract in the bill of lading is governed. There are no express terms; it is a matter of inference or implication. Looking at it as best I can, I am unable to find that the true implication is that anybody intended that this contract should be governed by English law. It may well be that when the contract was made none of the parties applied his mind very closely, if at all, to that particular problem. As was pointed out by the learned President, one has to deal with the matter as if they might have done. I can see no reason why the parties should have wanted to make this particular contract a contract to be dealt with under English law. If they had done so, they could very easily have put in a clause to that effect. There is some evidence that in some cases of chartering by the Netherlands government an arbitration clause has been insisted on, and a clause could have been put in the contract providing for arbitration in Holland. But that was not done in this case. I do not draw any inference from the absence of such a clause in the contract. Counsel for the plaintiffs argued that the English language in the charterparty and bill of lading was of some significance, but I think that that is not more than one of the matters which I have to consider. I was told by both counsel, and I readily accept it, that a very large number of documents dealing with the carriage of goods by sea are in the English language, and the English language, undoubtedly, is used to govern contracts of this kind which have no relation to geographical circumstances, such as consignment to or from an English port, or with any intention, as I think, of application of English law. Therefore, I am bound to hold that this case does not come within R.S.C., Ord. 11, r. 1 (e) (iii), and that it was not the intention that it should be governed by English law.

I now return to the other justification put forward, namely, that this was a contract made by or through an agent trading or residing within the jurisdiction on behalf of a person trading or residing outside the jurisdiction. I have

already stated, and I hope sufficiently, the facts, which show that, so far as the defendants were concerned, the charterparty was signed on their behalf by an English company with an office in London, but that refers to the charterparty, and counsel for the defendants has emphasised that, as in other cases (and in a number of reported cases) it may well be that the parties to the bill of lading were quite ignorant of the terms of the charterparty. I myself do not think that this contract between the plaintiffs and the defendants was one made within the ambit of R.S.C., Ord. 11, r. 1 (e) (ii), namely, by or through an agent within the jurisdiction.

That disposes of the matter, but I think it is desirable that I should say something else with regard to the discretionary power of the court. Even if I had been satisfied that this matter came within R.S.C., Ord. 11, r. 1, there still remains for the court to consider the question whether or not the power conferred by that rule should be exercised. In *The Hagen* (3) FARWELL, L.J. ([1908] P. 201) emphasised the great care which must be exercised in the application of the jurisdiction conferred by the rule, and he cited with approval the principle enunciated by PEARSON, J., in *Société Générale de Paris v. Dreyfus Bros.* (4) where PEARSON, J., said (29 Ch.D. 242):

“ ‘it becomes a very serious question, and ought always to be considered a very serious question, whether or not, even in a case like that, it is necessary for the jurisdiction of the court to be invoked, and whether this court ought to put a foreigner, who owes no allegiance here, to the inconvenience and annoyance of being brought to contest his rights in this country, and I for one say, most distinctly, that I think this court ought to be exceedingly careful before it allows a writ to be served out of the jurisdiction.’ ”

KENNEDY, L.J., said much the same thing, in slightly different words, when he said ([1908] P. 204):

“ But, assuming that there was jurisdiction to make an order, the court has to decide whether, under the initial words of Ord. 11, it was a case in which the jurisdiction, though legitimate, ought to be, as a matter of discretion, exercised in favour of the owners of the City of Bradford.”

I have to consider whether, even if the jurisdiction was open, it ought to be exercised. The plaintiffs are a Dutch company and the defendants are a Greek partnership or firm in Piraeus, and the ship was lost off the coast of Holland. I am told that the pilot survived, and I have no doubt that the master and some members of the crew did as well. I have to consider, among other things, where the balance of convenience lies, and whether it would be right in this case in any event to bring the defendants to this country. I am told by counsel for the plaintiff (and I, of course, accept it at once and it is borne out by an affidavit sworn on behalf of the defendants) that the persons with the major financial interest in this loss are an insurance club. That may well be so, but it does not alter the position with regard to collecting witnesses and bringing them to this country. I deal with this matter only for this reason, that had I felt that I possessed the jurisdiction to make the order in question I do not think I would have done so in the exercise of my discretion, having regard to all the material facts which have been put before me. But I have come to the clear conclusion that there is no jurisdiction to make the order for service of the writ out of the jurisdiction, and, in my view, this motion succeeds. Therefore, the order made on Aug. 1, 1952, by the learned registrar giving leave to serve notice of the writ outside the jurisdiction must be set aside.

Order accordingly.

Solicitors: *William Charles Crocker* (for the plaintiffs); *Richards, Butler & Co.* (for the defendants).

[Reported by A. T. HOOLAHAN, ESQ., Barrister-at-Law.]

UNION CORPORATION, LTD. v. INLAND REVENUE
COMMISSIONERS.

JOHANNESBURG CONSOLIDATED INVESTMENT CO., LTD. v.
INLAND REVENUE COMMISSIONERS.

TRINIDAD LEASEHOLDS, LTD. v. INLAND REVENUE
COMMISSIONERS.

A

[HOUSE OF LORDS (Lord Normand, Lord Oaksey, Lord Morton of Henryton, Lord Reid and Lord Cohen), February 5, 9, 10, 11, 12, March 9, 1953.]

Profits Tax—Relief—Non-distribution relief—Company ordinarily resident both within and outside the United Kingdom—Finance Act, 1947 (c. 35), s. 39 (1).

B

On the footing that it was ordinarily resident outside the United Kingdom, a limited company, which was admittedly also ordinarily resident in the United Kingdom, claimed that, having regard to the Finance Act, 1947, s. 39 (1), profits tax ought to be charged on it as if no net relevant distributions to proprietors had been made in the relevant chargeable accounting period.

C

HELD: on its true construction, s. 39 (1) (which affords relief from profits tax to persons "ordinarily resident outside the United Kingdom") did not extend to a person who was also ordinarily resident in the United Kingdom, and, therefore, the company was not entitled to relief.

Decision of the COURT OF APPEAL ([1952] 1 All E.R. 646), affirmed.

D

FOR THE FINANCE ACT, 1947, s. 39 (1), see HALSBURY'S STATUTES, Second Edn., Vol. 12, p. 784.

Cases referred to:

(1) *Stockton & Darlington Ry. Co. v. Barrett*, (1844), 11 Cl. & Fin. 590; 8 E.R. 1225; 42 Digest 743, 1668.

E

(2) *Warrington v. Furbor*, (1807), 8 East. 242; 103 E.R. 334; 1 Digest 54, 445.

(3) *Armtyage v. Wilkinson*, (1878), 3 App. Cas. 355; 47 L.J.P.C. 31; *sub nom. Armtyage v. Master in Equity of the Supreme Court of Victoria*, 38 L.T. 185; 44 Digest 1035, 8924.

APPEALS by the taxpayers, three limited companies, from orders of the Court of Appeal dated Feb. 22, 1952, reported [1952] 1 All E.R. 646, affirming orders of HARMAN, J., dated July 20, 1951, whereby he dismissed the taxpayers' appeals from decisions of the Special Commissioners of Income Tax.

The Special Commissioners held (i) that residence in a place outside the United Kingdom throughout a given chargeable accounting period would entitle the company to the benefit of the Finance Act, 1947, s. 39 (1), in relation to profits tax notwithstanding that it was also at the same time resident in the United Kingdom; but (ii) that the taxpayers were not shown to have been resident outside the United Kingdom as claimed. HARMAN, J., differed from the Special Commissioners on both points (which, however, resulted in the same conclusion as the Special Commissioners as regards the application of the relief afforded by s. 39 (1)). The Court of Appeal took the same view as HARMAN, J., on point (i), while disagreeing in part with his view on point (ii).

H

Millard Tucker, Q.C., Mustoe, Q.C., and R. R. D. Phillips for Union Corporation, Ltd. and Johannesburg Consolidated Investment Co., Ltd.

Grant, Q.C., F. N. Bucher and Shelbourne for Trinidad Leaseholds, Ltd.

The Attorney-General (Sir Lionel Heald, Q.C.), Heyworth Talbot, Q.C., and Sir Reginald Hills for the Crown.

The House took time for consideration.

Mar. 9. The following opinions were delivered.

LORD NORMAND: My Lords, I fully agree with the opinion which my noble and learned friend, LORD COHEN, is about to deliver and have nothing to add.

LORD OAKSEY: My Lords, I, too, agree with the opinion which my noble and learned friend, LORD COHEN, is about to deliver.

LORD MORTON OF HENRYTON: My Lords, I also agree with the opinion which my noble and learned friend, LORD COHEN, is about to deliver.

LORD REID: My Lords, I also agree with that opinion.

LORD COHEN: My Lords, these are three appeals brought respectively by Union Corporation, Ltd., Johannesburg Consolidated Investment Co., Ltd., and Trinidad Leaseholds, Ltd., from three orders of the Court of Appeal made on Feb. 22, 1952, affirming three orders of HARMAN, J., made on July 20, 1951, whereby he dismissed the respective appeals of the three appellant companies from decisions of the Special Commissioners concerning the computation of their respective liabilities to profits tax.

Each of the three appeals raises the same two questions: (i) whether on the assumption that a company is shown to have been ordinarily resident in a place outside the United Kingdom throughout a given chargeable accounting period it is, on the true construction of the Finance Act, 1947, s. 39 (1), entitled to the benefit of that provision in the computation of its liability to profits tax, as having been "ordinarily resident outside the United Kingdom throughout" the relevant chargeable accounting period within the meaning of s. 39 (1), notwithstanding that it was admittedly also ordinarily resident in the United Kingdom throughout the same period; and (ii) if the answer to the first question is in the affirmative, whether, having regard to the circumstances in which, according to the authorities, dual residence can as a matter of law properly be inferred, the company is on the facts of the case shown to have been throughout the relevant period ordinarily resident in the place outside the United Kingdom claimed as its second or concurrent place of residence.

The effect of the Special Commissioners' decision in each of the three cases was: (i) as regards the first question, that residence in a place outside the United Kingdom throughout a given chargeable accounting period would, if established, entitle the company to the benefit of s. 39 (1) notwithstanding the admitted fact of concurrent residence in the United Kingdom throughout the same period; but (ii) as regards the second question, that the test of dual residence in their view deducible from the authorities precluded them as a matter of law from holding that the company was on the facts of the case shown to have been ordinarily resident outside the United Kingdom as claimed, concurrently with its admitted residence in the United Kingdom. The claims of the three appellant companies to the benefit of the Finance Act, 1947, s. 39 (1), accordingly failed before the Special Commissioners. The learned judge (who took the convenient course, also adopted in the Court of Appeal, of hearing the three cases together and combining them in a single judgment) differed from the Special Commissioners on both questions, but, nevertheless, arrived at the same result, for he held (in effect): (i) as regards the first question, that on its true construction s. 39 (1) did not apply to a company ordinarily resident in a place outside the United Kingdom throughout a given chargeable accounting period if it was also ordinarily resident in the United Kingdom during the same period; and (ii) as regards the second question, that the Special Commissioners had misapprehended the effect of the authorities as regards the circumstances in which dual residence can as a matter of law properly be inferred, and that, judged by the true test deducible from the authorities when properly understood, the facts as found by the Special Commissioners in the cases of Union Corporation, Ltd., and Johannesburg Consolidated Investment Co., Ltd.,

sufficed to establish the dual residence in South Africa as well as in the United Kingdom claimed by them respectively, but that as regards Trinidad Leaseholds, Ltd., the facts so far found were not sufficient to warrant the same course, and, had he reached a different conclusion on the first question, he would have thought it necessary to remit the case to the Special Commissioners for further consideration. The Court of Appeal agreed with the conclusion of HARMAN, J., on the first point though not with all his reasoning; on the second point also they agreed with his view of the law but saw no reason on the facts to distinguish the case of Trinidad Leaseholds, Ltd., from that of the other two companies.

Before I consider the ratio decidendi in the courts below, it will be convenient to refer briefly to so much of the legislation dealing with profits tax as is relevant to the questions your Lordships have to decide. Profits tax was first introduced under the style "National Defence Contribution" by the Finance Act, 1937, s. 19, and was charged on all the profits of each chargeable accounting period arising from any trade or business irrespective of whether the profits were distributed or were retained in the business. It was levied on individuals and partnerships as well as on bodies corporate. Section 19 (2) provided as follows:

"Subject as hereafter provided, the trades and businesses to which this section applies are all trades or businesses of any description carried on in the United Kingdom, or carried on, whether personally or through an agent, by persons ordinarily resident in the United Kingdom."

By s. 20 (1) it was provided that the profits arising from a trade or business were to be computed on income tax principles as adopted in accordance with the provisions of sched. IV to the Act.

The tax, originally introduced for a period of five years, was continued indefinitely by the Finance Act, 1942, s. 36. Its name was changed to "profits tax" by the Finance Act, 1946, s. 44. A radical alteration in the character of the tax was made by the Finance Act, 1947, which introduced an entirely new feature in the shape of discrimination between distributed and undistributed profits. By s. 30 (1), as amended by the Finance (No. 2) Act, 1947, the rate of profits tax was increased to twenty-five per cent. By s. 30 (2), as similarly amended, relief was granted at the rate of fifteen per cent. on the amount of any excess of profits chargeable to tax for any chargeable accounting period over the amount of profits distributed for that period (in the section called "net relevant distributions"). Conversely, by s. 30 (3), as similarly amended,

an additional charge at the rate of fifteen per cent. was made on the amount of any excess of profits distributed for any chargeable accounting period over the profits chargeable to tax for that period. The broad effect of the provisions thus briefly summarised was, therefore, to charge profits tax at the rate of twenty-five per cent. on distributed, and ten per cent. on undistributed, profits, and these were the rates in force during the periods relevant to the present appeals. By the Finance Act, 1947, s. 31, trades or businesses carried on by individuals, partnerships of individuals and persons acting as personal representatives were exempted from the tax, and its scope (save in certain special cases probably rare in practice) was thus in effect limited to trades or businesses carried on by corporate bodies. The Act also contains elaborate provisions, which need not for the present purpose be considered in detail, but to which some further reference is made hereafter, for exempting from further liability to tax profits received by way of distribution by one profits-tax paying concern from another (termed in the Act "franked investment income"), and for excluding the appropriate proportion of any franked investment income in computing the amount of any taxable distribution made out of profits which include franked investment income.

I turn now to the Finance Act, 1947, s. 39, on the true construction of sub-s. (1) of which the first question before your Lordships' House turns. Sub-section (1) and sub-s. (2) are in the following terms:

I turn now to the Finance Act, 1947, s. 39, on the true construction of sub-s. (1) of which the first question before your Lordships' House turns. Sub-section (1) and sub-s. (2) are in the following terms:

“(1) Where the person carrying on a trade or business is ordinarily resident outside the United Kingdom throughout a chargeable accounting period, the profits tax payable by that person shall be ascertained as if no net relevant distributions to proprietors had been made in the case of that person for that period. (2) Where a trade or business is carried on by a body corporate and, throughout a chargeable accounting period, both the following conditions are fulfilled, that is to say—(a) that that body corporate is ordinarily resident in the United Kingdom; and (b) that another body corporate which is not ordinarily resident in the United Kingdom controls, directly or indirectly, not less than one-half of the voting power in the first-mentioned body corporate, distributions to that other body corporate shall be left out of account in determining, in relation to the first-mentioned body corporate, the net relevant distributions to proprietors for that period.”

It will be observed that sub-s. (1) granted relief to a foreign body corporate carrying on a trade or business in the United Kingdom in its own name, while sub-s. (2) in effect granted relief to a foreign company carrying on business in the United Kingdom through a subsidiary company. It is, however, also to be noticed that if the subsidiary company was not a hundred per cent. subsidiary company the relief granted would enure to the benefit also of the other shareholders in the subsidiary company. Sub-section (3) is a charging and not an exempting provision and its purpose appears to be to levy a distribution charge on profits which have obtained relief under sub-s. (1) or sub-s. (2) but ultimately find their way into the coffers of a body corporate resident in the United Kingdom. The sub-section provides:

“Where the franked investment income of a person includes income received from a body corporate ordinarily resident outside the United Kingdom to which sub-s. (1) or sub-s. (2) of this section applies, the preceding provisions of this Part of this Act relating to the determination of the net relevant distributions for any period by reference to the gross relevant distributions therefor shall have effect subject to the following modification, that is to say, that any reference therein to the profits for the period (not being a reference to profits computed without abatement and including franked investment income) shall be construed as a reference to the first-mentioned profits increased by the said income received from the said body corporate.”

With these provisions in mind I return to the judgments of HARMAN, J., and of SIR RAYMOND EVERSHED, M.R., who delivered the judgment of the Court of Appeal, and I shall confine myself for the time being to the question of the true construction of s. 39 (1). HARMAN, J., based his decision mainly on three points: (i) He considered that to describe a person, whether real or juridical, as resident outside an area implies *prima facie* non-residence within it. (ii) He considered that in sub-s. (2) the contrast between the expressions “resident in” in (a) and “not . . . resident in” in (b) necessarily involved that “resident in” in (a) meant “resident in and nowhere else” and from this he arrived at the conclusion that “resident outside” in sub-s. (1) should be opposite to that, namely, resident outside and nowhere else. (iii) He considered that the introductory words of sub-s. (3):

“Where the franked investment income of a person includes income received from a body corporate ordinarily resident outside the United Kingdom to which sub-s. (1) or sub-s. (2) of this section applies”,

gave rise to the obvious inference that the body corporate referred to as resident outside the area was one to which sub-ss. (1) and (2) applied indifferently: in other words, that to the draftsman “resident outside” and “not resident in” were synonymous.

The Master of the Rolls agreed with HARMAN, J., as to the *prima facie* meaning of the phrase "resident outside". He rejected, and I think rightly rejected, the second point on which HARMAN, J., relied, since, as the Master of the Rolls pointed out, once it is conceded that a company may be resident in two places the positive finding that a company is resident in the United Kingdom does not necessarily exclude a finding that the same company is also resident outside the United Kingdom. The Master of the Rolls agreed, however, with HARMAN, J., in the inference that he drew from sub-s. (3). He ended his judgment on this question by saying ([1952] 1 All E.R. 653):

"We think, however, that support for the Crown's contention (apart from the *prima facie* meaning of the word 'outside') is also to be found in the structure of the legislation by which the profits tax is imposed. The normal dichotomy in the taxing Acts is between persons residing in, and persons residing out of, the United Kingdom. We use the word 'normal' to show that we have not overlooked the fact (pointed out by counsel for the third taxpayer company) that the Act of 1947 introduced a new conception, namely, differential rates of profits tax according to whether profits were distributed or not, and that the distinction is not one wholly between resident and non-resident, since under s. 39 (2) relief is given to a person who is resident in this country. The distinction does, however, appear in s. 19 of the Finance Act, 1937, which first imposed the National Defence Contribution. The taxpayer companies were made subject to the tax by the Act of 1937, and if it had been intended by s. 39 (1) of the Act of 1947 to give persons resident not only inside but also at the same time outside the United Kingdom relief already given by the same section to persons residing exclusively outside the United Kingdom the legislature would, in our opinion, have said so in terms. In our judgment, the words of s. 39 (1), construed in their natural meaning, in their context, and against the background of the taxing Acts generally, can only properly be construed in the sense contended for by the Crown, so that the companies, being resident inside, cannot claim the benefit conferred by the section on persons resident outside, the United Kingdom."

Before your Lordships, counsel for the first two appellant companies relied on the same arguments which he addressed to the Court of Appeal. They may be summarised as follows: (i) Once it is admitted that for the purposes of the profits tax Acts a company may reside both outside and in the United Kingdom, the expression "ordinarily resident outside the United Kingdom" does not exclude the possibility of the same body corporate residing in the United Kingdom. This construction is reinforced by the fact that it is common ground that the expression a "body corporate . . . ordinarily resident in the United Kingdom" in sub-s. (2) (a) would cover a body corporate which was also resident outside the United Kingdom. (ii) The change of language from "ordinarily resident outside" in sub-s. (1) to "not ordinarily resident in" in sub-s. (2) (b) connotes a change of meaning. (iii) He agreed with the Attorney-General that the expression in sub-s. (3) "a body corporate . . . resident outside the United Kingdom to which . . . sub-s. (2) . . . applies" refers to the "body corporate which is not ordinarily resident in the United Kingdom" mentioned in sub-s. (2) (b) and not to the "body corporate . . . ordinarily resident in the United Kingdom" referred to in sub-s. (2) (a). He differed, however, from the Attorney-General by insisting that sub-s. (3) was neutral in its effect when construing sub-s. (1). He concluded by submitting that: (i) the primary rule of construction is that words must be given their natural meaning in the absence of some context forcing your Lordships to place some other meaning on them; (ii) the possibility of dual residence being admitted, the natural meaning of the words "a person . . . ordinarily resident outside the United Kingdom" is inclusive of a person answering the description but

also ordinarily resident in the United Kingdom; (iii) as his clients were companies within that category they were entitled to the relief given by sub-s. (1).

I am unable to accept this argument. It seems to me that the expression your Lordships have to construe is capable of bearing either the inclusive or the exclusive meaning. I agree with the Master of the Rolls that your Lordships must construe the section in the light of the provisions of Part III of the Finance Act, 1937, with which it has, under the Finance Act, 1947, s. 74, to be read, and also against the background of the taxing Acts generally. That background is, I think, correctly stated in the passage from the judgment of the Master of the Rolls which I have already read. I appreciate that the change in language to which counsel referred is *prima facie* against the construction to which reference to the background of the Acts would lead me, but I agree with the explanation of that change of language offered by the Master of the Rolls when he says (*ibid.*, 651):

“ We admit that, if the Crown is right, the change in terminology is open to criticism as a matter of drafting, but we think it is easy to see (on the Crown’s view) how it may have come about. The Act reads in s. 39 (2) (a) ‘ that that body corporate is ordinarily resident in the United Kingdom ’, and then continues in s. 39 (2) (b) ‘ that another body corporate which is not ordinarily resident in the United Kingdom,’ etc. In drafting (a) and (b) together it seems natural enough to add the word ‘ not ’ before the words ‘ ordinarily resident ’ rather than to look back to see what form of words was used in s. 39 (1) to describe the same thing.”

Looking at the matter as a whole, I should be inclined, quite apart from sub-s. (3), to the opinion expressed by the Court of Appeal that the words of s. 39 (1), construed in their natural meaning in their context, and against the background of the taxing Acts generally, should be construed in the sense contended for by the Crown. I would add that any doubt I might otherwise have felt is removed by sub-s. (3) if that sub-section is to be construed in the sense for which the Crown contends and which counsel for the first two appellant companies accepts. Once it is admitted that the expression in sub-s. (3) “ body corporate ordinarily resident outside the United Kingdom to which . . . sub-s. (2) . . . applies ” refers to the body corporate mentioned in sub-s. (2) (b), it seems to me a necessary inference that the expression “ body corporate ordinarily resident outside the United Kingdom ” and “ body corporate not ordinarily resident in the United Kingdom ” are being used by the draftsman as interchangeable terms. The latter phrase is plainly exclusive of a body corporate also resident in the United Kingdom, and it follows that the exclusive meaning must be attributed to the former.

However, counsel for Trinidad Leaseholds, Ltd., while adopting the rest of the argument of counsel for the other appellants, differs from him as to sub-s. (3) and contends that the expression “ body corporate ordinarily resident outside the United Kingdom to which . . . sub-s. (2) . . . applies ” is a reference to the “ body corporate . . . ordinarily resident in the United Kingdom ” mentioned in sub-s. (2) (a). He founds his argument on the contention, which, I think, is not disputed, that, if the Attorney-General is right, the word “ applies ” cannot be read in its normal sense and must be construed as “ refers ”. He points out that, if his construction be accepted, the word “ applies ” can be given its natural meaning, and he says that as the possibility of dual residence is admitted, the company ordinarily resident in the United Kingdom referred to in sub-s. (2) (a) may often be also a company ordinarily resident outside the United Kingdom. This is, no doubt, true, but the wording of sub-s. (3) is extremely inept if the intention was to refer to the body corporate mentioned in para. (a) of sub-s. (2), and the contention of the Attorney-General that in relation to sub-s. (2) the word “ applies ” in sub-s. (3) means “ refers ” seems to me to involve far less a distortion of the language of the section. It must

also be observed that, if counsel for the appellants are right, a company might answer the description of a body corporate ordinarily resident outside the United Kingdom in sub-s. (1) and also be a company ordinarily resident in the United Kingdom not less than half of the voting power in which was held by a company not ordinarily resident in the United Kingdom within sub-s. (2). There could, therefore, plainly be an overlap between sub-ss. (1) and (2). The existence of such an overlap is not an inevitable bar to the acceptance of their argument since, as counsel for the first two appellants points out, there are instances under the Income Tax Acts where a taxpayer can be taxed under one or other of the taxing provisions at the option of the Crown, but none the less, if I were left in doubt as between two constructions and there were no other factors to consider, I should prefer the construction which avoided the overlap.

Bearing all these considerations in mind, I have come to the conclusion that the Court of Appeal were right when they said that the words of s. 39 (1), construed in their natural meaning and against the background of the taxing Acts generally, can only be construed in the sense contended for by the Crown, so that the appellants, being resident inside, cannot claim the benefit conferred by the section on persons resident outside the United Kingdom. In arriving at this conclusion I have not overlooked the contention that on this basis logically the "body corporate . . . ordinarily resident in the United Kingdom" referred to in sub-s. (2) (a) should not include a body corporate ordinarily resident outside the United Kingdom, whereas the Crown accepts that it does include such a body corporate. Since the construction of sub-s. (2) is not now directly in point and may arise before us in another case, I prefer to say no more than that I do not think this contention can affect your Lordships' decision in view of the other matters to which I have referred.

Counsel for the first two appellants submitted that in case of doubt the statute should be strictly construed against the Crown and he relied on the following cases: *Stockton & Darlington Ry. Co. v. Barrett* (1), *Warrington v. Furber* (2), and *Armytage v. Wilkinson* (3). I observe that in the last mentioned case SIR JAMES COLVILLE, delivering the judgment of the Board, said:

"It is only, however, in the event of there being a real difficulty in ascertaining the meaning of a particular enactment that the question of strictness or liberality of construction need arise."

In the case before your Lordships I find it unnecessary to consider whether the principle on which counsel relies applies to such a case as the present or whether, where the question is whether a taxpayer brings himself within the category of persons entitled to total or partial exemption from duty, it may not be right to apply the ordinary principle that the onus of proving an allegation rests on the person making it. Both HARMAN, J., and the Court of Appeal dealt at length with the question whether each of the three appellant companies was in fact resident outside as well as inside the United Kingdom, no doubt in order that your Lordships might have the assistance of their opinions on that question in case your Lordships differed from them on the first question. In view of the fact that your Lordships are affirming the decision of the Court of Appeal on the first question, I do not find it necessary to consider the second question. For the reasons I have stated I would dismiss the appeals with costs.

Appeals dismissed.

Solicitors: *Herbert Smith & Co.* (for Union Corporation, Ltd.); *Holmes, Son & Pott* (for the other taxpayers); *Solicitor of Inland Revenue.*

[Reported by G. A. KIDNER, Esq., Barrister-at-Law.]

ROAD HAULAGE EXECUTIVE v. ELRICK (TRADING AS ELRICK AND HUTCHEON).

[HOUSE OF LORDS (Lord Normand, Lord Oaksey, Lord Reid, Lord Asquith of Bishopstone, Lord Cohen), January 29, March '9, 1953.]

British Transport Commission—Transferred undertaking—Compensation to owner of undertaking—One-man business conducted by owner personally—Calculation of average net annual profit—Transport Act, 1947 (c. 49), s. 47 (3), sched. IX, paras. 1, 2 (1).

The respondent was the sole owner of a road haulage undertaking which he conducted himself. For the years 1946/47 and 1947/48 he had received £700 per annum as proprietor's remuneration and these amounts had been entered separately in the accounts of the undertaking. On Jan. 22, 1949, the undertaking was transferred to the appellants, the Road Haulage Executive, pursuant to a notice of acquisition served on the respondent on Oct. 14, 1948, under s. 39 (1) of the Transport Act, 1947. The respondent thereupon became entitled to compensation under the Act, and a dispute arose as to the sum payable to the respondent under s. 47 (3), which provides: "In respect of the total or partial cessation of business caused to the transferor by the operation of a notice of acquisition, the [British Transport Commission] shall pay to the transferor such sum, if any, as may be just, being a sum calculated by reference to the average net annual profit as defined in sched. IX to this Act, and being not less than twice nor more than five times the said average net annual profit." On the question whether, in order to determine the profit of the business for each year taken into account in determining the average net annual profit, there ought to be deducted from the profit which would be shown in the profit and loss account a sum representing the value of the respondent's services to the business,

HELD: the word "profit" was not defined in sched. IX, paras. 1 and 2 (1), to the Act, and, therefore, it must be taken to have its ordinary meaning, and, accordingly, the sum paid annually to the respondent as proprietor's remuneration should not be deducted in calculating the profit made in carrying on the undertaking in the financial years under review.

FOR THE TRANSPORT ACT, 1947, s. 47 (3) and sched. IX, see HALSBURY'S STATUTES, Second Edn., Vol. 24, pp. 761, 798.

Cases referred to:

- (1) *Arthur J. Maggs v. Road Haulage Executive*, Road Haulage Cases No. 3 (E. & W.)/1950, 15.
- (2) *Road Haulage Executive v. Yeoman*, Road Haulage Cases No. 4 (E. & W.)/1951, 33; on appeal, Road Haulage Cases No. 9 (E. & W.)/1952, 75.

APPEAL by the Road Haulage Executive from a decision of the First Division of the Court of Session (Lord President (LORD COOPER), LORD CARMONT, LORD RUSSELL and LORD KEITH), dated Feb. 1, 1952, affirming on a Stated Case a proposed holding of the Transport Arbitration Tribunal for Scotland that in computing the average net annual profit of the undertaking, the appellants were wrong in not adding back the sums received by the respondent in respect of services rendered to the undertaking for the years 1946/47 and 1947/48.

The appellants contended that, in ascertaining the profit made in carrying on the undertaking, the value of the services rendered by the respondent should be deducted from the income of the undertaking. The respondent contended that, in ascertaining the average net annual profit of the undertaking, no deduction should be made of the sum paid annually to him as proprietor's remuneration in calculating the profit made in carrying on the undertaking in each of the financial years under review.

Milner Holland, Q.C., P. R. E. Browne and G. C. Emslie (of the Scottish Bar) for the appellants.

H. R. Leslie, Q.C., and Alexander Thomson (both of the Scottish Bar) for the respondent.

The House took time for consideration.

Mar. 9. The following opinions were read.

LORD NORMAND: My Lords, I agree with the opinion which my noble and learned friend, LORD REID, is about to deliver, and I am satisfied with the reasoning of the Lord President in the court below, and have nothing to add.

LORD OAKSEY: My Lords, I also agree with the opinion about to be read by my noble and learned friend, LORD REID.

LORD REID: My Lords, the respondent owned a road haulage undertaking in Aberdeen. In 1948 the appellants, the Road Haulage Executive, served on him a notice of acquisition of his undertaking under s. 39 of the Transport Act, 1947, and on Jan. 22, 1949, this notice took effect and the undertaking was transferred to the appellants. The respondent thereupon became entitled to compensation under the Act. Compensation was due under several heads and the parties reached agreement on all matters except the proper basis of compensation under s. 47 (3). An application with regard to the matter was made to the Transport Arbitration Tribunal, the question submitted being what sum was payable to the respondent by way of compensation for cessation of business under s. 47 (3) on the transfer. Section 47 (3) provides:

“In respect of the total or partial cessation of business caused to the transferor by the operation of a notice of acquisition, the commission shall pay to the transferor such sum, if any, as may be just, being a sum calculated by reference to the average net annual profit as defined in sched. IX to this Act, and being not less than twice nor more than five times the said average net annual profit. In considering the proportion which the amount of the compensation is to bear to the average net annual profit as so defined, regard shall be had to the likelihood or otherwise that profits at the rate represented by the average net annual profit might, but for the operation of this Act, have been made after the date of transfer by carrying on the undertaking.”

Accordingly, the amount of compensation depends on two factors, the average net annual profit and a “multiplier” which is to be not less than two nor more than five. There is no dispute in this case about the multiplier. The sole question is what is the average net annual profit?

The tribunal found: “The compensation payable for cessation of business under s. 47 (3) is calculated by reference to the average net annual profit as ascertained in accordance with the provisions of sched. IX to the Act. The said average net annual profit is in this case ascertained under para. 6 of sched. IX by reference to the last two financial years of the undertaking, ending Mar. 31, 1947, and Mar. 31, 1948. During each of these two years the respondent was the sole proprietor of the respondent undertaking and in each year received £700 by way of proprietor’s remuneration in respect of services rendered to the respondent undertaking. This payment appeared in the audited accounts of the undertaking. In computing the average net annual profit of the undertaking, the [appellants] did not add back in each of the said two financial years the said sum of £700 in respect of proprietor’s remuneration. The respondent contended that in arriving at the average net annual profit the sum of £700 should be added back. The tribunal propose to hold that the [appellants] were wrong in not adding back to the profits of the undertaking as shown in the balance sheets the sum of £700 in each of the years 1946/47 and 1947/48,

and that these sums must be added back to arrive at the average net annual profit."

The appellants then applied for a Stated Case for the opinion of the Court of Session. The question of law submitted for the opinion of the court is as follows:—"Whether in the circumstances of the case, in ascertaining the average net annual profit of the undertaking of the respondent under and in terms of the Transport Act, 1947, there should be deducted the sum paid annually to the respondent as proprietor's remuneration in calculating, in accordance with para. 2 of sched. IX to the said Act, the profit made in carrying on the undertaking in each of the financial years under review?"

The case was heard by the First Division on Feb. 1, 1952, and the court unanimously answered the question in the negative (subject to a small alteration of the question which is immaterial in this appeal). This appeal is brought against that decision.

The respondent's business was a one-man business which he conducted himself and of which he was the sole owner. The appellants contend that in order to determine the profits of the business for each year taken into account in determining the average net annual profit there ought to be deducted from the profit which would be shown in a profit and loss account made up in the ordinary way a sum representing the value of the respondent's services to the business. Whether or not that is right depends on the meaning of the phrase "average net annual profit". Section 47 (3) refers to "the average net annual profit as defined in sched. IX to this Act", so one must go to that schedule. The schedule does not contain a definition. It provides, in para. 1, that "the average net annual profit of the undertaking" shall be ascertained in accordance with the subsequent provisions of the schedule; and, in para. 2 (1), that there shall be ascertained "what profit or loss was made in the carrying on of the undertaking". There is no further definition, later paragraphs being concerned with various special matters. One would, therefore, naturally assume that, apart from these special matters, the word "profit" must be taken to have its ordinary meaning.

In the ordinary way everything that an owner gains in running his business is profit and there is no question of dividing up his gains before the amount of profit is ascertained and calling a part remuneration for his services and the rest profit. The owner does not pay wages or salary to himself and deduct that as an expense of running the business. It is true that sometimes the owner may draw so much a week for himself and for convenience enter that separately in his accounts. The respondent did that in this case: he entered £700 per annum in his accounts as proprietor's remuneration, but that was a mere book-keeping entry without legal or practical significance. He chose to apportion his profit in this way, but what he did with his profit after he had earned it cannot affect the amount of the compensation to which he is entitled. The appellants' case would have been the same if he had never made any such appropriation. The appellants do not dispute that for ordinary purposes there is no distinction between one part of the profit and another, but it is contended that when the provisions of the Act dealing with compensation are read as a whole it becomes apparent that what the Act means by profit is the profit-earning capacity of the undertaking and not the profit actually earned by the owner. It is said that the profit-earning capacity of the undertaking must be the same whether the owner does the work himself or pays someone else to do it: in the latter case the sum so paid would be a deduction and, therefore, when the owner does the work himself a similar deduction must be made. I cannot find anything in the Act to support this distinction between profit-earning capacity and actual profit made by the owner. If the Act had intended compensation to be based on an estimate of profit-earning capacity it would have been easy to say so: but in fact sched. IX deals with profit actually earned in the past

A and compensation is based on that. The appellants found on the phrase "average net annual profit of the undertaking" in para. 1 of the schedule. But in para. 2 the reference is to "what profit or loss was made in the carrying on of the undertaking", and this must mean what was made by the owner, and an owner who works himself naturally makes more profit than an owner who pays someone else to work for him. I see nothing to indicate that the word "profit" in para. 1 means something different from what it means in para. 2. And I think that this gains support from the terms of s. 47 (3) which sets out what it is for which compensation is to be paid. It is not the profit-earning capacity of the undertaking, but "the cessation of business caused to the transferor" (i.e., the owner), and the cessation of business caused to an owner whose business is to conduct his own undertaking is a different thing from the cessation of business caused to an owner who does no work but merely draws profit.

B The appellants found strongly on the contrast, if the respondent is right, between the compensation payable under s. 47 (3) in respect of two exactly similar businesses if in the one case the owner had continued to own it himself, but in the other he had formed a private company and taken a salary as managing director. In the latter case that salary would be deducted as an expense and the profit of the company would be reduced accordingly. It was said that the real value of the business would not have been altered by the formation of a company, and that Parliament must have intended that the compensation should be the same in each case, and, therefore, must have intended that in the former case there should be a deduction of the value of the owner's services to the business to correspond with the deduction of the salary in the latter case. To that there appear to me to be two answers. In the first place the intention of Parliament must be discovered from the terms of the Act, and, as I have said, I can find nothing in the Act to indicate any intention that such a deduction should be made. And, secondly, even if the appellants were right, there would still be no equality between the two cases.

C Section 101 of the Act provides for compensation to officers or servants of the transferor who suffer loss of employment or diminution of emoluments by reason of the transfer, but there is no such compensation if the transferor himself is out of work by reason of the transfer. So the owner who had formed a company and became its managing director could claim compensation under s. 101, but the owner who had continued to own his own business could not. D If Parliament had intended that part of the latter owner's profit should be treated as his remuneration it would seem strange that he should be excluded from claiming compensation for loss of that remuneration on the transfer. E I think that the limited scope of s. 101 goes to confirm my view that the Act does not require the owner to treat part of his profit as remuneration. Further, F if the Act did require that, I would expect to find in it some statement or definition of what is to be deducted: this might be the value of the owner's G services to his business or it might be the salary which the owner could command in the market and these might differ widely.

H Then the appellants founded on the terms of the Transferred Undertakings (Compensation to Employees) Regulations, 1950 (S.I., 1950, No. 1083), as throwing light on the intention of the Act. I find it difficult to see how regulations made by a Minister can be used to determine the intention of Parliament expressed in an Act even where, as in this case, the regulations have been the subject of an affirmative resolution of both Houses. But I do not find it necessary to decide that question because I find that the part of the regulations on which the appellants specially rely is so obscure that I could get no help from it.

Finally, the appellants say that a profit and loss account based on the sums actually paid and received in carrying on the business is not conclusive, and that, if these sums do not represent the true value of goods or services in respect

of which they were paid, then the true value must be taken instead. From this they argue that the true value of the owner's services must also go into the account. It was held by the Transport Appeal Tribunal in *Arthur J. Maggs v. Road Haulage Executive* (1) that where the owner of the undertaking transferred had allowed it to occupy rent-free premises which belonged to him, the true rental value of the premises ought to go into the account. I see no reason to doubt this decision. If some figure is not settled by any agreement between independent parties but is a mere book-keeping entry it may well be necessary to substitute the true value to find the true profit. But I agree with the view of the tribunal in *Road Haulage Executive v. Yeoman* (2) that that is a very different matter from charging the profits with a notional remuneration to the proprietor. The decision of the tribunal in *Yeoman's* case (2) was reversed by the Court of Appeal, but on grounds which had nothing to do with the issue in this case, and SIR RAYMOND EVERSHED, M.R., in delivering the judgment of the court, refrained from expressing any opinion on the questions now in issue. In my judgment, this appeal should be dismissed with costs to the respondent.

LORD ASQUITH OF BISHOPSTONE: My Lords, I also agree with the opinion delivered by my noble and learned friend, LORD REID. The contrary view seems to me to be based on the fallacy that a one-man firm is a separate person from the one man who owns and conducts it, and that it can employ him. I respectfully concur in the whole of LORD REID's reasoning.

LORD COHEN: My Lords, I agree with the opinion delivered by my noble and learned friend, LORD REID, and with the whole of his reasoning as well as with that expressed by Mr. Montgomery White in giving the decision of the Transport Appeal Tribunal in *Yeoman's* case (2) to which LORD REID refers. I have nothing further to add.

Appeal dismissed.

Solicitors: *Clifford-Turner & Co.*, agents for *J. & A. Hastie*, Edinburgh (for the appellants); *Forsythe, Kerman & Phillips*, agents for *Henry J. Gray & Connochie*, Aberdeen, and *James Farquharson*, Edinburgh (for the respondent).

[Reported by G. A. KIDNER, ESQ., Barrister-at-Law.]

LOUDON v. RYDER.

[COURT OF APPEAL (Singleton, Denning and Hodson, L.JJ.), February 5, 6, 1953.]

Damages—Exemplary damages—Trespass and assault—Way forced into flat—Shock, but no injuries, inflicted—Award of separate sums for assault and as exemplary damages—Judge's direction comparing damages with magistrates' fine.

A

The plaintiff was told by her father that he intended a flat to be hers, and after his death, though led to believe that there was nothing for her by her mother, an executrix or trustee of her father, she discovered a document which showed that she was entitled to the flat. In the absence abroad of the tenant, to whom her mother had let the flat and who was the plaintiff's fiancé, she went to live in it. The defendant came to the flat with the plaintiff's mother, and, failing to get in at the door, climbed up a ladder placed against the wall, shouting: "Come out, you have no business here", forced open a window and entered the flat. He beat the plaintiff on the shoulders and head and dragged her downstairs before they were separated by a third party. The plaintiff suffered from nervous shock and some tenderness on pressure, but there were no marks on her

B

C

D

E

and she was not seriously hurt. In an undefended action for trespass and assault, the plaintiff was cross-examined at length, and the defendant gave no evidence and did not express regret or give an explanation. The judge directed the jury that the case was one for exemplary damages because of "the outrage . . . committed against the plaintiff". He warned them against losing their "sense of proportion in the matter" and said the damages would include "compensation . . . for the treatment [the plaintiff] received, not only for the physical treatment, but for the way in which she was treated" and also "punitive damages". He compared punitive damages with a fine imposed by a bench of magistrates to show the view they took of a wanton and wilful disregard of the law. The jury awarded £5,500 damages, apportioned as follows: "trespass £1,500, and the combined assault and exemplary damages £4,000, in the proportion of assault, £1,000, and exemplary damages £3,000". On appeal,

F

HELD: (i) though much in excess of what the members of the court would have awarded if called on to determine the question, the damages were not so high that no reasonable jury in the circumstances could have given them; the jury were entitled to arrive at separate sums for the assault and for exemplary damages; and their verdict must be upheld.

DICTUM OF LORD ESHER, M.R., in *Praed v. Graham* (1889) (24 Q.B.D. 55), cited with approval by LORD WRIGHT in *Mechanical & General Inventions Co., Ltd., & Lehwess v. Austin & Austin Motor Co., Ltd.* ([1935] A.C. 378), applied.

G

(ii) it was not suggested that an outrage had not been committed against the plaintiff; the judge was entitled to direct the jury that they could give exemplary or punitive damages; the direction as to such damages was merely an explanation of how to approach the matter; and, therefore, the direction was unexceptionable.

Merest v. Harvey (1814) (5 Taunt. 442), applied.

H

AS TO EXEMPLARY DAMAGES, see HALSBURY, Hailsham Edn., Vol. 10, pp. 87, 111, 133, 135, paras. 108, 139, 171, 173; and FOR CASES, see DIGEST, Vol. 17, pp. 79, 122-124, Nos. 10, 11, 308-323.

Cases referred to:

(1) *Mechanical & General Inventions Co., Ltd. & Lehwess v. Austin & Austin Motor Co., Ltd.*, [1935] A.C. 346; 104 L.J.K.B. 403; 153 L.T. 153; Digest Supp.

(2) *Praed v. Graham*, (1889), 24 Q.B.D. 53; 59 L.J.Q.B. 230; 17 Digest 136, 418.

(3) *Merest v. Harvey*, (1814), 5 Taunt. 442; 128 E.R. 761; 17 Digest 123, 318.

APPEAL against the verdict of a jury and judgment given thereon by DEVLIN, J., on Oct. 10, 1952, whereby the plaintiff was awarded £5,500 damages for trespass and assault and battery committed by the defendant.

The defendant had forced open a window and entered a flat, let by the plaintiff's mother to the plaintiff's fiancé and then in the possession of the plaintiff, and had assaulted her. The jury awarded £1,500 damages for the trespass, £1,000 for the assault, and £3,000 as exemplary damages for the assault. The defendant appealed. He contended that the damages were much too high, and that the jury, having awarded £1,000 for the assault, ought not to add £3,000 by way of exemplary damages. He also submitted that DEVLIN, J., had misdirected the jury by asking them, as the defendant alleged, to give damages under three heads, the assault itself, the circumstances of the assault, and punitive or exemplary damages, and by comparing exemplary damages with a fine imposed by magistrates to show the serious view taken of a wanton and wilful disregard of the law.

Beyfus, Q.C., and *J. C. Lawrence* for the defendant.

Fearnley-Whittingstall, Q.C., and *C. H. Duveen* for the plaintiff.

SINGLETON, L.J.: Mr. Lewis, the plaintiff's father, died in April, 1950, and about a month afterwards, in May, 1950, the plaintiff became twenty-one years of age. She has two sisters. Her father had put some property in trust for his daughters, and had told the plaintiff that he intended two properties to be hers, including the flat, No. 3, Coleherne Mews, Kensington. But after his death and after the plaintiff had attained the age of twenty-one years, her mother, who was an executrix or a trustee, did not say anything to the daughters about the matter and, indeed, according to the plaintiff's evidence, said there was nothing for her. When on a visit to her mother's house, the plaintiff and one of her sisters looked in a deed box and found a document which showed that she was entitled to No. 3 Coleherne Mews when she was twenty-one years of age. She took the document out of the deed box and showed it to a solicitor.

The family was in fairly affluent circumstances. The mother had a house or flat in Redcliffe Gardens and a bungalow at Staines, and she was living somewhere else at the time of the trial. Another property called Shalimar, a bungalow at Staines, where the mother was living at one time, was in trust for another daughter, Sheila Marett. The mother was asked in cross-examination at the trial:

"When your husband died you were the sole remaining trustee to convey Shalimar to your daughter? A.—Yes. Q.—That daughter had to issue a writ against you, did she not? A.—Yes. Q.—And after she had issued a writ against you—and she is entitled, is she not, to the freehold of Shalimar—did you sell it to [the defendant]? A.—Well, it is in dispute at the moment, you know, whether she is entitled to it or not. Q.—Did you sell it to [the defendant]? A.—I did, yes."

The suggestion was made that she had sold it to the defendant for much less money than it was worth. I do not know whether that is right or not, but when the daughter was just over twenty-one years of age her mother parted with that property, or sought to do so, and sold it to the defendant in this case. The mother was cross-examined further as to moneys which were in building societies in the names of the daughters, and according to her evidence, though the money was in the names of the daughters, it ought to go to the defendant, because it had been deposited for the defendant's sister who had died in Poland, and the defendant was now taking out, or had taken out, letters of administration of the estate of his sister. Why in such circumstances the

money should be in the names of the daughters I do not know. That is all I know about the defendant except for the events of May 28, 1951, which led to this action. The flat at No. 3, Coleherne Mews had been let by the mother to Mr. Loudon, to whom the plaintiff is now married. He left to go to Ireland on business, and the plaintiff went to live in the flat. She said she thought possession was part of the law, and she felt she would keep the flat, and she had the document taken from the deed box. On May 28 she received a message

A from someone who had heard a conversation that they (whoever "they" might be) were going to break into the flat. She took precautions, and put something behind the door of the flat, which is above a garage in the mews. During the morning her mother, the defendant, and her mother's gardener arrived in the mews. Her mother remained in the car. The others, one or

B both, tried to enter the flat by the door, but could not. They found a ladder and put it against the building, so that it reached approximately to the window of the small kitchen of the flat. The gardener went up, but seeing the plaintiff, his mistress's daughter, when part-way up came down again. The defendant then went up the ladder. By that time the plaintiff was prepared with a pail half-full of water, and when the defendant got on the ladder she threw the

C water down on to him. That did not seem to have any effect, and she had not time to get any more water. The defendant advanced up the ladder with an iron instrument, broke one of the small panes of glass close to the fastening, forced open the window and jumped into the kitchenette. What then took place was described by the plaintiff—not by the defendant, for he did not give evidence—and a Mr. Gardiner, who was outside, and the plaintiff's mother

D described what they heard, though the mother does not appear to have recognised her daughter's voice and said she did not know her daughter was in the flat. Mr. Gardiner heard screams and shouting. So far as Mr. Gardiner could understand him, the defendant was shouting before he went into the flat some such words as "Go out" or "Come out, you have no business here." According to the plaintiff the defendant beat her on the shoulders and on the head with his fists. He does not appear to have done any material physical damage to

E her, but it must have been upsetting for a young woman to be attacked like that by a man who came through the window. She knew the defendant, and she did not like him for reasons which she gave. When he had beaten her he pulled her to the stairs and dragged her down them by her hair or by her head or body. Meanwhile Mr. Gardiner had gone up the ladder on someone's advice. He found the plaintiff and the defendant on the stairs, and was unable to pass

F until they got to the bottom. He then pushed the defendant from the plaintiff and opened the door, and they went out. The plaintiff went the same day to see a doctor and her solicitor. She had some nervous shock. She was not seriously hurt, though she had had a very unpleasant experience. The doctor said in evidence that there were no marks on her so far as he could find. She complained of some tenderness on pressure, but apart from the shock

G there was not much wrong with her.

In those circumstances, the plaintiff brought her action for damages, and it was tried by a jury. On such a trial all the issues of fact are to be decided by a jury, and if the case is proved it is for the jury to assess the damages. There were two claims, one for trespass and the other for assault. In such a case it is the duty of the jury to assess damages separately for each of those torts,

H provided it is proved. A defence had been put on the record, though it was withdrawn a short time before the action was heard. Paragraph 3 of the defence reads:

"At the time of the alleged trespass to the said premises the said premises were not the plaintiff's, but were the property of her mother, Mrs. Dorothy Spencer Lewis, and the defendant entered upon the said premises by the command and authority of the said Mrs. Dorothy Spencer Lewis."

The evidence given by the plaintiff in chief was very short, but she was cross-examined at considerable length. I would not have it thought that I am suggesting that junior counsel for the defendant was wrong in cross-examining her. He had his instructions, and I have no doubt he considered how far it would help. His client, the defendant, undoubtedly wished the plaintiff to be cross-examined, or else counsel would not have been supplied with the material which he had. But a good deal of his material was not helpful to the defendant, and it showed the part which he was playing in the affairs of this family. The evidence of Mr. Gardiner supported the plaintiff as to the nature of the assault, and showed that it was a serious matter, and that the plaintiff was in a very difficult plight. Only one piece of evidence was missing. If the defendant had gone into the witness-box and said: "I am very sorry about this. I did think this was Mrs. Lewis's flat. I did think the girl had no right there. I am very sorry. I know I treated her rather badly", a different view must have been taken by the jury from that which it took. But, if the plaintiff in a case of this nature is cross-examined at length, and if attacks are made on her, and if then the defendant does not give evidence, a jury is apt to take an unfavourable view of the defendant.

The jury, having been told by the learned judge that it was an undefended case and that they had to assess damages, when asked in what amount, said through their foreman: "A total of £5,500". That is a very large sum of money indeed for a case of this kind. They were asked by the associate to give the apportionment, and answered:

"On the trespass, £1,500, and the combined assault and exemplary damages, £4,000, in the proportion of assault, £1,000, and exemplary damages £3,000."

Counsel for the defendant submitted that £5,500 was very much too high, and that, if the jury gave £1,000 for the assault, having regard to the circumstances in which it was committed, they ought not to, and could not properly, add to it the £3,000 by way of exemplary damages. On the question of amount in general, in *Mechanical & General Inventions Co., Ltd., & Lehwess v. Austin & Austin Motor Co., Ltd.* (1) LORD WRIGHT, after reciting the words of LORD ESHER, M.R., in *Praed v. Graham* (2) (24 Q.B.D. 55), said ([1935] A.C. 378):

"LORD ESHER adds that the court cannot set aside the verdict merely because it is larger than they themselves would have given, but only if 'having regard to all the circumstances of the case, the damages are so excessive that no twelve men could reasonably have given them'."

The damages, £5,500, are much higher than I should have given had I had to determine that question as a judge of first instance. But in the circumstances of this case I am not prepared to say that they are so high that no reasonable jury could have given them, and when trial is by jury the verdict of a jury ought to be upheld, unless it is clearly shown that it is wrong in the sense that I have mentioned. Nor am I prepared to say that the jury, in awarding £4,000 in respect of the assault, must be held to be wrong because they have said £1,000 for the assault plus £3,000 by way of exemplary damages. They have thought the matter out for themselves, and that, I suppose, was their way of arriving at the result in determining the right figure as damages for the assault.

Counsel for the defendant went further and submitted that the learned judge misdirected the jury on this matter, and he referred to certain passages in the summing-up. DEVLIN, J., pointed out to the jury that the decision as to the appropriate amount of damages was for them, and, having told them the law in regard to an assault, he said:

"If the assault is conducted in such a way as to insult the dignity of the person who is assaulted, if it is conducted in such a way as to invade

A the rights of the property that a person is granted by the law of this country the liberty to hold inviolate, in those circumstances the law permits a jury or a judge, if he happens to be doing it, to go outside the measure of compensation and assess damages, which are sometimes called exemplary, sometimes called punitive, sometimes indignant damages . . . It seems to me to be on the agreed facts of the case quite plainly a case which calls for exemplary damages—whether they are large or small is entirely a matter for you, but damages that are far more than nominal, in order to mark the outrage, because I do not think there is any doubt that it was an outrage that was committed against the plaintiff.”

B It has not been suggested in this court that this was not an outrage committed against the plaintiff, and the learned judge's direction on that matter cannot be attacked. The passage of which counsel makes most complaint is:

C “Those, members of the jury, are the matters which you have to have regard to. May I give you one word of advice? It cannot be more than advice, because it is a matter entirely for you in the end. It is possible—I do not say more than that it is possible, because I do not know—that the circumstances of this case and the way in which the defence has been conducted made some of you feel angry. If that be so, do not lose your sense of proportion in the matter. You have got to award damages under two heads, for compensation and, if you think right, for punitive or exemplary damages. Under the head of assault itself you can properly consider the circumstances of the assault and you will decide upon a sum which you think is appropriate by way of compensation to the plaintiff for the treatment she received, not only for the physical treatment, but for the way in which she was treated. You will also consider what sum you think is appropriate by way of punitive damages to award against the defendant.”

D The reference to their not losing their sense of proportion was a warning to the jury not to go too far. Up to the last sentence counsel for the defendant had no complaint, but he submitted that that was putting three heads of damage for assault: (i) the assault itself; (ii) the circumstances of the assault, the way in which she was treated; and (iii) punitive damages. I regard it as no more than an explanation to the jury as to how they should approach the matter. The judge continued:

E “The punitive damages are rather like imposing a fine as if you were a bench of magistrates and you wanted to impose a fine which made it quite clear what view you took of a wanton and wilful disregard of the law or for somebody else's rights, and wished to make it quite plain that you marked the seriousness of the offence, if it was a serious offence, and so to show the defendant that he cannot do that sort of thing with impunity. That is the way in which you can regard that, if you take that view. Think of it as a fine which has got to hit the defendant hard if he has disregarded the rights of others and must show that that sort of conduct does not pay. I do not mean, of course, that you have to arrive at two separate sums and add them together.”

F Counsel for the defendant submitted it was wrong to direct the jury that this was a fine. What they had to do was to give the plaintiff compensation sufficient for the injury which she had suffered. None the less, the judge was entitled to direct the jury that they could give damages of an exemplary or punitive kind.

H The judge ended his direction to the jury in this way:

“You will bear in mind all the time, of course, that you are exercising a judicial function, and should exercise it calmly and logically, and should keep it within what you as a body feel to be appropriate bounds. Would you now consider your verdict ”

—another warning to the jury. They were told they could give exemplary damages or punitive damages. That is wholly in line with what has been said time and time again on this subject. In *Merest v. Harvey* (3) (5 Taunt. 442):

“The court held that upon a declaration for breaking the plaintiff’s close, treading his grass, and hunting for game, and other wrongs, £500 were not excessive damages for a trespass in sporting, persevered in in defiance of notice, and accompanied with indecent and offensive demeanor”; and SIR VICARY GIBBS, C.J., said (*ibid.*, 443):

“I wish to know, in a case where a man disregards every principle which actuates the conduct of gentlemen, what is to restrain him except large damages? To be sure, one can hardly conceive worse conduct than this.”

That case was in 1814. The court upheld the verdict of the jury, or refused to interfere with it. HEATH, J., in a very short judgment, said (*ibid.*, 444):

“I remember a case where a jury gave £500 damages for merely knocking a man’s hat off; and the court refused a new trial . . .”

That was nearly a hundred and forty years ago. Those judgments show that the court does not lightly interfere with the verdict of a jury if there is a proper direction. I can see no fault in the direction given by DEVLIN, J., in this case, and though I should not have given so large a sum as £5,500 damages, I am of opinion that it was within the province and the power of the jury to give it if they thought the circumstances were such that that was the right sum. It was for their decision, and it would not be right for this court to interfere. I hope it will be known that, when juries are called on to exercise a duty such as this, their verdict is, and ought to be regarded as, final. The more that is realised, the more will they be anxious, as they always are, to view these things as they are directed to do—carefully and fully and mindful of their responsibility. In my opinion, this appeal must be dismissed.

DENNING, L.J.: I entirely agree. I would only like to quote one passage from the evidence of Mr. Gardiner, an electrician, who was working in his car opposite this mews and heard and saw what happened. He said he saw a well-dressed man making this trespass by means of the ladder and breaking in and attacking this young woman, the plaintiff. He went up the ladder to rescue her, and when he got inside the flat he said he saw this:

“She was holding up her hands and he was beating her hands. I caught hold of him by the shoulders. He had not seen me until then and his face changed and he started cringing in the corner and asked me what I was doing there: ‘What are you doing here? It is nothing to do with you’. I told him he had no business to be doing things like that in England . . .”

I am quite sure the jury took the same view, and I am not at all surprised at the figure of damages which they awarded. I agree that this appeal should be dismissed.

HODSON, L.J.: I agree, and have nothing to add.

Appeal dismissed.

Solicitors: *Adler & Perowne* (for the defendant); *Hardman, Phillips & Mann* (for the plaintiff).

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

INLAND REVENUE COMMISSIONERS v. CITY OF GLASGOW POLICE ATHLETIC ASSOCIATION.

[HOUSE OF LORDS (Lord Normand, Lord Oaksey, Lord Morton of Henryton, Lord Reid and Lord Cohen), February 2, 3, 4, March 9, 1953.]

Charity—Benefit to community—Encouragement of athletic sports of police force—Provision of recreation for police officers—Finance Act, 1921 (c. 32), s.

A 30 (1) (c), (3) (as substituted by Finance Act, 1927 (c. 10), s. 24).

Income Tax—Charity—Law to be applied in Scotland.

Scotland—Charity—Income tax—Law to be applied.

In considering whether a body is a charity for the purposes of exemption from income tax, it is the duty of the Court of Session to apply the English law relating to charities.

B In 1938 various clubs connected with a Scottish city police force merged in an association of which the objects were “to encourage and promote all forms of athletic sports and general pastimes”. The chief constable was president of the association, and all resolutions and decisions passed at meetings of the association were subject to his approval. Membership was confined to officers and ex-officers of the city police force, and, until 1947, was compulsory for a police officer. Members paid a small subscription, which was deducted from their pay.

C HELD (LORD OAKSEY dissentiente): although the association had official importance and a public aspect, its provision of recreation for members was an essential non-charitable purpose which was not subsidiary or incidental to the furtherance of a public purpose, and, therefore, the association was not a body established for charitable purposes only within the Finance Act, 1921, s. 30 (3), and it was not entitled to exemption from income tax under s. 30 (1) (c) of that Act.

D *Re Hobourn Aero Components, Ltd.’s Air Raid Distress Fund* ([1946] 1 All E.R. 501), applied.

E *Re Good* ([1905] 2 Ch. 60) and *Re Gray* ([1925] Ch. 362), considered.

AS TO ASSOCIATIONS FOR BENEFIT OF MEMBERS, see HALSBURY, Hailsham Edn., Vol. 4, p. 130, para. 172; and FOR CASES, see DIGEST, Vol. 8, pp. 261-263, Nos. 240-252.

Cases referred to:

F (1) *Re Good*, [1905] 2 Ch. 60; 74 L.J.Ch. 512; 92 L.T. 796; 8 Digest 258, 197.

(2) *Re Gray*, [1925] Ch. 362; 94 L.J.Ch. 430; 133 L.T. 630; Digest Supp.

(3) *Income Tax Special Purposes Comrs. v. Pemsel*, [1891] A.C. 531; 61 L.J.Q.B. 265; 65 L.T. 621; 55 J.P. 805; 3 Tax Cas. 53; 28 Digest 10, 51.

(4) *Baird’s Trustees v. Lord Advocate*, (1888), 15 R. (Ct. of Sess.) 682; 25 Sc.L.R. 533; 28 Digest 10, g.

G (5) *Gilmour v. Coats*, [1949] 1 All E.R. 848; [1949] A.C. 426; [1949] L.J.R. 1034; 2nd Digest Supp.

(6) *Oppenheim v. Tobacco Securities Trust Co., Ltd.*, [1951] 1 All E.R. 31; [1951] A.C. 297; 2nd Digest Supp.

(7) *Jackson’s Trustees v. Inland Revenue*, 1926 S.C. 579; 10 Tax Cas. 460; Digest Supp.

H (8) *Trustees for Roll of Voluntary Workers v. Inland Revenue*, 1942 S.C. 47; 24 Tax Cas. 320; 2nd Digest Supp.

(9) *Re Hobourn Aero Components, Ltd.’s Air Raid Distress Fund*, [1945] 2 All E.R. 711; [1946] Ch. 86; 115 L.J.Ch. 50; 174 L.T. 91; *affd.* C.A., [1946] 1 All E.R. 501; [1946] Ch. 194; 115 L.J.Ch. 158; 174 L.T. 428; 2nd Digest Supp.

(10) *Inland Revenue Comrs. v. Yorkshire Agricultural Society*, [1928] 1 K.B. 611; 97 L.J.K.B. 100; 138 L.T. 192; 13 Tax Cas. 58; Digest Supp.

- (11) *Royal College of Surgeons of England v. National Provincial Bank, Ltd.*, [1952] 1 All E.R. 984; [1952] A.C. 631.
- (12) *Inland Revenue Comrs. v. Forrest*, (1890), 15 App. Cas. 334; 60 L.J.Q.B. 281; 63 L.T. 36; 54 J.P. 772; 3 Tax Cas. 117; 39 Digest 299, 780.
- (13) *Oxford Group v. Inland Revenue Comrs.*, [1949] 2 All E.R. 537; 31 Tax Cas. 221; 2nd Digest Supp.

APPEAL by the Crown from an order of the First Division of the Court of Session made on a Case stated by the Special Commissioners of Income Tax. A

The Special Commissioners held that, having regard to such cases as *Re Good* (1) and *Re Gray* (2), the City of Glasgow Police Athletic Association was a charity and exempt from income tax under the Finance Act, 1921, s. 30 (1) (c), as amended by the Finance Act, 1927, s. 24. The First Division held that it was bound to treat English law as a matter of fact, and that the only course open to it was to treat the determination of the Special Commissioners as a finding of fact for the Scottish courts. B

The Lord Advocate (J. L. Clyde, Q.C.), J. H. Stamp, Sir Reginald Hills and W. R. Grieve (of the Scottish Bar) for the Crown.

Hunter, Q.C. (of the Scottish Bar), Wilfrid Hunt and W. I. R. Fraser (of the Scottish Bar) for the City of Glasgow Police Athletic Association. C

The House took time for consideration.

Mar. 9. The following opinions were read.

LORD NORMAND: My Lords, the question in this appeal is whether the respondent association is a body of persons established "for charitable purposes only". If so, it is agreed that the profits of a trade, namely, the holding of annual athletic sports, carried on by them, will be exempt from income tax under sched. D, by virtue of the Finance Act, 1921, s. 30 (1) (c), as amended by the Finance Act, 1927, s. 24. D

I will first summarise the facts found in the Case stated by the Special Commissioners. Before 1938 there were various clubs connected with the City of Glasgow Police. In February, 1938, they were merged in the respondent association, which was established at that time in order to co-ordinate the various athletic and sporting activities of the members of the police force. Attention must be drawn to certain excerpts from the general rules of the association. E

"Rule 2. Objects.—The objects of the association shall be to encourage and promote all forms of athletic sports and general pastimes. Rule 3. Officers.—. . . The chief constable shall be president and the assistant chief constables and superintendents of the force shall be vice-presidents. Rule 4.—Management of the association shall be vested in an executive committee, divisional activities by a divisional committee, and each branch of sport or pastime by a sectional committee. Rule 5. Committees.—(1) Executive committee.—The executive committee shall consist of the president, two vice-presidents, one representative from each divisional committee, one representative from each sports sectional committee, the honorary general secretary and the honorary treasurer, ten to form a quorum. (2) Divisional committees.—The annual general meeting of each division shall be held in the second week of September . . . The business to be transacted at such meetings shall be . . . (b) to elect the divisional committee, consisting of superintendent, lieutenant, inspector, two sergeants and five constables. Rule 8. Membership.—Ordinary membership shall be restricted to officers and ex-officers of the City of Glasgow Police Force. Rule 10. Subscriptions.—The subscription for each serving member shall be 3d. per week deducted from pay. Rule 21. Alteration of rules.—None of the foregoing rules shall be altered or revoked save by a two-thirds majority of those present at the annual general meeting or at a special F

G

H

meeting called for the purpose. Rule 23. Sanction of the Chief Constable.

—All resolutions and decisions passed at all meetings of the association are subject to the approval of the chief constable."

- Membership of the association was, until 1947, a condition of service for all new entrants into the Glasgow Police Force. In 1948 membership became voluntary but in fact all recruits have continued to join the association. The
- A** present membership is about eighty-five per cent. of the force, and there were in September, 1950, nine ex-officers who retained their membership. Ex-officers can render useful services as coaches. The activities of the association include angling, athletics, badminton, billiards, bowling, boxing and wrestling, cricket, association football, golf, rugby football, shooting, swimming and training in life saving, table tennis, dances, omnibus runs, "mystery tours" by omnibus,
- B** and whist drives. Sports are held in May of each year as a preparation for the annual sports, the "trade" carried on by the association for the purpose of raising funds. These annual sports are held on the ground of an amateur association football club, the use of which is given without charge. There is an attendance of about fifty thousand people, who pay for entry, and the profits are applied solely to the purposes of the association. Some events
- C** are confined to members of the association, others to members of other police clubs in Great Britain. But the majority of the events are open to all amateurs, including members of the association. Efforts are made to have some outstanding competitors to attract the public. The members of the association control the sports, the spectators and the traffic, and no charge is made for their services. The net proceeds are paid into the general fund of the association.
- D** In the year ended Sept. 30, 1950, the total revenue of the association was £2,778, of which £1,225 was derived from members' subscriptions and £1,214 from profits of the annual sports. The association is affiliated to the Police Athletic Association, a body whose rules are approved by the Home Secretary and the Secretary of State for Scotland, and whose objects are to encourage the development of all forms of amateur sport in the police forces and to promote and control suitable competitions and championships. The relations between the
- E** respondent association and the Glasgow Police Force are close, and the association is regarded as an essential part of the police organisation. It plays a valuable part in maintaining health, morale and esprit de corps. It helps to bring the force into friendly contact with the public, and it enables the members of the association to mix with members of other professions and trades.
- F** The hours of police duty make it almost essential that some special provision should be made for the recreation of the police. The activities of the association are thus conducive to a contented, fit and efficient police force; they are a help towards recruiting, and to the promotion of good relations with the public. By these means, also, the association has directly benefited the public.

- The Special Commissioners, having found these facts, rejected the only
- G** contention then put forward on behalf of the Crown that, by reason of the wide nature and extent of the objects of the association, it was not a body of persons established for charitable purposes only. They were aided in arriving at this conclusion by such cases as *Re Good* (1) and *Re Gray* (2). As I shall not have occasion to refer to these cases again I will say now that so far as they are founded on the principle that gifts exclusively for the purpose of promoting
- H** the efficiency of the armed forces are good charitable gifts, they are, in my opinion, unassailable, but that the decision that the actual gifts were of that nature is more doubtful. I would hold further that gifts or contributions exclusively for the purpose of promoting the efficiency of the police forces and the preservation of public order are by analogy charitable gifts.

The Stated Case came before the First Division of the Court of Session. Their Lordships did not address themselves to a discussion and decision of the question of law submitted for their opinion:

“ . . . whether the City of Glasgow Police Athletic Association is, within the meaning and for the purposes of s. 30 of the Finance Act, 1921 (as amended by s. 24 of the Finance Act, 1927), a charity, namely a body of persons established for charitable purposes only.”

The Lord President pointed out that *Income Tax Special Purposes Comrs. v. Pemsel* (3), decided that the words “charity” and “charitable” in the Income Tax Act, 1842, must be construed in their technical meaning according to English law. The words which have to be construed under the Acts now in force are the same. *Pemsel's* case (3) also disapproved of *Baird's Trustees v. Lord Advocate* (4) in which Lord President INGLIS had held that the words “charitable purposes” in the Act of 1842 were to be interpreted in their popular signification as meaning the relief of poverty. Plainly, *Pemsel's* case (3) laid down the rule for construing “charity” and “charitable” as one to be observed both by the courts in England and by the Court of Session. The advantage for Scottish taxpayers of this rule over the construction accepted in *Baird's Trustees* (4) is obvious and considerable. The Lord President proceeds to say that the general law of charities has progressed in England and Scotland since *Pemsel's* case (3) was decided and that there is a considerable and growing divergence. His conclusion is that the Court of Session cannot invest itself with the unique attributes of the Chancery Division or perform the functions which belong to the system of law there administered, and that the difficulty in which the Court of Session finds itself, hitherto evaded, must now be faced. His solution of the problem is that the English law of charities is foreign law and a matter of fact for the Court of Session, and, therefore, that the only course open to him was to take the determination of the Special Commissioners as a finding of fact for the Scottish Courts. With this mode of disposing of the Stated Case the other members of the court agreed. They professed a sense of incapacity to deal with the case in any other way.

My Lords, I will not disguise that I have a certain sympathy with the Scottish judges, who feel embarrassed at having to administer as part of the law of Scotland a difficult and technical branch of English law. For I have had in the Court of Session some, though not a large, experience of this jurisdiction, and I felt the embarrassment. Nevertheless, I must at once say that there has been here a failure to exercise a jurisdiction which the court had a plain duty to exercise. In *Pemsel's* case (3) it was decided authoritatively that it was part of the jurisdiction of the Court of Session as Court of Exchequer in Scotland to administer this branch of English law in claims for exemption by charities. Since then the Finance Act, 1925, s. 19, has provided that claims for exemption by charities were in future to be made to the Inland Revenue Commissioners and were to be determined by the Special Commissioners in like manner as an appeal made to them against an assessment under sched. D, and that all the provisions of the Income Tax Acts relating to such an appeal (including the provisions relating to the statement of a Case for the opinion of the High Court on a point of law) shall apply accordingly with any necessary modifications. For Scottish subjects the appeal on law is, of course, to the Court of Session (Income Tax Act, 1918, s. 235 and s. 149 (3)). The Court of Session has, therefore, a statutory duty to decide any question of law that may come before it in a claim to exemption, and the law which it must administer is the English law of charity.

The necessary effect of *Pemsel's* case (3) and now also of the provisions of s. 19 of the Act of 1925 is that the English law of charity has, for income tax purposes and for them alone, to be regarded as part of the law of Scotland and not as a foreign law. The practical difficulties for a Scottish lawyer are considerable, but I would not have them exaggerated. These difficulties spring mainly from the nature of charity and from the way in which the law of charity has grown up. I need not enlarge on this for it is an aspect of the English

law which has been recently sufficiently commented on with special authority by LORD SIMONDS in *Gilmour v. Coats* (5) ([1949] 1 All E.R. 856) and in *Oppenheim v. Tobacco Securities Trust Co., Ltd.* (6) ([1951] 1 All E.R. 34). I venture, however, to say that many of the difficulties felt by Scottish lawyers in administering this law, are scarcely less felt by English equity lawyers, and that the general Scots law of charities likewise has difficulties of its own. It has never yet, for example, been found possible to define in generally accepted terms what is the precise meaning of charity in Scottish law, and one reason is that the Scots law of charities owes nothing to the great institutional writers, and much of it, like its counterpart in England, has been built up piecemeal by the decisions of the courts.

The duty of the Court of Session to apply the English law of charities in income tax cases has been expressly recognised in *Jackson's Trustees v. Inland Revenue* (7) by Lord President CLYDE and LORD SANDS. In that case the limits of the rule were defined. It was also recognised and applied in *Trustees for Roll of Voluntary Workers v. Inland Revenue* (8). Among the consequences of the action taken by the First Division in this case is to cast some doubt on these cases and to deprive Scottish claimants of an effective right to appeal from the determination of the commissioners. In certain respects the jurisdiction is less embarrassing than their Lordships seem to have supposed. They are technically not bound by the decisions of the English courts in the matter of charities and it is not improper for them to discuss or criticise English decisions. The Court of Session is not reduced to the role of an obsequious follower of decisions either of a judge of first instance or of the Court of Appeal, though it is only good sense to pay special regard and respect to the decisions and opinions pronounced by the English courts on a branch of the law built up by English judges, and familiar to them by long training and experience.

I come now to the merits of the appeal and I unfeignedly regret that I must do so without the aid of the opinions of the learned judges of the First Division, especially as the issue, though not easy, owes none of its difficulty to technicalities of English law. The respondents' contention is that the association falls within the last category of LORD MACNAGHTEN's classification of charities, and that it is established for charitable purposes only. In looking for the purposes for which it is established I begin with the rules. The objects set out in r. 2, to encourage and promote all forms of athletic sports and general pastimes, are not charitable purposes. But it will not do to stop there. The next step is to notice that the members' subscriptions are exclusively spent on their own sports and recreations. In order to augment the fund expendable for these purposes the members carry on the trade of holding the annual sports. So far, again, there is no element of charity and the purposes are self-regarding. In *Re Hobourn Aero Components, Ltd.'s Air Raid Distress Fund* (9), voluntary collections from employees of the munition factories belonging to a certain company were to be used to relieve without a means test the distress suffered by the employees from air raids. It was held by COHEN, J., that this was not a charity and this decision was affirmed by the Court of Appeal. LORD GREENE, M.R., said ([1946] 1 All E.R. 506):

"The point, to my mind, which really puts this case beyond reasonable doubt is the fact that a number of employees of this company, actuated by motives of self-help, agreed to a deduction from their wages to constitute a fund to be applied for their own benefit without any question of poverty coming into it. Such an arrangement seems to me to stamp the whole transaction as one having a personal character, money put up by a number of people, not for the general benefit, but for their own individual benefit."

MORTON, L.J., said (*ibid.*, 511):

"... those eligible to receive benefits were not even all the employees

of the particular company. They were those who chose to join in the scheme . . .”

In *Oppenheim's* case (6) LORD SIMONDS expressed his full agreement with all that was said by LORD GREENE, M.R., and MORTON, L.J., in *Hobourn's* case (9). The case is an authority against recognising as a charity a body that merely applies the subscriptions of its members to their own recreation. It does not, of course, prejudice the question whether in certain circumstances the benefit of members is not subsidiary and incidental to another and charitable purpose.

It would be unjust to the respondent association to represent it as having no purpose beyond the recreation and amusement of the individual subscribers constituting its membership. No one can read the rules without perceiving that the association was regarded as having an official importance and a public aspect. And in order to ascertain what the purposes of an association are, the court is not limited to consideration of its rules or its constituent documents. They are very important and it would be difficult for an association to say that something declared in its rules to be its object was not one of its purposes. But it is quite in order for the association to prove by parol evidence that it had other purposes than that set down in the rules. The Special Commissioners had evidence before them which entitled them to find that among its purposes were the encouragement of recruiting, the improvement of the efficiency of the force, and the public advantage. This is a purpose which the Special Commissioners were entitled to hold in law to be a public charitable purpose, but there remains the non-charitable purpose of providing recreation to the members. The question is whether this non-charitable purpose is incidental to the public charitable purpose. If not, it cannot be said that the association was a body established for charitable purposes only. This is not a matter of the motive of the members of the association or of the high police officials who took a part in furthering the association, though there is a natural probability that their motives agree with the purposes of the association. The question is what are the purposes for which the association is established, as shown by the rules, its activities and its relation to the police force and the public. And what the respondents must show in the circumstances of this case is that, so viewed objectively, the association is established for a public purpose, and that the private benefits to members are the unsought consequences of the pursuit of the public purpose, and can therefore be disregarded as incidental. That is a view which I cannot take. The private benefits to members are essential. The recreation of the members is an end in itself, and without its attainment the public purpose would never come into view. If the result of establishing the association had been that the members had, instead of being interested, found themselves involved in wearisome and lifeless activities, their efficiency would have suffered, the membership would have fallen off, and there would have been public detriment instead of public benefit. The private advantage of members is a purpose for which the association is established and it therefore cannot be said that this is an association established for a public charitable purpose only. In *Inland Revenue Comrs. v. Yorkshire Agricultural Society* (10) ATKIN, L.J., considered the problem of societies having more than one purpose. He says ([1928] 1 K.B. 631):

“First of all it is said: No, this society was in fact formed for the purpose of giving benefit to its members; it is nothing but a club for the mutual advantage of the members of the club. If that were so I agree that the claim of the society would fail, both because it could not be said that the society was established for a charitable purpose, and because it certainly could not be said that it was established for a charitable purpose only. There can be no doubt that a society formed for the purpose merely of benefiting its own members, though it may be to the public advantage that its members should be benefited by being educated or having their aesthetic tastes

A improved or whatever the object may be, would not be for a charitable purpose, and if it were a substantial part of the object that it should benefit its members I should think that it would not be established for a charitable purpose only. But, on the other hand, if the benefit given to its members is only given to them with a view of giving encouragement and carrying out the main purpose which is a charitable purpose, then I think the mere fact that the members are benefited in the course of promoting the charitable purpose would not prevent the society being established for charitable purposes only."

B In principle, therefore, if an association has two purposes, one charitable and the other not, and if the two purposes are such and so related that the non-charitable purpose cannot be regarded as incidental to the other, the association is not a body established for charitable purposes only. I would allow the appeal.

C **LORD OAKSEY:** My Lords, I agree with what has been said by the noble Lord on the Woolsack as to the function of the Court of Session in tax cases. On the merits of the appeal I have had much difficulty and have come to the conclusion that the appeal ought to be dismissed. In my opinion, the efficiency of a police force is largely dependent on the activity and physical fitness of its members, and athletic and other sports ought to be and are encouraged by those responsible for such forces. It is clear, too, that the efficiency of the police is a matter of public importance which falls within the class of charitable purposes to which the exemption in the Finance Act, 1921, s. 30, applies. The question then is whether the City of Glasgow Police Athletic Association is a body of persons established for public charitable purposes only.

D Now, it is clear that "purposes" are not the same as "results" and there is ample authority that a body of persons or trust may be established for charitable purposes only although its establishment has results which are not charitable, for instance, the benefits derived by the officers in the cases of *E Re Good* (1), in *Re Gray* (2), and by the surgeons in the *Royal College of Surgeons of England v. National Provincial Bank, Ltd.* (11). As **LORD MACNAGHTEN** said in *Inland Revenue Comrs. v. Forrest* (12) (15 App. Cas. 354):

F "It cannot I think be doubted that the institution has raised the standard of the profession, and that to a civil engineer it is of advantage and probably of pecuniary advantage to be a member. But is that result the purpose of the society, or is it an incidental, though an important and perhaps a necessary consequence of the way in which the institution does its work in the pursuit of science?"

G The purposes for which a body of persons is established can only be discovered from the constitutional document, if there is one, which establishes the body. In the present case, in my opinion, the constitution and general rules of the respondents indicate that the purpose of the body was the efficiency of the force. There can, in my opinion, have been no other reason for r. 23 which makes every resolution and decision subject to the approval of the chief constable. The chief constable is only concerned with the amusement of his men for the purpose of having a contented and efficient force. All the rules are framed to meet the needs of a disciplined force. It is, in my opinion, impossible to imagine that such rules would have been drawn up by anyone or by any body of men who were not intending to promote discipline. Decisions are not confided to the majority or even to a unanimous vote, but to the chief constable. It is true that no one need belong to the association, but that is equally consistent with it being the view of the chief constable or other authority who devised the scheme, which was originally compulsory, that a voluntary scheme was from its nature more likely to create the keenness and esprit de corps

which have the necessary result of efficiency. The matters to which I have referred are all found as facts by the commissioners in the Special Case.

It has been argued for the Crown that the association is nothing but a club or mutual society for the benefit of the subscribers, but, in my opinion, the chief constable's veto is absolutely inconsistent with any such idea. It is true that the money subscribed comes from the members and is used for their immediate benefit, and it is argued that this negatives the idea of any public charitable purpose, but, in my opinion, it is not any more a necessary inference that the purpose of the members was their own enjoyment than that their purpose was their own efficiency. The purposes of a body of persons can only be inferred from the facts as to their association as a body; some may have one purpose, others another; but when they all submit themselves to the dictation of their commanding officer it appears to me that the reasonable inference is that they are prepared to subordinate their private purposes to his and that his purpose must be inferred to be the efficiency of the force and not its amusement.

LORD MORTON OF HENRYTON: My Lords, the only question arising for decision on this appeal is whether the respondent association is a "body of persons . . . established for charitable purposes only" within the meaning of the Finance Act, 1921, s. 30 (3). If the association is such a body, it is not disputed that the profit of £1,214 resulting from its annual amateur sports meeting, held during the year ending Sept. 30, 1950, is exempted from income tax by the Finance Act, 1921, s. 30 (1) (c), as amended by the Finance Act, 1927, s. 24.

The facts as to the establishment of the association are set out in the Case Stated as follows:

"Prior to 1938 there were various clubs connected with the City of Glasgow Police. In February, 1938, these clubs were merged in the association, which was established at that date with the purpose of co-ordinating the various athletic and sporting activities of the members of the police force."

Starting from this point, I have carefully considered the constitution and general rules of the association, and the facts as to its activities which are set out in the Case Stated, and I am quite unable to hold that this body of persons is established for charitable purposes only.

Rule 2 provides that: "The objects of the association shall be to encourage and promote all forms of athletic sports and general pastimes". It was accepted by the Special Commissioners, and it is not disputed by the respondent association, that these objects, stated in such general terms, are not objects which the law regards as charitable. It is rightly said, however, that the constitution and rules must be read as a whole and construed in the light of such evidence of surrounding circumstances as may be admissible. So reading them and so construing them I arrive at the conclusion that the purpose for which the association is established is to provide for its members and their friends facilities for taking part in athletic sports and general pastimes, both outdoor and indoor. I cannot detect in this purpose any element of charity. The members pay their subscriptions and get certain benefits in return; they make a profit by running the annual amateur sports meeting already mentioned and that profit is applied to carrying out the purpose which I have just stated. So far, the association would not appear to be any more a charity than is any other athletic or social association or club established for the like purpose. The association does not, in my view, fit into any of the four "principal divisions" mentioned by LORD MACNAGHTEN in *Pemsel's* case (3) ([1891] A.C. 583), and the purpose just stated is far indeed from the "spirit and intendment" of the preamble to the statute 43 Eliz. c. 4.

Counsel for the respondent association rely strongly on the facts found in para. V of the Special Case and especially on sub-para. (f) which is as follows:

- A "The existence and activities of the respondent association: (i) played an important part in the maintenance of physical fitness, health, morale and esprit de corps within the force, (ii) attracted recruits to the force, (iii) helped to maintain the strength and efficiency of the force by conducting to a contented force, keeping members happy in their work and inducing them to continue in the force, rather than leave it, (iv) conducted to the public order by promoting good relations between the force and the general public, (v) increased the efficiency of the force, generally, and thereby directly benefited the public."
- B They contend that the achievement of the results just stated is the purpose for which the association is established, and that this is a charitable purpose. I do not doubt, my Lords, that a gift made for the sole purpose of increasing the efficiency of the police force would be a charitable gift, but the task before your Lordships is first to determine the purpose or purposes for which the association is established and then to determine whether the sole purpose is, or
- C all the purposes are, charitable. In my view, the purpose for which the association is established, within the meaning of the Finance Act, 1921, s. 30 (3), is the non-charitable purpose which I have already stated and the achievement of the results set out in para. V is simply a consequence which will follow if the purpose for which the association is established is carried out successfully and efficiently.
- D Even if I were satisfied that there exists some other purpose for which the association was or is established, for instance, the purpose of maintaining the strength and efficiency of the police force, I should find it impossible to say that the sole purpose of the association is a purpose which is nowhere even mentioned in the constitution and general rules, and that the purpose which emerges so clearly in the rules and on which the income of the association
- E appears to have been expended ever since it came into existence is either non-existent or merely incidental. Observations have been made by my noble and learned friend on the Woolsack as to the course which this case took in the First Division of the Court of Session. I agree with these observations and do not desire to add to them. I agree also with my noble and learned friend's comments on the cases of *Re Good* (1), *Re Gray* (2) and *Re Hobourn Aero Components, Ltd.'s Air Raid Distress Fund* (9). I would allow the appeal.
- F
- LORD REID: My Lords, the respondents claim that they are entitled to exemption from income tax under the Finance Act, 1921, s. 30, as amended by the Finance Act, 1927, s. 24. It is admitted that if they are a "body of persons . . . established for charitable purposes only" they are entitled to exemption, the other requirements of the section being satisfied.
- G The respondents' association was formed in 1938, apparently under official guidance. From then until 1947 membership of the association was a condition of service for all new entrants to the Glasgow Police Force. Compulsory membership was abolished in 1947, but it appears that all new entrants since that date have in fact become members. Membership is restricted to officers and ex-officers of the force: only a few ex-officers remain members and they
- H give valuable service in coaching other members. Under the rules the management of the association is largely in the hands of senior officers of the force and all resolutions passed at meetings of the association are subject to the approval of the chief constable. The objects of the association, set out in r. 2, are to encourage and promote all forms of athletic sports and general pastimes, and later rules show that this means to provide facilities for the members to take part in those activities and to encourage them to do so. The Special Commissioners have found that the association is regarded as an essential

part of the police organisation, that it plays an important part in the maintenance of health, morale and esprit de corps within the police force, that it attracts recruits to the force and that it helps to induce members of the force to continue in the force rather than leave it. Those findings amply justify the conclusion that the existence and activities of the association increase the efficiency of the force generally and thereby directly benefit the public. I do not doubt that the purpose of increasing or maintaining the efficiency of a police force is a charitable purpose within the technical meaning of those words in English law. It appears to me to be well established that the purpose of increasing the efficiency of the army or a part of it is a charitable purpose. It may be that in some cases the facts hardly justified the conclusion that this was the purpose of the gift in question but that does not affect the principle. I can see no valid distinction between the importance or character of the public interest of maintaining the efficiency of the army and that of maintaining the efficiency of the police. But it is not enough that one of the purposes of a body of persons is charitable: the Act requires that it must be established for charitable purposes only. This does not mean that the sole effect of the activities of the body must be to promote charitable purposes, but it does mean that that must be its predominant object and that any benefits to its individual members of a non-charitable character which result from its activities must be of a subsidiary or incidental character.

It was argued that this association could not be regarded as established for charitable purposes because its revenue is all spent on activities in which its members alone take part. I am not satisfied that in every case that would be enough by itself to prevent the body from being held to be established for charitable purposes only and I prefer to base my opinion on the facts of this case.

The peculiarity of this case is that the same activities have a double result. They are beneficial to the public by increasing the efficiency of the force and they are beneficial to the members themselves in affording to them recreation and enjoyment: and all the relevant facts appear to me to indicate that the purpose was to produce this double result. It may well be that considerations of public interest were the primary cause of the association being established and maintained: but I think that it is clear that all or most of the activities of the association are designed in the first place to confer benefits on its members by affording to them recreation and enjoyment. It is only as a result of these benefits that the purpose of increasing the efficiency of the force is achieved. In some cases where the end is a charitable purpose the fact that the means to the end confer non-charitable benefits may not matter; but in the present case I have come to the conclusion that conferring such benefits on its members bulks so largely in the purposes and activities of this association that it cannot properly be said to be established for charitable purposes only. I, therefore, agree that the appeal should be allowed.

There is one other matter that I must notice. The First Division have held that they are not competent to decide what is a charitable purpose because that is purely a question of English law. In this I think that they were mistaken. It has commonly been accepted since *Pemsel's* case (3) that the words "charity" and "charitable" in income tax legislation must be interpreted according to English law, but I do not think that that is a full or accurate statement of the position. In my judgment, holding that those words must be interpreted according to English law must mean that it is to be held that Parliament enacted that on that matter the law of England should also become the law of Scotland, and it must follow that Parliament must be held to have placed on the courts of Scotland the duty of administering what was formerly only the law of England but what has been made by Act of Parliament the law of both countries. It is true that this form of legislation by reference puts the Scottish courts in some difficulty because it may not always be easy for them

to discover what are the principles to be applied in a particular case—incidentally that is not always easy even for an English court. But whatever the practical difficulties may be, and whether or not those difficulties were ever appreciated by Parliament or by this House in determining what Parliament must be held to have enacted, the fact remains that Parliament must be held to have required the Scottish courts to surmount those difficulties, and the duty so placed on the Scottish courts can now only be removed by legislation.

A **LORD COHEN:** My Lords, the question at issue in these proceedings is whether the respondent association is a “body of persons . . . established for charitable purposes only” and is therefore entitled to exemption under the Finance Act, 1921, s. 30, as amended by the Finance Act, 1927, s. 24. The Special Commissioners answered this question in favour of the association
B but stated a Case at the instance of the appellants, the question for the decision of the court being framed as follows:

“The question of law for the opinion of the court is whether the City of Glasgow Police Athletic Association is, within the meaning and for the purposes of s. 30 of the Finance Act, 1921 (as amended by s. 24 of the Finance Act, 1927), a charity, namely a body of persons established for
C charitable purposes only.”

The First Division of the Court of Session answered this question in the affirmative. They arrived at their conclusion by treating the question as one of fact, on the ground that your Lordships’ House had held in *Pemsel’s* case (3) ([1891] A.C. 583) that the question whether a body of persons was a charity for the purposes of the Income Tax Acts fell to be determined according to English
D law and that English law in a Scottish court was a question of fact. Counsel for the association did not attempt to support that line of reasoning and I have nothing to add to what has been said by my noble and learned friend on the Woolsack on this aspect of the question. I turn, therefore, to the question stated by the Special Commissioners.

They based their conclusion in favour of the respondent association in substance on the decisions in the Chancery Division in *Re Good* (1) and *Re Gray* (2). In both those cases the question at issue was the validity of a gift contained in the will of a testator, the gift in the former case being of a library and plate for an officers’ mess and in the latter of a fund for the promotion of sport in a regiment. The ratio decidendi of the two cases is conveniently stated by
E FARWELL, J., in *Re Good* (1) in the passage cited by the Special Commissioners, which reads as follows ([1905] 2 Ch. 66):

“I have come to the conclusion that this is a good charitable gift on the first ground—namely, that it is a direct public benefit to increase the efficiency of the army, in which the public is interested, not only financially, but also for the safety and protection of the country.”

G The commissioners then observed that the increase of the efficiency of police forces appeared to them analogous to the increase of the efficiency of the army, and on this ground decided in favour of the association. They omitted, however, to notice that they were not concerned with the question whether a gift for the promotion of efficiency in the police force was a valid charitable gift but with the different question whether the respondent association was formed
H for charitable purposes only.

This question has to be determined on the construction of the constitution and rules of the association and of the findings of fact contained in the Stated Case, but before I turn to them it will be convenient to refer briefly to some of the authorities to which your Lordships’ attention was directed in the course of the argument. From them certain principles appear to be settled:—(i) If the main purpose of the body of persons is charitable and the only elements in its constitution and operations which are non-charitable are merely incidental

to that main purpose, that body of persons is a charity notwithstanding the presence of those elements: *Royal College of Surgeons of England v. National Provincial Bank, Ltd.* (11). (ii) If, however, a non-charitable object is itself one of the purposes of the body of persons and is not merely incidental to the charitable purpose, the body of persons is not a body of persons formed for charitable purposes only within the meaning of the Income Tax Acts: *Oxford Group v. Inland Revenue Comrs.* (13). (iii) If a substantial part of the objects of the body of persons is to benefit its own members, the body of persons is not established for charitable purposes only: *Inland Revenue Comrs. v. Yorkshire Agricultural Society* (10). The distinction between this class of case and that contemplated in the first principle I have stated is aptly pointed out by ATKIN, L.J., in the case last cited, when he says ([1928] 1 K.B. 631):

"There can be no doubt that a society formed for the purpose merely of benefiting its own members, though it may be to the public advantage that its members should be benefited by being educated or having their aesthetic tastes improved or whatever the object may be, would not be for a charitable purpose, and if it were a substantial part of the object that it should benefit its members I should think that it would not be established for a charitable purpose only. But, on the other hand, if the benefit given to its members is only given to them with a view of giving encouragement and carrying out the main purpose which is a charitable purpose, then I think the mere fact that the members are benefited in the course of promoting the charitable purpose would not prevent the society being established for charitable purposes only."

With these principles in mind I turn to the constitution and rules of the respondent association. Rule 2 declares the objects of the association to be "to encourage and promote all forms of athletic sports and general pastimes". It was common ground between the parties that if this object had to be considered in vacuo it would not be a good charitable purpose, but counsel for the association argued, and I think, rightly, that, read in its context, it must be limited to the promotion of sports and pastimes among the Glasgow police; not, however, as I read the document, all the Glasgow police, but only such of them and such ex-members of the Glasgow police as become and remain members of the association. So limited, said counsel for the appellants, the association is merely a private club and the observations of LORD GREENE, M.R., in *Re Hobourn Aero Components, Ltd.'s Air Raid Distress Fund* (9) were in point. In that case LORD GREENE, after citing a passage from TUDOR ON CHARITIES, 5th ed., p. 18, said ([1946] 1 All E.R. 508), the particular association of persons with which the court was there concerned could properly be described as a mutual benefit society, which could not be charitable unless poverty was an essential qualification for participation in the benefits. There is no element of poverty to be found in the present case. Therefore, said counsel for the appellants, the respondent association is stamped with the character of a private trust.

Counsel for the association did not dispute the correctness of that decision, but argued that in the present case the purpose of the association was to maintain the strength and the efficiency of the Glasgow police force and the benefits to the membership of the association were merely incidental to that purpose.

Counsel relied on the findings of the commissioners as expressed in para. V of the Case Stated as establishing the correctness of this contention. He relied also on the following rules: r. 3 giving the superior officers of the force strong representation on the executive committee and the divisional committees; r. 10 providing for deduction of serving members' subscriptions from their pay, and, above all, r. 23 giving the chief constable a power of veto on all resolutions and decisions passed at meetings of the association.

He referred also to the finding that the sports meetings of the association received specially favourable treatment in that no charge was made for the services of the police in connection therewith. It is, I think, a fair inference from these matters and from other evidence that was before the commissioners that the association was regarded by the authorities as an essential part of the police organisation and as playing an important part in the maintenance of health, morale, and esprit de corps in the police force: but the achievement of this end was more the result of the operations of the association than an achievement of its purpose, and I am unable to draw from the evidence the conclusion that the benefits to the members were given with a view *only* to giving encouragement to the maintenance of the strength and efficiency of the Glasgow police force. These benefits were and could be given to the members and to no one else. Reading the Case Stated and the documents annexed thereto I am forced to the conclusion that the conferment of those benefits was a substantial part of the objects of the association. In my opinion, therefore, the association cannot be said to have been established for a charitable purpose only. I agree that the appeal should be allowed.

Appeal allowed.

Solicitors: *Solicitor for Scotland of the Board of Inland Revenue* and *Solicitor for England of the Board of Inland Revenue*; Wedlake, Letts & Birds, agents for Rob. Walker & Orr, Glasgow, and A. & W. M. Urquhart, Edinburgh (for the respondents).

[Reported by G. A. KIDNER, Esq., Barrister-at-Law.]

D RELIANCE (NAMEPLATES), LTD. AND ANOTHER v. ART JEWELS, LTD.

[CHANCERY DIVISION (Vaisey, J.), March 3, 1953.]

Copyright—Medal—Coronation commemorative medallion—Exclusion from registration as design—Copyright Act, 1911 (c. 46), s. 1 (1)—Designs Rules, 1949 (S.I., 1949, No. 2368), r. 26.

The plaintiff company were manufacturers of a metal coronation commemorative medallion bearing on one side a picture of the Queen designed by the second plaintiff, which the plaintiff company was licensed by him to reproduce. The reverse side bore the royal cypher with a circle of oak leaves and an inscription, the whole being a design of employees of the plaintiff company. The defendants reproduced exact copies by means of a die made from one of the plaintiff's medallions and offered them for sale at a price lower than that charged by the plaintiffs. On a motion by the plaintiffs for an interim injunction to restrain the infringement of their copyright,

G **HELD:** the medallion was a "medal" within the meaning of r. 26 of the Designs Rules, 1949, and was, therefore, excluded from registration under the Registered Designs Act, 1949, and a subject-matter for copyright under the Copyright Act, 1911, s. 1 (1), and the injunction would be granted.

H **FOR THE COPYRIGHT ACT, 1911, s. 1 (2),** see HALSBURY'S STATUTES, Second Edn., Vol. 4, p. 779; and **FOR THE REGISTERED DESIGNS ACT, 1949, s. 1,** see *ibid.*, Vol. 17, p. 723.

Case referred to:

(1) *Usher v. Barlow*, [1952] 1 All E.R. 205; [1952] Ch. 255.

MOTION for an injunction to restrain the defendants, whether by themselves or by their servants or agents, from reproducing, selling by way of trade, exposing or offering for sale or distributing, medals, being copies or colourable imitations of the plaintiffs' medal.

Mould, Q.C., and *F. E. Skone James* for the plaintiffs.

Shelley, Q.C., and *Share* for the defendants.

VAISEY, J.: The plaintiff company, Reliance (Nameplates), Ltd., has for some time past been manufacturing and distributing what I may describe by a neutral term as coronation medallions. They are round pieces of metal, somewhat larger than a half-crown, bearing on one side a picture of Her Majesty the Queen and on the other side the royal cypher, the year "1953", a design of oak leaves, and an inscription round the edge of the medal: "The Coronation of Her Majesty Queen Elizabeth II". The design of oak leaves and the cypher were made by employees of the plaintiff company and are said to represent their original skill and labour. The picture of Her Majesty was the work of the second plaintiff, Mr. George Henry Paulin, and, so far as it originated from him, the plaintiff company has been manufacturing the whole article under licence from him. These medallions have apparently been on the market and sold in considerable numbers by the plaintiff company. The defendants have been supplying a medallion which is in design admittedly indistinguishable from the plaintiffs' article, and it is alleged that it has been re-produced from the medallion of the plaintiff company by the use of a die, thereby securing an exact copy. This allegation is not denied. The medallions made by the defendants are being sold in large quantities at a lower price than those of the plaintiffs, and it is alleged that such continued sales are likely to cause the plaintiff company loss. The defendants were approached, and they referred the matter to their solicitors who have written a letter in which they say that they are "amazed that there should be an allegation of infringement of copyright". Their amazement appears to be based on what I regard as the absurd idea that the copyright consisted in the words: "The Coronation of Her Majesty Queen Elizabeth II". Nobody could suppose that that was the ground of the plaintiffs' complaint, and I think it is unfortunate that the plaintiffs' objections were not treated in a more serious and courteous manner.

The law is well settled and not in dispute. "Copyright" under the Copyright Act, 1911, s. 1 (2), means "the sole right to produce or reproduce the work or any substantial part" of the work in respect of which the copyright is claimed, and it also includes the right to authorise sales, publications, and so forth. An infringement of copyright is to do something, without the consent of the owner of the copyright, the sole right to do which is conferred on such owner by the Act. In s. 35 (1) of the Act there is a definition which provides that works of sculpture include casts and models, and s. 22 (1) excludes from the operation of the Act designs capable of being registered under the Patents and Designs Act, 1907. The latter Act has since been repealed, but I have the authority of *Usher v. Barlow* (1), in which JENKINS, L.J., points out ([1952] 1 All E.R. 211) that the reference in the Copyright Act, 1911, to the Patents and Designs Act, 1907, must now be read (regard being had to the Interpretation Act, 1889) as a reference to the existing Registered Designs Act, 1949. By s. 1 (4) of this Act of 1949, provision is made for the exclusion under rules made by the Board of Trade from its operation of designs for articles which are primarily artistic in character—that is to say, if this particular artistic work has been excluded from the operation of the Registered Designs Act, 1949, it becomes subject or remains subject to the provisions of the Copyright Act, 1911. The Board of Trade has made rules called the Designs Rules, 1949, r. 26 of which provides:

"There shall be excluded from registration under the Act [of 1949] designs to be applied to any of the following articles, namely:—(1) works of sculpture other than casts or models used or intended to be used as models or patterns to be multiplied by any industrial process. (2) wall

plaques and medals. (3) printed matter primarily of a literary or artistic character . . .”

Counsel for the defendants admitted, for the purposes of this motion at any rate, that the whole of his argument depends on the contention that the particular object on which this action is based is not a medal within the meaning of that excluding r. 26. What is a medal? It is defined in the OXFORD ENGLISH

A DICTIONARY as

“a piece of metal, usually in the form of a coin, struck or cast, with an inscription, a head or effigy of a person, or other device or figure to commemorate a person, action or event; also as a distinction awarded to a soldier . . .”

- B** Counsel for the defendants suggests that this article was not a medal within the meaning of that definition, so far as the definition can be applied to r. 26 of the Designs Rules, 1949. I do not know why it is not. It is obviously a piece of metal in the form of a coin. There can be no doubt that it bears an inscription, a head or effigy, and other devices or figures to commemorate an event, namely, the year of the coronation of Her Majesty. Whether the main purpose of the exclusion was to apply to service medals, I cannot say. It may be that that was the primary intention, but I think that it is exceedingly difficult to exclude these and similar objects from the definition of “a medal” in the dictionary and from the conception of a medal in the minds of ordinary people. This is an interlocutory application and I do not wish to come to any final conclusion as to the validity of submissions which the defendants may desire to advance
- C**
- D** at the trial, but I think that, in the circumstances and having regard to the fact that the sale of these objects is likely to be of limited duration, the balance of convenience is that I should grant the injunction that is sought until judgment in the action or further order.

Order accordingly.

- E** Solicitors: *Allen & Overy* (for the plaintiffs); *Beach & Beach* (for the defendants).

[*Reported by* MISS PHILIPPA PRICE, *Barrister-at-Law.*]

COOTE v. EASTERN GAS BOARD.

[QUEEN'S BENCH DIVISION (Byrne, J.), February 24, 25, 26, 27, 1953.]

Gas—Nationalisation—Action against gas board—Period of limitation—Alleged tort by undertaking before transfer to board—Gas Act, 1948 (c. 67), s. 14 (2), s. 17 (5).

In 1945 the plaintiff, then an employee of a gas undertaking, became ill as a result, he alleged, of the failure of his employers to provide adequate ventilation of, and/or to take all practicable measures to protect him against the inhalation of dust or fumes in, the retort house in which he worked. On May 1, 1949, under the Gas Act, 1948, the gas undertaking became vested in the defendant gas board. On Oct. 14, 1949, the plaintiff issued a writ against the defendants claiming damages for a breach of statutory duty by their predecessors, the gas undertaking.

HELD: in view of the provisions of s. 17 (5) of the Act of 1948, the appropriate period of limitation was the six years provided by s. 2 (1) (a) of the Limitation Act, 1939, and not the three years provided by s. 14 (2) of the Act of 1948, and, therefore, the action was not out of time.

FOR THE GAS ACT, 1948, s. 14 (2) and s. 17 (5), see HALSBURY'S STATUTES, Second Edn., Vol. 10, pp. 876 and 881 respectively.

ACTION for damages against the defendants for breach of statutory duty to provide and maintain suitable and effective ventilation of their work premises and for failing to prevent the accumulation of dust, fumes and impurities and their inhalation by employees, contrary to s. 4 and s. 47 of the Factories Act, 1937, whereby the plaintiff suffered injury to his health.

The plaintiff, who was fifty-seven years old, entered the employment of the Luton Gas Company in 1919 as a water gas plant operator. In 1937 he became a stoker in the vertical retort house, and, apart from two short periods in 1941 and 1942, he worked as a stoker till 1948, when, owing to the state of his health, he ceased to be a stoker and became a slot meter collector. By virtue of the Gas Act, 1948, s. 17 (1), the Luton Gas Company was dissolved and its undertaking became vested in the defendants on May 1, 1949, the plaintiff thereby becoming the employee of the defendants from that date. During the first half of 1945, the plaintiff found difficulty in breathing. In 1947 his doctor, not being satisfied with his condition, had him X-rayed. Shortly afterwards the plaintiff became ill with pneumonia. On Mar. 10, 1948, he was admitted to hospital and remained there till Apr. 22, 1948, suffering from bronchitis. On being examined on Sept. 10, 1948, and subsequently, the plaintiff was found to be suffering from emphysema and bronchitis. The writ in the action was issued on Oct. 14, 1949.

It was contended on behalf of the defendants that the plaintiff's cause of action arose in 1945 when his health was first affected, and that, as the writ in the action was not issued till Oct. 14, 1949, the plaintiff's action was statute-barred under s. 14 (2) of the Gas Act, 1948.

Stephen Chapman for the plaintiff.

Baker, Q.C., and Sir Shirley Worthington-Evans for the defendants.

BYRNE, J., stated the facts and continued: The defendants contend that the cause of action arose in 1945, and that, as this writ was not issued until Oct. 14, 1949, the action is statute-barred, and they base their contention on s. 14 (2) of the Gas Act, 1948, by which the period of six years which is provided in s. 2 (1) of the Limitation Act, 1939, is reduced to three years.

Under s. 17 (1) of the Gas Act, the Luton Gas Co. was dissolved, and its undertaking was vested in the defendant gas board on May 1, 1949. Section 17 (5) of the statute provides as follows:

"Without prejudice to the generality of the preceding provisions of

A this section, where any right, liability or obligation vests by virtue of this Act, the appropriate board and all other persons shall, as from the vesting date, have the same rights, powers and remedies (and in particular the same rights as to the taking or resisting of legal proceedings or the making or resisting of applications to any authority) for ascertaining, perfecting or enforcing that right, liability or obligation as they would have had if it had at all times been a right, liability or obligation of the board, and any legal proceedings or applications to any authority pending on the vesting date by or against the undertaker, in so far as they relate to any property, right, liability or obligation vested by virtue of this Act or to any agreement or document which has effect in accordance with sub-s. (3) or sub-s. (4) of this section or to any enactment applied by or under this Act, shall be continued by or against the appropriate board to the exclusion of the undertaker."

B I take that section to mean that, if the gas board take over the liabilities of a private undertaking (as was the case here), they take them over subject to the six years' limitation period, but that, thereafter, when they do something in their own name as a gas board, they have the protection of the three years' period mentioned in s. 14 (2). If s. 17 (5) does not mean that, it seems to me that it would produce a state of injustice, because one can well envisage a case in which a person, prior to the vesting day, was within the six years within which he could bring an action against the company which was dissolved on the vesting day, and then, the vesting day having arrived, it would mean that the right of action which had existed, so to speak disappeared overnight because the six years had been reduced to three. I do not read this section as meaning that such an injustice should be effected, but I take it to mean what I have already stated, and that is, that applying it to this case this plaintiff is not statute-barred, for he had the six years within which to bring his action. I, therefore, hold, so far as this aspect of the case is concerned, that the action is not statute-barred.

D [His LORDSHIP then considered in detail the evidence of the witnesses with regard to the ventilation, heat, and the state of the air in the vertical retort house. He found that the circulation of air was quite adequate and that no injurious fumes or dust were produced and in consequence the defendants were not in breach of their statutory duties under s. 4 and s. 47 of the Factories Act, 1937.]

E F *Judgment for the defendants.*
Solicitors: *L. Bingham & Co.* (for the plaintiff); *Barlow, Lyde & Gilbert* (for the defendants).

[Reported by MICHAEL MALONEY, ESQ., Barrister-at-Law.]

*In the Estate of WIPPERMANN. WISSLER v. WIPPERMANN
AND OTHERS.*

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Pearce, J.), February 9, 10, 11, 12, 13, 16, 17, 18, 19, 20, 24, 25, 26, 27, March 2, 3, 1953.]

Probate—Will—Lost will—Parol evidence of contents—Standard of proof.

Evidence—Examination of witness before special examiner—Special report by examiner—Comment on credibility of witness—R.S.C., Ord. 37, r. 17.

The plaintiff sought to prove a will said to have been contained in one sentence in each of two letters sent in 1942 by the testator from the prison in Germany where he was awaiting trial to the lawyer who was defending him. These letters were destroyed in an air raid and the plaintiff, therefore, relied on the oral evidence of the lawyer given before a special examiner in Germany. At the plaintiff's request, the examiner made a special report under R.S.C., Ord. 37, r. 17, in which he stated that the witness impressed him as being "absolutely sincere and honest".

HELD: (i) while parol evidence of the contents of a lost will must be admitted with caution, the standard of proof required for the re-construction of a lost will by such evidence was no different from the standard of proof in other cases, namely, the establishment of reasonable probability as to the terms of the document, but in the circumstances the existence of the alleged will had not been proved.

Dictum of LORD HERSCHELL, L.C., in *Woodward v. Goulstone* (1886) (11 App. Cas. 475), explained.

Dictum of SIR GEORGE JESSEL, M.R., in *Sugden v. Lord St. Leonards* (1876) (1 P.D. 241), applied.

(ii) the right of an examiner under R.S.C., Ord. 37, r. 17, to make a special report to the court is intended to give him an opportunity of recording facts, such as that the witness fainted or became violent, and it is not proper for an examiner to give his opinion on the credibility of the witness, and, therefore, the report must be disregarded.

AS TO PROBATE OF CONTENTS OF A LOST WILL, see HALSBURY, Hailsham Edn., Vol. 14, p. 196, para. 323; and FOR CASES, see DIGEST, Vol. 23, pp. 106-109, Nos. 1007-1030.

Cases referred to:

(1) *Woodward v. Goulstone*, (1886), 11 App. Cas. 469; 56 L.J.P. 1; 55 L.T. 790; 51 J.P. 307; 23 Digest 106, 1016.

(2) *Sugden v. St. Leonards (Lord)*, (1876), 1 P.D. 154; 45 L.J.P. 49; 34 L.T. 372; 23 Digest 108, 1019.

PROBATE ACTION.

The testator's father founded a large manufacturing business in Germany. The testator and his two brothers entered the business, and in 1923 it was turned into a limited liability company, the testator becoming chairman. In October, 1933, he was arrested on a currency charge, was released a few days later, and then was re-arrested on a charge of holding anti-Nazi views. His passport was taken from him, but he was released on bail and escaped to Switzerland. In March, 1934, the testator was compelled to resign from the board of directors of the company. In November, 1934, he left Switzerland and went to live in Holland. On Apr. 11, 1936, the testator made a will leaving everything to his mother. On Oct. 20, 1936, he was convicted by a German court, in his absence, on charges of economic treason and was sentenced to four years' imprisonment with hard labour and fined one million marks. His share in the family business was confiscated. He appealed without success. On Apr. 19, 1938, he was deprived of his German nationality, and he thus became a stateless person living in Holland. In May, 1940, Holland was invaded, and on Aug. 18, 1940, the testator was arrested by the Dutch police on the

instructions of the Nazis. He was taken to a remand prison at Frankfurt, but he refused to disclose his foreign assets and in October, 1941, he was transferred to a nerve clinic for observation and investigation into his sanity. In December, 1941, he was taken back to the remand prison. On Aug. 24, 1942, he was brought to trial and found not to be responsible for his treasonable acts, and so he was acquitted and ordered to be detained in the mental asylum at Eichberg where he died on Mar. 5, 1943.

- A The plaintiff, a sister of the testator, sought to prove an alleged will of 1942 whereby he left everything to her. That will was said to have been contained in one sentence, quite unconnected with its context, in each of two long letters sent by the testator from the German prison in Frankfurt where he was awaiting trial to the German lawyer who was defending him, dealing with matters relating to the charges against him. This lawyer gave evidence for the plaintiff before a special examiner in Germany. His office and documents were destroyed in an air raid at the end of the war, and the plaintiff, therefore, had to rely on oral evidence. The wording of the sentences was said to have been either:

- B “My sister, Else Wissler, is to be my sole heiress in the event of my dying before regaining my freedom”,
- C or:

“My sister, Else Wissler, is to be my sole heiress in the event that I do not come alive out of prison.”

- D This report deals only with the questions of the standard of proof required in the re-construction of a lost will by parol evidence, and of the right of an examiner to report under R.S.C., Ord. 37, r. 17.

Simon, Q.C., and W. T. Wells for the plaintiff.

Raeburn, Q.C., and Victor Russell for the Custodian of Enemy Property for England and the Administrator of German Enemy Property.

The other defendants (a brother and a sister of the testator and personal representatives of another brother) did not appear.

- E **PEARCE, J.:** This is a probate action concerning the English assets of a wealthy German industrialist who died unmarried on Mar. 5, 1943, at the age of fifty-five. The English assets consist of thirty-six bars of gold deposited in 1939 with the Westminster Bank in defiance of German finance regulations. They are now worth about £250,000.

- F The father of the testator died in 1929, leaving a widow and five children, of whom the testator was the third child. The plaintiff was the second child, and the other children were Wilhelm, Erich, and Herta. Wilhelm and Herta are defendants in this case. Erich died just before the case started, and his personal representatives have been made defendants. If the plaintiff fails to prove the alleged will, the property would fall to be shared equally between the brothers and sisters, for there is no doubt that the testator made an earlier will in proper form in Holland on Apr. 11, 1936, leaving everything to his mother and that on July 14, 1941, she pre-deceased him. His property would, therefore, be divided as on an intestacy. At the date of the testator's death in 1943, Wilhelm, Erich and Herta were, and still are, German nationals living in Germany. By the German Enemy Property Vesting Order, the Administrator of German Enemy Property has a right to so much of the gold as belongs to Wilhelm, Erich and Herta. The plaintiff, however, though a German national, has, for the most part, been resident in Switzerland, being the widow of a Swiss subject, and, if her claim is successful, the Administrator would (as it seemed at all events when this trial started) have no claim to the assets of the testator. The Custodian of Enemy Property and the Administrator have, therefore, been joined as defendants. It is they, and they alone, who have contested the claim. The family defendants, so far from contesting it, have lent their moral support to the plaintiff. The two contesting defendants (to whom I will refer

merely as the defendants) put the plaintiff to proof of the execution, validity and effect of the alleged will. They further say that the testator was incapable of making a will owing to unsoundness of mind. Various issues arise involving considerations of domicile and of German and Dutch law, and on these depend the answer to the question whether the alleged will, if made, was valid. The counterclaim filed by the Custodian and the Administrator asks me to pronounce for the will of Apr. 11, 1936, in favour of the testator's mother under which the plaintiff will only get one-quarter, and the Administrator will be able to enforce his rights to three-quarters of the estate. A

[HIS LORDSHIP stated the facts and decided that the testator was capable of making a will according to either Dutch or German testamentary standards; that the testator abandoned his German domicile when he left Germany and acquired a domicile of choice in Holland; that by Dutch law, as the testator was not a subject of the Netherlands, the form of the alleged will was to be tested by the *lex loci*, that is to say, by German law; and that by German law the alleged will would be valid and would suffice to pass the testator's whole estate to the plaintiff; and he continued:] The most difficult part of this case is the question whether the plaintiff has succeeded in establishing the will which she alleges. Counsel for the defendants argues that the plaintiff has a greater burden of proof in this case than the burden in ordinary civil cases. In C
Woodward v. Goulstone (1) LORD HERSCHELL, L.C., said (11 App. Cas. 475):

"Now I cannot but be alive to the extreme danger of establishing a will merely by parol evidence of its contents."

He then makes observations that are relevant rather to English than to foreign forms, and continues (*ibid.*):

"I think, therefore, that in order to support a will propounded, when it is proved by parol evidence only, that evidence ought to be of extreme cogency, and such as to satisfy one beyond all reasonable doubt that there is really before one substantially the testamentary intentions of the testator." D

No authority other than that dictum of LORD HERSCHELL has been cited to show that the standard of proof required in the re-construction of a lost will by parol evidence differs from that in other cases. In my opinion, that dictum was intended, not to have universal application, but only to apply to the facts of that case. *Sugden v. Lord St. Leonards* (2) seems to suggest no such difference. In my view, the standard of proof in such a case as this is the ordinary standard of proof in civil cases, namely, a reasonable balance of probabilities. But there is a passage (1 P.D. 241) from the judgment of SIR GEORGE JESSEL, M.R., in *Sugden's* case (2), where he is dealing with evidence of a testator's declarations of intention, which should be borne in mind: E

"Of course, as in the case of pedigree, the courts must be cautious in admitting such evidence. From its very nature it is evidence not open to the test of cross-examination, it is very often produced at second or third hand, and it is therefore particularly liable to lose something of its colour in the course of transmission. It is so easily and so frequently fabricated that all courts which have to dispose of such cases must be especially on their guard." G

The plaintiff's case on this point is put very attractively by her counsel. Looking at the probabilities of the case, he argues, one can hardly doubt that the testator would have wished to make a will in the plaintiff's favour. As he was a man of perspicacity, one can hardly doubt that he did, in fact, do so. His lawyer in Germany was the person to whom he would naturally have expressed the will. The lawyer, an impressive and honest witness, establishes that he did do so. There is, therefore, reliable evidence that he did what one would expect him to do, and the court should feel no doubt in pronouncing for the will. The defendants' case, put no less attractively by their counsel, H

is this. The probability that the testator would have wished to leave all his money to the plaintiff is not so cogent. He may well have not cared very much who got it as his mother was dead, and the circumstances make it extremely doubtful if in fact he did make a will. The subsequent history of the case is far more consistent with that of a family who all believed he was intestate and never thought of a will in the plaintiff's favour until it became apparent that the plaintiff was the only person in whose hands the testator's money could escape the hands of the Administrator. Thereafter, one sees this will being wished into existence in a natural desire to save from alien hands the gold that the testator had died in trying to preserve. The lawyer, he argues, is neither impressive nor reliable, and he criticises many parts of his evidence. Those are the two broad points of view that I have to consider.

The most important witness for the plaintiff was the German lawyer. His evidence was taken by examination in Germany, through an interpreter. Counsel for the plaintiff relies strongly on a special report which, at the request of the plaintiff's solicitors, was made under R.S.C., Ord. 37, r. 17, by the examiner. The defendants' solicitors quite properly did not dissent from that report being made, but they did not agree that it was admissible. The report reads as follows:

"The witness impressed me as an absolutely sincere and honest witness who within the limits of his memory (which he was at pains to point out) was doing his utmost to give fair and accurate evidence. His occasional hesitation before answering a question seemed to me to be accounted for by the difficulty of remembering events which occurred many years before. When he disagreed with suggestions put to him in cross-examination, his denials were unequivocal and emphatic. His attitude and manner appeared to me to be wholly consistent with his answer in re-examination that he had come to give evidence because he was obliged to co-operate in the search for truth."

In my opinion, the right of an examiner to report is intended to give him an opportunity of recording facts (for example, the witness fainted, or rose to his feet, and tried to assault the cross-examining counsel), and it is not proper for an examiner to give his opinion on the credibility of the witness. If laudatory comments are permissible, so, too, must be damaging criticism. It would then be permissible for an examiner to report: "The witness appeared to me to be a specious liar". The examiner has no such function. If it were

otherwise, the procedure in choosing an examiner would be different. Instead of appointing (as generally happens) examiners who have not a very long or varied experience of litigation, one would insist on appointing some person known to the court as capable of supporting the extremely difficult task of assessing credibility from demeanour. The self-reliant person who has the technique of giving evidence—namely, the power to answer calmly and with poise and proper emphasis—is often, in my view, less reliable than the fumbling, hesitant witness. When the witness speaks in a foreign tongue and the examination occurs in a difficult case, and when there are complicated points with which an examiner can have only a nodding acquaintance (if that), it is impossible for him to express an opinion on which a trial judge ought to rely. I shall, therefore, disregard the report. This is not, of course, intended as a criticism of this examiner. On examinations it is more sensible to include rather than to exclude, since the judge can always reject any surplus, as I do now.

[HIS LORDSHIP dealt with the rest of the evidence and concluded:] On a careful weighing of the probabilities and the evidence, I am not satisfied of the existence of the alleged will. I pronounce for the holograph will of Apr. 11, 1936, and against the will put forward by the plaintiff. *Order accordingly.*

Solicitors: *Sole, Sawbridge & Co.* (for the plaintiff); *Solicitor, Board of Trade.*

[*Reported by A. T. HOOLAHAN, Esq., Barrister-at-Law.*]

BATES v. PARKER.

[COURT OF APPEAL (Lord Goddard, C.J., Morris and Romer, L.J.J.), February 18, 27, 1953.]

Negligence—Invitee—Duty of occupier—Protection against unusual danger—Window cleaner—Plywood panel in window—Occupier's removal of bolts—Failure to inform cleaner.

The plaintiff was employed by the defendant as an independent contractor to clean the windows of his hairdressing shop every fortnight. When cleaning a window with three panels, in order to steady himself, he had made a practice of putting his hand through a hole in a piece of plywood in the middle panel, which was bolted to the sides of the window. The defendant had seen him cleaning the window, but was not found to have known that he used the plywood in this way. A few days before the windows were due to be cleaned the defendant, intending to glaze the space occupied by the plywood, unbolted it and cut a piece of glass to fit the space, but, being temporarily unable to obtain putty, replaced the plywood in the panel without bolting it. When the plaintiff, while next cleaning the window, took hold of the panel, it moved and he fell and was injured. In an action by the plaintiff for damages for negligence against the defendant, the judge held that the defendant knew of the unusual danger due to the alteration of the plywood and held him liable. On appeal,

HELD: an independent contractor employed to do work on premises decides how he will do the work and what safeguards he shall take and must satisfy himself as to the safety or condition of that part of the premises in which he is to work; the danger from the plywood was an ordinary danger to the plaintiff and not an unusual danger of which the defendant knew or ought to have known, since, although he knew of the alteration, he did not know it had created danger for the plaintiff, and he could not be deemed to have that knowledge from merely seeing the plaintiff cleaning the window; and, therefore, the defendant was not liable.

Christmas v. General Cleaning Contractors, Ltd. ([1952] 1 All E.R. 39), and dicta of DENNING, L.J. (*ibid.*, 41), applied and extended.

Dicta of LORD PORTER and LORD NORMAND in *London Graving Dock Co., Ltd. v. Horton* ([1951] 2 All E.R. 5, 9), applied.

Semble, if the defendant had known that the plaintiff used the plywood to steady himself he would have been liable.

Decision of LYNSEY, J. ([1952] 2 All E.R. 987), reversed.

AS TO DEGREE OF CARE ORDINARILY REQUIRED, see HALSBURY, Hailsham Edn., Vol. 23, pp. 571-587, paras. 825-840; and FOR CASES, see DIGEST, Vol. 36, pp. 16-21, Nos. 68-101.

AS TO DUTY TO INVITEES, see HALSBURY, Hailsham Edn., Vol. 23, pp. 600-609, paras. 851-858; and FOR CASES, see DIGEST, Vol. 36, pp. 41, 42, Nos. 247-258.

Cases referred to:

(1) *Christmas v. General Cleaning Contractors, Ltd.*, [1952] 1 All E.R. 39; [1952] 1 K.B. 141; *affd.*, H.L. *sub nom. General Cleaning Contractors, Ltd. v. Christmas*, [1952] 2 All E.R. 1110.

(2) *London Graving Dock Co., Ltd. v. Horton*, [1951] 2 All E.R. 1; [1951] A.C. 737; 2nd Digest Supp.

(3) *Indermaur v. Dames*, (1866), L.R. 1 C.P. 274; 35 L.J.C.P. 184; 14 L.T. 484; *affd.* Ex.Ch., (1867), L.R. 2 C.P. 311; 36 L.J.C.P. 181; 16 L.T. 293; 31 J.P. 390; 36 Digest 35, 208.

APPEAL from an order of LYNSEY, J., at Birmingham Assizes, dated Oct. 17, 1952, reported [1952] 2 All E.R. 987, in which he held the defendant liable in an action for damages for negligence.

The plaintiff was a window cleaner in partnership with his brother-in-law. From October, 1947, to Feb. 18, 1949, they were employed by the defendant to clean the windows of premises in his occupation at 94, Weoley Castle Road, Birmingham. When cleaning one of the windows the plaintiff made a practice of holding a piece of plywood in the middle panel to steady himself. As a result of the removal by the defendant of the bolts by which the plywood was secured, with a view to glazing the window, it came away when the plaintiff took hold of it, and he fell and was injured. **A** LYNSEY, J., held that the plywood in its altered condition constituted an unusual danger or trap which was known to the defendant, and of which it was his duty to warn the plaintiff, and he was, therefore, liable. The defendant appealed. He contended that he had not known that the plaintiff used the plywood to steady himself, that he did not know that it constituted a danger to the plaintiff, and that he was under no **B** duty to warn the plaintiff of it.

Stephen Chapman and Miss H. M. Shore for the defendant.

R. K. Brown for the plaintiff.

Cur. adv. vult.

Feb. 27. The following judgments were read.

C **LORD GODDARD, C.J.:** This is an appeal from the order of LYNSEY,

J., who entered judgment for the plaintiff, a window cleaner, who alleged that injuries sustained by him were caused by a window frame at the defendant's premises being in a dangerous, unusual and unsafe condition, of which he had no notice or warning, in consequence of which he fell from the ladder on which he was working and sustained severe injuries. The main facts of the case are not in **D** dispute. The plaintiff and another man carried on business in partnership as window cleaners and had for some considerable time been employed by the defendant, who has a small hairdressing shop in Birmingham over which he lives, to clean the windows back and front every fortnight, the usual day for the plaintiff's visit being on Friday and it was on a Friday that the accident happened. The plaintiff was cleaning the windows at the back and one of them, on the first **E** floor, had three panels. In the middle panel there had originally been a dormer window. Some considerable time ago the dormer had been taken out, leaving the bottom part glazed and in the place previously occupied by the dormer a fan had been installed for ventilation purposes. The fan was held in position by a panel of plywood with a hole in the centre in which the fan was fixed and the plywood was bolted to the sides of the window, and there was in front of **F** the fan on the outside a grille to prevent any great amount of dust getting in. Some considerable time before the accident, which happened on Feb. 18, 1949, the fan had been removed but the plywood panel remained in position, and, according to the plaintiff, and as I think the judge must be taken to have found, the window had been in this condition ever since the plaintiff had begun to clean the defendant's windows, which was some time in 1947. There was some **G** dispute as to when the grille had been removed, the plaintiff saying that it had never been there since he cleaned the windows, and the defendant saying that he had only removed the grille a few days previously. There does not seem to be any specific finding by the learned judge on this point, but at any rate the grille was not there on the day of the accident. A few days previously the defendant had removed the panel and was minded to glaze the space it **H** had previously occupied. Accordingly, he unbolted the plywood panel and cut a piece of glass to fit the space, but unfortunately the shop at which he dealt was temporarily out of putty so he replaced the plywood in this space but did not bolt it. Consequently, it was in a condition that a slight pressure would cause it to move. The plaintiff's case was that when he came to clean this window he had often been in the habit of placing his hand on the plywood to steady himself when he desired to clean the glass panels on either side. He had a telescopic ladder on which he stood to reach the window, and he described

the movements he went through when he wished to clean either the right hand or the left hand glass panel. On the day in question he put his hand through the hole in the plywood, that caused the panel to fall or move, and this in turn caused him to lose his balance whereby he fell. There is no finding by the learned judge as to whether the defendant knew that the plaintiff was accustomed to steady himself by means of the plywood, and I do not think that there was any evidence that would justify a finding that the defendant did know of this practice on the part of the plaintiff. The most that can be said is that the plaintiff said that the defendant had seen him at work on one or two occasions when he had his hand on or through the panel. The defendant's evidence was that he had no knowledge that the plaintiff adopted this method, but in any case I do not think that, even assuming the defendant was in the yard on occasions when the plaintiff was cleaning the window, that fact would bring home to him that the plaintiff was adopting a system, if I may so put it, of steadying himself by this means. I need not, therefore, stay to consider what the position would have been had the defendant been affected with this knowledge.

The learned judge has held that the panel being in this condition amounted to an unusual danger or trap of which it was the defendant's duty to warn the plaintiff, while, on the other hand, the defendant, who was unrepresented below, contends that there was no such duty, and reliance is placed on his behalf on *Christmas v. General Cleaning Contractors, Ltd.* (1), a case which counsel for the plaintiff very properly cited to the court below. The learned judge said that, but for that case, he would have regarded the present as quite a simple matter and went on to say that he thought the decision referred to depended entirely on the particular facts of that case. That also was a case of a window cleaner in which a window, being ill-balanced, came down on the cleaner's hand and caused him to overbalance and fall. In allowing the appeal by the occupiers of the premises, DENNING, L.J., said ([1952] 1 All E.R. 41):

"What then is the law on this matter? Is a householder responsible for seeing that windows are safe for window cleaners to hold on to? I think not. The householder is concerned, of course, to see that the windows are safe for his servants to open and close, and, indeed, to clean, but he is not concerned to see that they are safe for a window cleaner to hold on to. The duty which a householder owes to his servants is much higher than that which he owes to a window cleaner who is only an invitee. The householder employs the window cleaner as an independent contractor to clean his windows, and leaves it to him to decide how he shall do it and what safeguards he shall take, whether he shall use ladders or cradles or simply stand on the sill. The householder does not know what strains or stresses the window cleaner is going to put on the window. If the window cleaner chooses to rely on the window for his safety, then it is for him, and not for the householder, to take steps to see that it is safe for his special purposes. The window cleaner has no right to expect the windows to be in perfect condition. Windows, which are often quite serviceable for ordinary purposes, may yet have some minor defect, such as rusty screws or worn sash-cords, or ill-balanced weights, making them unsuitable for window cleaners to put their trust in. Such defects are, for window cleaners, common, recognisable dangers of everyday experience and cannot be classed as 'unusual'. They are, therefore, dangers against which window cleaners must provide their own safeguards. They cannot saddle the householder with damage which results from them: see *London Graving Dock Co., Ltd. v. Horton* (2). In my opinion, therefore, the judge was wrong in finding the club liable, and their appeal should be allowed."

In my opinion, the law thus laid down is not peculiar to window cleaners, nor does it depend simply on the facts found in that case. The decision, in my opinion, is that where a householder employs an independent contractor to do

A work, be it of cleaning or repairing, on his premises, the contractor must satisfy himself as to the safety or condition of that part of the premises on which he is to work. He is left to himself to decide how and in what manner he will perform his task. Whether he is to put his ladder in one place or another, or to shift it or, instead of shifting it, to stretch and endeavour to support himself with his other hand, is a matter for him to decide and in the instant case it is quite clear that had the plaintiff chosen to move his ladder a foot or so to right or left he could have cleaned the panels on either side of the plywood in perfect safety. Equally, had he wished to carry out the operation as he did, he could have tested the plywood to see whether it was firm before he used it as a support before leaning over to clean the other window. It was not, as it seems to me, for the defendant to tell him how he was to do it or to call his attention to the fact that the piece of plywood was not in a condition to serve as a support.

B Counsel put the case very attractively for the plaintiff when he said that the decision in favour of the defendant was tantamount to saying that the rule in *Indermaur v. Dames* (3) did not apply to window cleaners. The answer to that is that, if the cleaner had been injured by some defect in the premises which had nothing to do with the work for which he was employed, as, for instance, C if a staircase up which he was going to get to the first floor windows inside the house had been to the knowledge of the householder in a defective condition, it would have been the duty of the latter to warn him. But, to take another instance, if a builder were employed to do repairs on the roof of a house, I think it is for him to decide how he will carry out the work and to find out for himself whether a chimney stack or other portion of the building which he may wish to use as a support for himself or his staging is satisfactory and safe for that purpose. D Where I differ from the learned judge is that I think that he has imposed on the defendant the same duty vis-à-vis an independent contractor as he would owe to one of his servants. To my mind, the decision in *Christmas v. General Cleaning Contractors, Ltd.* (1) is conclusive of this case, so far as this court is concerned, and I would allow the appeal.

E MORRIS, L.J.: When the plaintiff went to the defendant's premises to clean the windows, it was for the plaintiff to decide how he would set about his task. With his experience as a window cleaner and with the skill of his trade he would neither expect, nor, perhaps, welcome, any advice from the defendant as to method and procedure. The plaintiff was not a servant of any F contracting firm or company, and there was no employer who owed to him the duties which, as laid down by the House of Lords in *General Cleaning Contractors, Ltd. v. Christmas* (1), must be discharged by an employer of window cleaners. The plan which a window cleaner in the position of the plaintiff at any particular moment adopts must depend, therefore, on his own view, acting as an independent contractor, as to what in the particular location and G situation is demanded by considerations of safety and efficiency. In choosing his plan in reference to the particular task which confronts him, such a window cleaner will have his own personal knowledge of his own individual methods and will know whether he proposes to place any measure of dependence on the strength and stability of any part of the window that he is to clean. As it is he and not the occupier of the premises who knows the quality and extent of the support which at any particular moment he will require, so it is for him to H ascertain whether the required support is available.

In my judgment, the decision of this court in *Christmas v. General Cleaning Contractors, Ltd.* (1), which affirms the principles to which I have referred, governs the present case, unless it can be shown that in the present case there is some special distinguishing feature. It is said that the plaintiff was in the habit of relying for support on the plywood, the aperture in which provided a ready and inviting hand-hold, and that the defendant, in replacing the plywood,

without bolts or fastenings, in its previous position, caused a trap to come into existence. It is said that the plaintiff was entitled to expect that the plywood which on the day of the accident looked just as it had looked for a long time had not been robbed of its stability. So it is urged that the defendant had created for the plaintiff an unusual danger of which he (the defendant) knew. To these contentions counsel for the defendant submitted two answers:—first, that it was not established that the defendant ever knew that the plaintiff placed reliance on the plywood as a hand-hold, and, secondly, that, even if the defendant had so known, he was under no duty to warn the plaintiff, for the plaintiff should continuously during the course of his work satisfy himself of any hand-hold before depending on it. A

Was there then in the present case something which ought to be regarded as an “unusual danger”? In his speech in *London Graving Dock Co., Ltd. v. Horton* (2) LORD PORTER said ([1951] 2 All E.R. 5): B

“I think ‘unusual’ is used in an objective sense and means such danger as is not usually found in carrying out the task or fulfilling the function which the invitee has in hand, though what is unusual will, of course, vary with the reasons for which the invitee enters the premises.”

In his speech in the same case LORD NORMAND said (*ibid.*, 9): C

“I am of opinion that, if the persons invited to the premises are a particular class of tradesman, then the test is whether it is unusual danger for that class.”

Applying these tests, it seems to me that the presence of the unsecured plywood cannot in itself and taken by itself be regarded as an unusual danger. In the *Christmas* case (1) DENNING, L.J., said ([1952] 1 All E.R. 41): D

“Windows, which are often quite serviceable for ordinary purposes, may yet have some minor defect, such as rusty screws or worn sash-cords, or ill-balanced weights, making them unsuitable for window cleaners to put their trust in. Such defects are, for window cleaners, common, recognisable dangers of everyday experience and cannot be classed as ‘unusual’. They are, therefore, dangers against which window cleaners must provide their own safeguards.” E

It cannot be said that the piece of plywood was in any way intrinsically dangerous, or, indeed, that there was peril, unless it was touched, that it would fall from its place, or, indeed, that any harm would be likely if it did. If the unusual danger is thought to lie in a change in the situation in that previously to the day of the accident the plaintiff could have held on to plywood which was fixed, but that on the day of the accident he would be holding on to plywood that was not fixed and would no longer give support, then it seems to me that, so far as the defendant knew, there was no change in the situation, for it is not shown that the defendant knew that the plaintiff had been in the habit of holding on to the plywood. Nor do I think that it can be said that the defendant ought to have known this, for it was no part of his function or duty to ascertain or to guess exactly how the plaintiff did his work. It follows, therefore, that the defendant did not know that danger lurked for the plaintiff and that it cannot be said that the defendant ought to have known. F

This is, I think, the conclusion to be drawn from the evidence and from the findings of fact of the learned judge. It was submitted that the evidence of the plaintiff pointed to a different view. His evidence was as follows: G

“(LYNSKEY, J.): When you say you gripped the board, you mean you put your hand inside the hole? A.—Just gripped it like that. (Indicating). (Counsel for the plaintiff): Had there ever been any looseness or anything of that sort before the accident? A.—No. (LYNSKEY, J.): As far as you know had [the defendant] ever seen you cleaning that window? A.—Yes. Q.—When? A.—When he used to come out into the yard, my Lord. Q.— H

He saw you cleaning that particular window? A.—There was no window there, my Lord. Q.—You were cleaning part of that window, were you not? A.—Yes, my Lord. Q.—Did he ever see you doing that? A.—Yes, my Lord. Q.—When was that? A.—On one or two occasions. (Counsel for the plaintiff): You say he had seen you on one or two occasions. What did he do, or used he to do, on those one or two occasions? You would be up the ladder presumably? A.—Yes. Q.—Where was he? A.—Mr. Parker. Q.—Yes. A.—Walking about the yard or anything like that.”

In my judgment, the fact that the defendant had on occasions been in his yard and had seen the plaintiff cleaning the window does not establish that the defendant knew or appreciated the precise method of operation of the plaintiff, or whether or to what extent he used any particular hand-hold. Indeed, the defendant in reply to a question put by the learned judge made his position plain:

“(LYNSKEY, J.): Did you know at all that he had been using this grille or piece of wood as a hand grip to support himself? A.—No; it never entered my mind he would do that. I was under the impression that a window cleaner always supported himself solely from his ladder.”

The learned judge appears to have accepted this, for in the course of his judgment he said ([1952] 2 All E.R. 990):

“I am satisfied that there was an opportunity to warn and that the defendant had forgotten about the matter and did not realise that there was a danger to the plaintiff in cleaning the windows.”

The further evidence given by the defendant in regard to this matter was as follows:

“Q.—You knew perfectly well, did you not, that Friday morning was the regular day for [the plaintiff] and Mr. Rogers to come to window clean? A.—It was the normal day. Q.—That was in your mind, was it not? A.—It was not in my mind, no; not at the time I was doing the window. The thought of an accident to the window cleaners never crossed my mind. Q.—You say it never entered into your mind that they would be coming on the Friday morning? A.—I was thinking about repairing the windows, not window cleaners. Q.—What I think you said to [the plaintiff] when you were putting your own case to him, was that he had come too early, rather, and took you by surprise. If he had come at the proper time you would probably have told him about the window. A.—If he had come at the normal time, when I was working in my gents’ saloon, he would normally have cleaned my french window first and I would have normally said: ‘Hello, Albert, how are you?’, or something like that, and I should have said: ‘Do not knock the board out of the window’ in the same way as I might have said: ‘Mind the step’, which would not have been suggesting the step was insecure. Q.—I do not want to be appearing to trap you. This is the position, is it not? If it had been, according to you, the normal time you would have thought it right to warn him, would you not? A.—I would have thought it right to mention it. I do not consider anyway that it was unsafe or dangerous.”

The learned judge accepted the evidence of the plaintiff that the plywood in the period before the accident had no grille over it and accepted that the plaintiff had been in the habit of using the circumference of the aperture as a convenient hand-hold. Because of what the defendant did the learned judge held that ([1952] 2 All E.R. 990):

“... the result was to create, not merely an unusual danger, but what in effect became to the plaintiff a trap, because what appeared to be, and had been, safe until Feb. 4, had become on Feb. 18, although apparently

safe, completely dangerous if it was used as a hand-hold. Therefore, I am satisfied here that the defendant had created an unusual danger and knew of that unusual danger. In those circumstances there was a duty on him either to warn the plaintiff or to fence the danger so that it could not cause injury to the plaintiff."

When the learned judge said that the defendant knew of the unusual danger, he must, I think, having regard to his other finding, have meant, not that the defendant knew or realised that he had created danger for the plaintiff, but knew of the alteration he had made to the plywood, which the learned judge held constituted for the plaintiff an unusual danger.

With every respect, I do not find myself able to share the conclusions of the learned judge. The defendant did not foresee any danger to the plaintiff, and I do not consider that it should be held that he ought to have foreseen danger. The plaintiff was expected to clean the glass panes and had to do nothing with the piece of plywood. The defendant did not know that the plaintiff would hold on to, or would have any contact with, or reason to touch, the plywood though he appreciated that in the course of his work the plaintiff might touch and so dislodge the plywood. Therefore, even if on the special facts of this case it can be said that, vis-à-vis the plaintiff, an unusual danger was in fact in all innocence and ignorance created by the defendant, nevertheless it ought not to be held that the defendant failed to exercise reasonable care to prevent damage to the plaintiff from that unusual danger, since the defendant did not know of any unusual danger and could not reasonably have been expected to know of any unusual danger. For these reasons I think that the appeal should succeed. I do not find it necessary to express an opinion in regard to the second point of counsel for the defendant, but I must not be taken to assent to the submission that, if on the special facts of this case it had been shown that the defendant knew that the plaintiff would use the plywood as a hand-hold, then even then there would have been no liability.

ROMER, L.J.: I agree that this appeal should be allowed. I think myself that the present case differs from the circumstances of *Christmas v. General Cleaning Contractors, Ltd.* (1) in one material respect. In that case the defect which caused the plaintiff's injury was in the window itself, and was, accordingly, one which he, being familiar with the construction of windows and their peculiarities, might reasonably have foreseen if he had thought about it. In other words, the danger was not an unusual one vis-à-vis an invitee who was on the premises in the capacity of window cleaner and for the purpose of doing a job as such. In the present case the plaintiff's fall from his ladder was not strictly due to any fault or defect in the window which he was engaged in cleaning at the time. The accident was caused by the fact that what he believed, from previous experience, was a secure hand-hold, namely, the hole in the plywood, turned out on that occasion to be loose and insecure. I do not think that this danger was of a kind that should be more apparent to a window cleaner than to anybody else, for the possibility of its existence was merely a matter of general common sense. Accordingly, as I say, this case differs in that respect from the facts which were present in *Christmas's* case (1). Nevertheless, the following passage from the judgment of **DENNING, L.J.**, in that case (which my Lord has already cited) seems to me to be destructive of the plaintiff's attempt to render the defendant liable for the accident which befell him. **DENNING, L.J.**, said ([1952] 1 All E.R. 41):

"The householder employs the window cleaner as an independent contractor to clean his windows, and leaves it to him to decide how he shall do it and what safeguards he shall take, whether he shall use ladders or cradles or simply stand on the sill."

The lord justice was indicating in these observations that an employer is entitled

so to act, and, applying what he said to the case which is before us, it was for the plaintiff to decide on the manner in which he should clean the defendant's window, and, in particular, whether he should (as he very well could) run the ladder up at each side of the window in turn. Had he adopted this course he would not have had to resort to the plywood at all and the accident would not have happened. It appears to me that the position would have been different if it had been established at the trial that the defendant knew that it was the plaintiff's practice to use the hole in the plywood as a means of steadying himself. For on that hypothesis it seems to me that it would have been the defendant's duty to have warned the plaintiff that the hand-hold was no longer safe. He knew that the plaintiff was coming on the Friday as usual, and his failure to warn him of an invisible danger which he (the defendant) had himself brought about since the previous visit would have been tantamount, in my judgment, to inviting the plaintiff into a concealed trap, and I think the defendant would have been answerable for the consequences. The learned judge did not find that the defendant was unaware of the plaintiff's practice of gripping the plywood. On the other hand, he did not find (and I think he would have so stated had he formed that view) that the defendant was aware of the practice and the defendant himself swore that he was not. This denial (which was in answer to a question put by the learned judge himself) is in conformity with his earlier evidence that it never occurred to him that the plaintiff was in danger on the morning of the accident and is in no way inconsistent with the plaintiff's evidence that the defendant had on one or two occasions been in the yard and seen him cleaning the window. For even if the plaintiff had at the time been holding on to the plywood (which he might not have been doing) it by no means follows that a detail such as that would have impressed itself on the defendant's mind. Accordingly, it is impossible, in my opinion, to deal with the case on the footing that the defendant knew of the practice which ultimately led to the plaintiff's accident.

In conclusion I would like to associate myself with what my Lord has said in his judgment as to the general scope and effect of the judgment of DENNING, L.J., in *Christmas's* case (1) so far as it dealt with the appeal by the Caledonian Club. The observations of the lord justice cannot be regarded as confined to window cleaners, but extend, in my judgment, to all cases in which independent contractors are employed for the purpose of repairing or cleaning premises and the method of performing the work is left to them. I agree that the appeal should be allowed.

Appeal allowed.

Solicitors: *Whitlock & Storr*, agents for *Sidney G. Brown & Deasington*, Birmingham (for the defendant); *Caporn & Campbell*, agents for *T. H. Ekins & Son*, Birmingham (for the plaintiff).

[*Reported by F. A. AMIES, Esq., Barrister-at-Law.*]

Re A DEBTOR (No. 36 of 1952). *Ex parte THE DEBTOR v. J. T. RICHARDSON, RYMER BROTHERS, LTD. AND ANOTHER.*

[CHANCERY DIVISION (Harman and Danckwerts, JJ.), March 2, 1953.]

Bankruptcy—Appeal—Appeal from county court—Notice of appeal—Delivery of copy to registrar—Extension of time for delivery—“Good cause shown”—Mistake by appellant’s solicitor—Bankruptcy Rules, 1952 (S.I., 1952, No. 2113), r. 130, r. 389.

A

B

C

D

E

F

G

H

On Jan. 26, 1953, a receiving order was made against the debtor in the M. county court. On Feb. 2 the debtor’s solicitors in M. sent a notice of appeal to be entered in London, and on Feb. 3 they sent a copy of the notice to the registrar of the county court, to comply with the Bankruptcy Rules, 1952, r. 130, which requires a copy of the notice of appeal to be sent to the registrar of the court appealed from within seven days from the entry of the appeal. When the notice of appeal was received in London it was not entered as it was found to be in the wrong form. A new notice, in proper form, was prepared and was entered on Feb. 5. The debtor’s solicitors in M. did not learn these facts until some ten days later, and, in consequence, a copy of the notice of Feb. 5 did not reach the registrar of the county court until Feb. 16, more than seven days from the entry of the appeal.

HELD: the court had no power to extend the time for sending the notice to the registrar under r. 389 of the rules of 1952, since the reason given for the delay, viz., the mistake of the debtor’s solicitors at M. with regard to the form of the notice, was not “good cause shown” within the meaning of the rule, and, as the copy of the notice was not sent to the registrar within the time specified in r. 130, the court, having regard to the Bankruptcy Act, 1914, s. 108 (2) (c), had no jurisdiction to entertain the appeal.

Re Muscovitch. Ex p. Muscovitch ([1939] 1 All E.R. 135), applied.

AS TO BANKRUPTCY APPEALS FROM COUNTY COURTS, see HALSBURY, Hailsham Edn., Vol. 2, p. 398, para. 541; and FOR CASES, see DIGEST, Vol. 4, pp. 531, 532, Nos. 4869-4880.

Cases referred to:

- (1) *Re Muscovitch. Ex p. Muscovitch*, [1939] 1 All E.R. 135; [1939] Ch. 694; 108 L.J.Ch. 392; 160 L.T. 184; Digest Supp.
- (2) *Gatti v. Shoosmith*, [1939] 3 All E.R. 916; [1939] Ch. 841; 161 L.T. 208; Digest Supp.

APPEAL by the debtor from a receiving order made against him by the registrar of the Manchester County Court on Jan. 26, 1953. A preliminary point was taken by the creditors that the court had no jurisdiction to entertain the appeal as a copy of the notice of appeal had not been served on the registrar within the time specified in the Bankruptcy Rules, 1952, r. 130.

Ferns for the debtor.

Peter Foster for the creditors.

HARMAN, J.: This is a preliminary objection taken on an appeal under the Bankruptcy Rules, 1952, and is a matter of a good deal of technicality.

A receiving order was made in the Manchester County Court on Jan. 26, 1953, and the first attempt to appeal from that order was by a notice, dated Feb. 2, which was sent from Manchester to be entered in London. When it arrived in London, it was seen to be in the wrong form by reason of the fact that, instead of being in the bankruptcy form, which is to give a bankruptcy day for a return of the notice, it gave notice that the court would be moved

“ . . . at the expiration of fourteen days or so soon thereafter as counsel can be heard . . . ”

No attempt was made to enter that notice in London, but a new one was prepared and was duly entered on Feb. 5. That was in the proper form, it bore the appropriate £1 stamp, and it was accompanied by the sum of £20 as security for costs, as required by the Bankruptcy Rules, 1952, r. 129. Meanwhile, on Feb. 3, 1953, the debtor's solicitors in Manchester, assuming that the notice of Feb. 2 was in proper form and would be entered, sent a copy of it to the registrar of the Manchester County Court, to comply with the Bankruptcy Rules, 1952, r. 130. It was not until some ten days later that they realised the true state of affairs and it became apparent that there might have been no compliance with r. 130. A copy of the notice of Feb. 5 was then sent to the registrar. Rule 130 provides:

"Within seven days from the entry of the appeal a copy of the notice of appeal shall be sent by the appellant to the registrar of the court appealed from, who shall enter the date of receipt on the copy and file it with the proceedings."

The copy of the notice of Feb. 5 did not reach the registrar of the county court until Feb. 16, when it was put on the file with the county court stamp on it. That was not within seven days of the entry of the appeal, and, consequently, the creditors have taken the preliminary point that the appeal is bad because the copy of the notice of appeal was not sent to the registrar within the time specified in r. 130. Rule 130 is mandatory and it has not been complied with, and, therefore, unless in some way or another the irregularity (or whatever it should technically be called) can be waived, the appeal cannot be entertained. The fundamental principle in this matter seems to me to be that contained in the Bankruptcy Act, 1914, s. 108 (2) (c), which provides:

"No appeal shall be entertained except in conformity with such general rules as may for the time being be in force in relation to the appeal."

It follows that the appeal must be within the rules if it is to be entertained. Otherwise the court has no jurisdiction.

It is contended on behalf of the debtor that, notwithstanding that the service of the copy on the registrar was out of time, the court is enabled to waive or overlook that fact, by extending the time, under the Bankruptcy Rules, 1952, r. 389, which provides:

"The court may, for good cause shown, extend or abridge the time appointed by these rules or fixed by an order of the court for doing any act or taking any steps in any proceedings."

It has been pointed out, and, I think, rightly, that it is difficult to see that anyone has been harmed by the mistake that has occurred. Since Feb. 3, i.e., before the time of entry of the appeal, there has been a notice, albeit an incorrect one, on the registrar's file notifying the public, or anyone who wished to search, that an appeal was pending. Therefore, I cannot imagine any harm that can have ensued from this irregularity—I call it that without prejudice—but there is authority binding on us that the rule must be complied with unless there is good cause for absolving an appellant from complying with it.

A similar objection to an appeal by debtors was before the Court of Appeal in recent years in *Re Muscovitch. Ex p. Muscovitch* (1), where SIR WILFRID GREENE, M.R., found himself reluctantly constrained to hold that the objection was a good one, but that decision was under the Bankruptcy Rules, 1915, which differ in significant respects from the rules of 1952. The point with which the court was primarily concerned consisted in the word "forthwith" in r. 132 of the rules of 1915. That point does not now arise, for, in deference to the court's suggestion, the period of seven days has been substituted in the rules of 1952. Apart from this point r. 386 of the Bankruptcy Rules, 1915, was in these terms:

"The court may, under special circumstances and for good cause shown,

extend or abridge the time appointed by these rules . . . for doing any act or taking any proceeding."

It cannot be without significance that r. 389 of the Bankruptcy Rules, 1952, has omitted the words "under special circumstances", so that an appellant may now have his time extended without proving special circumstances, provided that he can show that there was "good cause". It is a little difficult to think of a "good cause" which would not also operate as a "special circumstance", but I am content to suppose—and I must suppose—that the two things are different, and, therefore, the question which we have here to decide is whether there is "good cause shown".

The "good cause" suggested on behalf of the debtor is a mistake made by his solicitors in Manchester, who thought that the first notice of appeal, which they sent to London, would be filed. They omitted to find out that it had not been filed, and that, therefore, the copy which they sent to the registrar on Feb. 3 was not a copy of a notice of appeal which was entered. Now, if this had been a case of extending the time of appealing from the High Court in its ordinary jurisdiction to the Court of Appeal, it is clear from the decision of the Court of Appeal in *Gatti v. Shoosmith* (2) that the mistake of a legal adviser may be a sufficient reason. SIR WILFRID GREENE, M.R., pointed out in that case that a recent alteration in the rules had set the court free from the fetters formerly circumscribing its discretion, and that, therefore, the discretion was unlimited. I should have expected the Bankruptcy Rules to follow suit, but they have only gone half way. The Bankruptcy Court's discretion, though freed from "special circumstances", is still fettered by "good cause shown". I cannot think that a mere blunder amounts to so much. Therefore, I am unable (though I do not relish coming to this conclusion) to see that we can extend the time. I think that the objection must be upheld.

DANCKWERTS, J.: I agree that the objection succeeds and that the appeal must be dismissed. I should like to add that I do not agree that no harm can have been done to anyone by the fact that a copy of the correct notice was not sent to the registrar within the time required by r. 130. I am not sure that I appreciate exactly the object of the notice being given to the registrar in a particular manner, but it seems to me that, if it is to enable the public to ascertain what is being done, a copy of the wrong form of notice, referring to the wrong date, might well mislead. It seems to me, therefore, that it does not necessarily follow that the irregularity did no harm whatever.

Appeal dismissed.

Solicitors: *L. Bingham & Co.*, agents for *James Chapman & Co.*, Manchester (for the debtor); *R. A. Rotherham & Co.*, agents for *Pearsons & Ward*, York (for the creditors).

[Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.]

MILES v. CLARKE.

[CHANCERY DIVISION (Harman, J.), February 19, 20, 23, 1953.]

Partnership—Dissolution—Ownership of assets—No partnership agreement except as to division of profits.

A. started in business as a photographer on premises of which he held the lease. A. had no skill in photography, and the business was not prosperous. A. invited B., who was a successful free-lance photographer with his own connection in the trade, to join him as a partner. B. agreed and brought with him his connection, which was considerable. The only agreement made was that profits should be shared equally, and that B. should draw £125 per month on account of his share. The business flourished, but A. and B. quarrelled and it became necessary to wind-up the partnership. Accounts had been drawn by an accountant, but they were found to be inaccurate and unreliable. On the question as to the ownership of assets used in the business,

HELD: as there had been no agreement except as to the division of profits, no further agreement should be implied than was necessary to give business efficacy to the relationship between A. and B., and, in the circumstances, the consumable stock which was actually used in the business should be treated as a partnership asset (notwithstanding that it was brought in by A.), but all other assets (including the lease of the premises, equipment, and personal goodwill) should be treated as being the property of the partner who brought them in, no sum being charged against profits in respect of the depreciation of the property remaining in A.'s hands.

AS TO REALISATION AND DISPOSAL OF PARTNERSHIP ASSETS, see HALSBURY, Hailsham Edn., Vol. 24, pp. 511-518, paras. 973-988; and FOR CASES, see DIGEST, Vol. 36, pp. 519, 520, Nos. 1893-1903.

Case referred to:

(1) *Pawsey v. Armstrong*, (1881), 18 Ch.D. 698; 50 L.J.Ch. 683; 36 Digest 326, 79.

ACTION.

In a partnership action the usual account and inquiry were ordered, and inquiries were also ordered whether certain assets belonged to the partnership or the respective partners, and whether either partner was entitled to be credited in the partnership accounts with any sum in respect of those assets. It was also ordered that the action be adjourned for further consideration.

The judge then treated as adjourned into court the inquiries relating to the ownership of assets and the amount with which the partners were respectively entitled to be credited in respect thereof.

Harold Christie, Q.C., and *Belcourt* for the plaintiff.

Raymond Jennings, Q.C., and *N. S. S. Warren* for the defendant.

HARMAN, J.: This is a partnership action in which the issues on the writ, at the hearing of a motion, and on the pleadings when the matter came to be dealt with in this court were two: First, was there a partnership at all? Secondly, if there was a partnership, what were the assets of the partnership?

The defendant was advised, and I think obviously rightly advised, that to contest the issue whether in law there was a partnership was to contest the incontestable, and that, therefore, at the outset he would be wise to concede that a partnership had existed, and that a partnership at will had begun on Apr. 1, 1950, and had expired at the issue of the writ in the action. This advice he rightly took. The expiry of the partnership may conveniently be taken to have occurred on May 29, 1952. That left to be decided the question: What were the partnership assets? Though it was pleaded in the defence that none

of the assets used in the business belonged to anyone but the defendant, yet the statement of claim, as it stood, did not conveniently raise that matter. It seemed to me and to counsel who represented the parties that the right course to take was to treat the hearing as deciding that a partnership existed and make an order on that footing, and then order the ordinary partnership accounts with an addition in a special form in order to raise the matters which remained in controversy between the parties. Consequently, on Feb. 19, 1953, I made an order declaring that there was a partnership between the plaintiff and the defendant, and that it began on Apr. 1, 1950, and was dissolved on May 29, 1952. I ordered, first, the following inquiry:

"An inquiry whether any and if so which of the following items as at Apr. 1, 1950, formed part of the partnership property or whether any and if so which of them remained the separate property of the plaintiff or the defendant as the case may be . . ."

and then follows the list: (i) the lease of the property at Shepherd's Market where the business was carried on; (ii) the furniture and fittings in the studio; (iii) and, perhaps, most important, the equipment of the studio; (iv) the plaintiff's and the defendant's photographic negatives and prints which were brought in by each of them at the outset; (v) the defendant's goodwill or reputation; and (vi) the plaintiff's goodwill or reputation. That order was followed by an order (in para. 2 and para. 3) for the taking of the usual account and inquiry in a partnership, in common form. In para. 4 I ordered an inquiry whether either the plaintiff or the defendant was entitled to be credited in the partnership accounts with any sum on account of any of the items referred to. I then treated the summons to proceed as having been issued and having come before the master and the inquiries ordered in para. 1 and para. 4 of the order as having been adjourned into court. This judgment will be a judgment to assist the master in answering the inquiry ordered in paras. 1 and 4 when the matter is sent back to him.

The defendant, who was a gentleman of some means, was minded to start a business in commercial and fashion photography. After looking about for some time, he found the premises which subsequently became the place of business of the partnership, and in June, 1948, he entered into a lease whereby the property, which consisted of two squash racquets courts, dressing-rooms, and so forth, was demised to him for a period of seven years from midsummer, 1948, at a rent of £400 a year, which was, I am told, an advantageous lease, bearing in mind the neighbourhood and the fact that squash racquets courts are easily adaptable as photographic studios, having a good overhead light. One court was left open as a large studio, the other was divided by partitions and a floor put in, part of it being used as dark rooms, part as offices, and part as a smaller studio. There the defendant started to carry on a photographer's business. He was not himself, as I understand it, skilled in the photographic art or craft, but he employed persons to carry out the photographic work for him. At the beginning he made a very considerable loss. In January, 1950, after some earlier approaches which were ineffective, he applied to the plaintiff to see whether he would come into the business as a partner. The plaintiff has been taking photographs all his life, and he is, apparently, well-known and has a good connection in this particular work. He was at that time working for others, using their studio partly for his own purposes and partly on their behalf, and he was making a very considerable income as what he called a free-lance photographer. He, it seems, was not very anxious to come in, and during the first month or so of 1950 he came down occasionally to the defendant's studio and took photographs, but from about the beginning of April he attended there as a full-time occupation and brought with him his own considerable connection. He took photographs of such subjects and such models as the

defendant on his side should provide. The upshot of it was a very successful business. The plaintiff's faithful clients followed him, and brought their work to him. The business is now in the hands of a receiver, after the partnership quarrel, in a flourishing condition.

A These two people, having, as it were, thrown in their lot together in this way, were too busy to think about the terms on which they should carry on business. They agreed that the profits, if there should be any, should be shared equally, and I take it the losses also, though, of course, they did not contemplate losses, and they did not have to face any. There also appears to have been an agreement reached that the plaintiff should draw £125 a month on account of his share of the profits, but that arrangement did not always continue, because the plaintiff appears to be a rather improvident person who is almost incapable of managing his own life. B The only two matters that were agreed were that there should be an equal sharing of the profits and that the plaintiff should have these monthly drawings on account. They both contemplated a regular legal connection, and the plaintiff employed as his solicitors Messrs. Blacket Gill & Topham, who, as early as January, 1950, can be found writing to the defendant setting out what the plaintiff understood. At that time the plaintiff, C by the advice, no doubt, of his solicitors, contemplated that there would be a limited company and not a partnership to carry on the business. Whether the matter was carried on in one guise or the other really made no difference in substance to the parties. Miss Blacket Gill, the senior partner in that firm of solicitors, who conducted all the negotiations on the part of the plaintiff, wrote on Jan. 31, 1950, in these terms:

D "We understand from [the plaintiff] that you and he are desirous of forming a limited company to carry on business as photographers. The business will be carried on at 5, Shepherd Street and the assets of the company will consist of Mr. Miles's goodwill, your goodwill and a lease and you will each hold shares in accordance with the value of the assets you put into the company. We understand that very little detail has E been arranged between you except that you both agree that you wish to proceed on these lines."

The defendant employed an accountant who treated as an item on the debit side of the business a bank overdraft of £1,000 or so, which was, in fact, the defendant's private bank overdraft which neither party had contemplated for one moment as being a liability of the business. As the so-called accounts F start from that monstrous unreality, it seems to me impossible to place any reliance on what should be put on the other side. On the other side, in fact, certain assets, including the lease and the stock-in-trade, are set down as assets of the business, but when one knows that the chief liability shown is not a business liability I do not think one is entitled to assume that that which appears as an asset is in truth an asset of the business. It is obvious that these G parties and their advisers, so far as they thought about it at all, always contemplated that the lease, the equipment and the studio furniture, and the stock-in-trade and so forth should all be brought into the common pool, but the fact is that nothing was ever finally agreed about it, and they just drifted on.

On what terms were these people partners? The only answer one can give is that they were partners on the terms that they shared the profits H between them. What more? It is said, and I think rightly, that, even though there was no further agreement, one must assume that the stock-in-trade, such as stocks of film, was put into the pool and cannot be taken out again, but must become part of the partnership assets. That is not denied. There remain, however, more important items. The first is the lease and the second is the plant which may be worth £2,000. It is said with force by counsel for the plaintiff that those two classes of assets were put forward throughout as being brought in as part of the assets of the intended association, and, the plaintiff having



come into the business on that footing, it would be inequitable now to deny him a right to share in those assets. It is said on the other side that it is not necessary to assume any further agreement between the parties, but one need only say that everything that belonged to one of them at the beginning of the partnership still belonged to that one at the end, and that the law will not make any imaginary agreement between the parties, it being ascertained as a fact that there was no agreement. In my judgment, no more agreement between the parties should be supposed than is absolutely necessary to give business efficacy to that which has happened, and that, I think, is the only safe way to proceed.

It is absolutely necessary to assume that things quae ipso usu consumuntur, the stock-in-trade, must be treated as having been brought into the partnership and their value must be ascertained by inquiry. They were all brought in by the defendant. I do not see the necessity of assuming that anything else went into the partnership. It seems to me that, as the parties failed to agree, it is not for me to say that the defendant must be assumed to have thrown the lease and the plant into the pool. The partnership could get on quite well if he gave his partner a licence to go on the leasehold property for the purposes of the business and to use the cameras to make the joint profits. Therefore, in my judgment, nothing changed hands except those things which were actually used and used up in the course of the carrying on of the business. The stock of negatives which each of these partners brought in was for the use of the business so long as it was going on. As I understand there is no great difficulty in separating them again now, and, indeed, being *ex necessitate* negatives or photographs taken before 1950, so far as they are fashion negatives I cannot think that, except historically, they have any great value. However, if desired, the parties can each take away their negatives. Of course, the stock of negatives of photographs taken during the course of the partnership must be a partnership asset. Everything that changed its existence during the currency of the partnership must be.

It was said that, apart from those matters, each party brought in a connection, and that the plaintiff brought in something of value in the shape of his goodwill or connection which must in some way be quantified or valued and treated as an asset of his. Some such scheme was, undoubtedly, envisaged, but it was never agreed on, and it seems to me it would be idle to suggest that, as the parties had not agreed anything of that sort, it ought to be treated as having happened. The plaintiff came there because, having the connection he did, if he had the studio and the equipment to his hand, he could make a good profit and presumably it would be worth his while to take half that profit in return for the benefit of the use of the studio and the equipment. I see no reason to suppose that, though his connection and skill were very useful to make profits, one ought to treat them in some way as capital assets. Therefore, neither his connection, nor the defendant's connection, if it was of any value (which I doubt), should be treated in any way as being a partnership asset.

The only partnership assets remaining are, I think, the studio name, or the goodwill, such as it is, which has been attaching to it (and I should have thought that was probably little), and the photographs in so far as they accumulated during the two years when the partnership was subsisting. Now that the parties have separated, the plaintiff will take away his own connection, no doubt, and his own clients, just as he brought them, and the defendant will presumably keep his own. It may be that it will be to his advantage that he will be able to keep the leasehold premises, but, as they were his before and he did not agree to assign them or to sub-let them, that is the inevitable result of the failure of the parties to make a more reasonable bargain.

Therefore, I propose to answer the inquiries by declaring that the lease, furniture and fittings, and the equipment of the studio did not form part of

the partnership property, but remained the separate property of the defendant; that the plaintiff's and defendant's photographic negatives and prints brought into the business on Apr. 1, 1950, remain the property of the person bringing them in; and, further, that neither the defendant's nor the plaintiff's goodwill or reputation form part of or should be treated as assets of the partnership. I will make a general declaration on the contrary that the stock-in-trade and consumable chattels ought to be treated as partnership property brought in by the defendant, and, in default of an agreement, I will direct a further inquiry, namely, as to what value ought to be attributed to those things in taking the partnership account. Lastly, it is suggested that, if the property remains that of the defendant, it is not right, in taking the accounts, to treat any depreciation as a charge against the profits, which would mean that the plaintiff would pay half of it. In my judgment, that is right. It would not be right to assume that the defendant leased or licensed either the leasehold property or the plant in the partnership at any price at all, because he did not, and, therefore, in my judgment, the result of no agreement works in the plaintiff's favour, and is that he does not have to contribute to wear and tear on those assets. That being so, in taking the accounts no sum ought to be charged against profit by way of depreciation. It is also said that certain partnership profits have been devoted to making improvements. For all I know that may be true or there may be nothing in it. The accounts are not sufficient to show. But *Pawsey v. Armstrong* (1) shows that that matter can be provided for in taking a partnership account, and I propose, therefore, to put in as part of the order an inquiry whether, having regard to the terms of the partnership and the purpose for which any expenditure on leasehold property was made, any, and, if any, what, sum should now be allowed to the partnership for such outlay. If it turns out that there is nothing in it the parties need not proceed with that inquiry.

Orders accordingly.

Solicitors: *Bucket Gill & Topham* (for the plaintiff); *Stafford Clark & Co.* (for the defendant).

[*Reported by R. D. H. OSBORNE, Esq., Barrister-at-Law.*]

HAR-SHEFI v. HAR-SHEFI.

[COURT OF APPEAL (Singleton, Denning and Hodson, L.J.J.), February 20, March 6, 1953.]

F *Nullity—Jewish bill of divorcement—Declaratory judgment sought that marriage be dissolved—Jurisdiction of court to make declaratory order—Husband domiciled in Israel—Wife resident in England—R.S.C., Ord. 25, r. 5.*

G On Jan. 10, 1950, the parties were married at the office of the Chief Rabbinate in Israel, the wife being domiciled in England and the husband in Israel. The wife was now resident in England and the husband was both resident and domiciled in Israel. On Sept. 6, 1951, a Jewish bill of divorcement dissolving the marriage was received by the wife at the Beth Din (the court of the Chief Rabbi) in London, and on May 16, 1952, she filed a petition for a declaration that her marriage had thereby been validly dissolved.

H **HELD:** (i) under R.S.C., Ord. 25, r. 5, the court had jurisdiction to make a declaratory order even though no other relief was sought and, therefore, it had jurisdiction to entertain a petition which sought only a declaration that a foreign decree of divorce was valid.

(ii) (SINGLETON, L.J., dubitante) the English courts could hear evidence of the law of Israel, on which the validity of the divorce, and, consequently, the domicile of the wife, depended, and so determine whether or not the divorce was valid by that law.

Decision of BARNARD, J. ([1952] 2 All E.R. 821), reversed.

AS TO DECLARATORY JUDGMENTS, see HALSBURY, Hailsham Edn., Vol. 19, pp. 212-217, paras. 511-514; and FOR CASES, see DIGEST, Replacement Vol. 30, pp. 168-181, Nos. 192-292, and Digest Supps.

AS TO JURISDICTION OF ENGLISH COURTS IN NULLITY SUITS, see HALSBURY, Hailsham Edn., Vol. 6, p. 303, para. 357, and 1952 Supp.; and FOR CASES, see DIGEST, Vol. 11, p. 428, Nos. 924-926, and Digest Supps.

Cases referred to:

- (1) *Schuck v. Schuck*, (1950), 66 (pt. 1) T.L.R. 1179; 2nd Digest Supp. A
- (2) *Guaranty Trust Co. of New York v. Hannay & Co.*, [1915] 2 K.B. 536; 84 L.J.K.B. 1465; 113 L.T. 98; 30 Digest, Replacement, 174, 239.
- (3) *Ray v. Sherwood & Ray*, (1836), 1 Curt. 173, 193; 163 E.R. 58, 65; *affd. sub nom. Sherwood v. Ray*, (1837), 1 Moo. P.C.C. 353; 12 E.R. 848; 27 Digest, Replacement, 448, 3799.
- (4) *De Gasquet James (Countess) v. Mecklenburg-Schwerin (Duke)*, [1914] P. 53; 83 L.J.P. 40; 110 L.T. 121; 11 Digest 427, 923. B
- (5) *Mansfield (Earl) v. Stewart*, (1846), 5 Bell, 139.
- (6) *Kingston's (Duchess) Case*, (1776), 2 Smith, L.C., 13th ed., 644; 1 Leach, 146 (168 E.R. 175); 27 Digest 692, 6623.
- (7) *Igra v. Igra*, [1951] P. 404; 2nd Digest Supp.
- (8) *De Reneville v. De Reneville*, [1948] 1 All E.R. 56; [1948] P. 100; [1948] L.J.R. 1761; 2nd Digest Supp. C
- (9) *Robert (otherwise De La Mare) v. Robert*, [1947] 2 All E.R. 22; [1947] P. 164; [1948] L.J.R. 680; 2nd Digest Supp.
- (10) *White (otherwise Bennett) v. White*, [1937] 1 All E.R. 708; [1937] P. 111; 106 L.J.P. 49; 156 L.T. 422; Digest Supp.
- (11) *Lindo v. Belisario*, (1795), 1 Hag. Con. 216; 161 E.R. 531; *on appeal*, (1796), 1 Hag. Con. App. 7; 161 E.R. 636; 27 Digest, Replacement, 35, 125. D
- (12) *Salvesen (or Von Lorang) v. Austrian Property Administrator*, [1927] A.C. 641; 96 L.J.P.C. 105; 137 L.T. 571; Digest Supp.

APPEAL from an order of BARNARD, J., dated Oct. 29, 1952, reported [1952] 2 All E.R. 821. E

On May 16, 1952, the wife, who was resident in England, filed a petition seeking a declaration that her marriage had been validly dissolved by a Jewish bill of divorcement delivered to her by the Beth Din (the court of the Chief Rabbi) in London. On July 2, 1952, the husband, who was both resident and domiciled in Israel, purported to enter an appearance, but he was unable to provide an address within the jurisdiction, and on Oct. 29, 1952, the wife applied ex parte by summons for leave to proceed with the petition. BARNARD, J., dismissed the summons and the petition on the grounds (i) that the court had no jurisdiction under R.S.C., Ord. 25, r. 5, to entertain a petition which sought only a declaration that a foreign decree of divorce was valid, and (ii) that, as the wife was, in effect, seeking a declaration of nullity, the proper court to consider the validity of the bill of divorcement was the court of the domicile. F

William Latey, Q.C., and *John Mortimer* for the wife petitioner.
The husband did not appear. G

Cur. adv. vult. H

Mar. 6. The following judgments were read.

SINGLETON, L.J.: The petitioner, Hannah Har-Shefi, prays for: " (i) A declaration that the said marriage has been validly dissolved on, and no longer subsists since, Sept. 6, 1951. (ii) Alternatively, a declaration that your petitioner is no longer married to the respondent ". That is all.

The petition reads as follows:

" 1. That on Jan. 10, 1950, your petitioner, then Hannah Cohen-Lask,

spinster, was lawfully married to Elhanan Har-Shefi (hereinafter called 'the respondent') at the office of the Chief Rabbinate of Jaffa and Tel-Aviv district, Israel. 2. That after the said marriage your petitioner and the respondent lived and cohabited at divers places and at 25, Goldhurst Terrace, in the county of London and there is living issue of the said marriage one child, namely, Adina D'Ovra Sabra born on Dec. 5, 1950. 3. That your petitioner is now living at 25, Goldhurst Terrace, aforesaid, and the respondent, whose occupation when last known to your petitioner was that of a mechanic, is now living at 32, Jonah the Prophet Street, Tel-Aviv, Israel. 4. That your petitioner is domiciled in England and that the respondent is domiciled in Israel. 5. That there have been no previous proceedings in the High Court or in any county court or court of summary jurisdiction either by or on behalf of your petitioner or the respondent save and except that on Aug. 13, 1951, an order was made by the Marylebone magistrate's court awarding the custody of the said child to your petitioner and the respondent was ordered to pay 20s. weekly for its benefit, since which date the parties have not cohabited. 6. That on Sept. 6, 1951, a Jewish bill of divorcement dissolving the said marriage was received by your petitioner at the Beth Din, London, or court of the Chief Rabbi. At the date of the said bill of divorcement both your petitioner and the respondent were domiciled in Israel, and the said bill of divorcement is valid to dissolve the marriage according to the laws of Israel."

In view of the unusual character of the petition, the learned registrar declined to set down the case for trial without directions from the judge. Accordingly, the petitioner took out a summons asking for leave to proceed with her petition, and that the case be set down for trial. The summons was heard by BARNARD, J., who refused the application of the petitioner and dismissed the petition. The petitioner appeals to this court, and two questions arise.

The first is whether the court has jurisdiction to hear a petition of this nature which seeks a declaration and nothing beyond that. In considering this question, I do not think that any good purpose is served by examining the practice of the ecclesiastical courts of old, though it may be that ORMEROD, J., in *Schuck v. Schuck* (1) overstated the matter to some extent when he said (66 (pt. 1) T.L.R. 1181):

"It appears from the authorities that it was the established practice of the ecclesiastical courts to make such declaratory orders, and I see no reason why, if the circumstances are proper, such an order should not be made in the present case."

Since 1924 the Rules of the Supreme Court have applied in matrimonial suits to any matters of practice or procedure which are not governed by statute or dealt with by the Matrimonial Causes Rules: see the Matrimonial Causes Rules, 1924, r. 97, and 1937, r. 81. The rule now in force is r. 80 of the Matrimonial Causes Rules, 1950 (S.I., 1950, No. 1940):

"Subject to the provisions of these rules and of any enactment, the Rules of the Supreme Court shall, notwithstanding the provisions of Ord. 68 thereof, apply with the necessary modifications to the practice and procedure in any cause or matter to which these rules apply."

This brings into play the provisions of R.S.C., Ord. 25, r. 5, which provides:

"No action or proceeding shall be open to objection, on the ground that a merely declaratory judgment or order is sought thereby, and the court may make binding declarations of right whether any consequential relief is or could be claimed, or not."

This rule was said by a majority decision of this court in *Guaranty Trust Co. of New York v. Hannay & Co.* (2) to be "merely an extension of the practice

and procedure of the court." Once it is clear that Ord. 25, r. 5, applies to proceedings in the Divorce Court it seems to me that a petition cannot be dismissed solely by reason of the fact that all that is sought is a merely declaratory judgment. None the less, as the authorities cited in the notes to Ord. 25, r. 5, show, any such claim will be carefully watched. The court will not grant a declaration in the air. It is impossible to say from the petition—and that is all we have—whether the petitioner can show a case entitling her to the declaration which she seeks. That can, I think, only be determined on the hearing of the petition itself. There may be nothing on which the aid of the court can properly be invoked; on the other hand, it is possible that the petitioner may be able to show grounds which would justify the granting of a declaration.

The other question depends on domicile. BARNARD, J., reached the conclusion that the proper court to consider the validity of the divorce said to have been granted on Sept. 6, 1951, is the court of domicile, and that the English courts had no jurisdiction to entertain the petition. There is much to be said for that view. The marriage took place at the office of the Chief Rabbinate of Jaffa and Tel-Aviv District. The petition states that the Jewish bill of divorcement was received by the petitioner at the Beth Din, London, and that at the date of the bill of divorcement both petitioner and respondent were domiciled in Israel. The petitioner states in para. 4 that she is domiciled in England and that the respondent is domiciled in Israel. *Prima facie*, she would retain the domicile of her husband. If there were a valid decree of divorce, she might well acquire another domicile, but that cannot be determined without a finding on the validity of the decree of divorce. The State of Israel has its own courts, and I should have thought that it was desirable that they should determine a matter of this kind, which affects the position of two people of the Jewish faith, and which raises the question of the validity of a bill of divorcement of the court of the Chief Rabbi. I do not know that it would be necessary for her to go to Tel-Aviv. I feel that we ought to have more information before the courts of this country assume jurisdiction. This is an unusual proceeding, and it may well be that the question is capable of easy solution by some tribunal or body. I cannot see that there would be any hardship on the petitioner if we refused jurisdiction, except that she has legal aid here, and that might not apply (or be necessary) elsewhere. However, I say no more on this subject as both my brethren hold the view that the petitioner should be allowed to proceed—which means that the appeal must be allowed.

DENNING, L.J.: The question is whether the Divorce Court has jurisdiction to make a declaration as to the validity of a divorce. The facts have not yet been judicially ascertained, but we are asked by counsel for the petitioner to assume that he will be able to prove these facts. The wife, who is a Jewess, was before her marriage an Englishwoman domiciled in England. The husband, who is a Jew, was domiciled in Israel. On Jan. 10, 1950, they were lawfully married at Tel-Aviv in Israel at the office of the Chief Rabbinate. They afterwards came to England, but the husband committed a criminal offence and was deported. Before he went, however, he delivered a *gett*, which is a letter of divorce, recognised by the Jewish rabbinical law as sufficient to dissolve a marriage, provided that the requisite formalities are complied with. This bill of divorcement, as it is called, was received by the wife at the Beth Din, London, which is the court of the Chief Rabbi. Counsel hopes to prove that that bill of divorcement was valid to dissolve the marriage according to the laws of Israel. The husband, on his deportation from this country, returned to Israel where he is said to have since married another woman, or, at least, gone through a form of marriage with her. The wife has decided to make England her permanent home, and now applies to the Divorce Court in this country for a declaration that the bill of divorcement was valid to dissolve

the marriage. The case has not, however, been allowed to go for trial, because the judge has ruled that the English court has no jurisdiction to entertain it.

The first question is one of procedure only, and it is whether the Divorce Court has jurisdiction to entertain a petition for a declaration when it is not attached to any other claim for relief. I am clearly of opinion that it has jurisdiction to do so. The ecclesiastical courts habitually entertained suits for declarations only. For instance, they entertained nullity suits, that is, suits of which the sole object was to obtain a declaration that what purported to be a valid marriage was in law a nullity. They did this not only in the case of a marriage which was void from the beginning, such as a bigamous marriage, but also in the case of a marriage which was only voidable, as, for instance, a marriage voidable for impotence: see SHELFORD ON MARRIAGE, 1841, pp. 565 to 572. The reason why the ecclesiastical courts exercised this declaratory jurisdiction was

“on the ground that it is material for their own sakes and that of the public that their status should be known; and the object of the proceeding is to have the status of the parties to the marriage defined by the sentence of a competent court . . .”

see *Ray v. Sherwood & Ray* (3) (1 Curt. 227) per SIR HERBERT JENNER. That reasoning is wide enough to justify a general jurisdiction to make declaratory orders, and I do not think the force of it is taken away by the undoubted fact that there was one particular exception to it, namely, that the ecclesiastical courts would not entertain a suit to declare the validity of a marriage: see *Countess De Gasquet James v. Duke of Mecklenburg-Schwerin* (4). That was an omission which was regretted by LORD BROUGHAM [in *Earl of Mansfield v. Stewart* (5)], but it was mitigated by the numerous ways available to people who wanted to establish the validity of marriages. For instance, if the validity of a marriage was in issue in certain real actions in the temporal courts, such as a writ of dower, it was the regular practice for the temporal courts to send that issue to the ecclesiastical courts. The ecclesiastical courts would hold a trial of the issue. They would make a proclamation requiring persons interested to come in and be made parties; and after the trial they would give their certificate (called a bishop's certificate) as to the validity or invalidity of the marriage. The certificate was perpetual and conclusive evidence against all the world on the point, and was nothing more nor less than a declaratory judgment. The practice is well described in BURN'S ECCLESIASTICAL LAW, vol. 2, 1842, at pp. 485 and 486, and in the *Duchess of Kingston's Case* (6). In addition to that practice, suits for restitution of conjugal rights were on occasion used for the purposes of establishing the validity of a marriage, in much the same way as the Scots declarator of marriage was used, though there are only very few instances of this: see BURN'S ECCLESIASTICAL LAW, vol. 2, at p. 500. Again, suits for jactitation of marriage were at one time frequently used for the like purpose, but they were discredited by the *Duchess of Kingston's Case* (6) in 1776 and rarely used thereafter.

Whatever be the reason why the ecclesiastical courts did not grant declarations of validity, however, there can be no doubt that they granted declarations of nullity when marriages were voided, and the reasoning on which these declarations were based supports the view that the ecclesiastical courts had a general jurisdiction to make declaratory orders as to the existence or non-existence or nullity of a marriage, even though no other relief was sought. If this is so, it follows that the Divorce Courts have inherited a like jurisdiction under s. 22 of the Matrimonial Causes Act, 1857. But, even if the ecclesiastical courts had no such jurisdiction, I am of opinion that the Divorce Courts have outgrown the disability. Since 1924 they have acquired under R.S.C., Ord. 25, r. 5, a jurisdiction to make declaratory orders in the same way as the other Divisions of the High Court. It was so held by ORMEROD, J.,

in *Schuck v. Schuck* (1), and by PEARCE, J., in *Igra v. Igra* (7), and I agree with them. BARNARD, J., said that those two cases were distinguishable from the present because each was a properly constituted petition for jactitation of marriage, that is, for wrongfully boasting or asserting that a marriage existed when it did not. I do not think that that is a valid ground of distinction. In each case the claim for jactitation failed, and so the declaratory order had to stand on its own feet. Apart from that, I do not think we ought to use suits for jactitation today for this purpose. The drawback of such suits was exposed in the *Duchess of Kingston's Case* (6) in 1776. The duchess was married first to a Mr. Hervey, and then, while he was still living, she went through a form of marriage with the duke. In the hope of avoiding a charge of bigamy, she brought a suit in the ecclesiastical courts against Mr. Hervey for jactitation, and she succeeded in obtaining a decree against Mr. Hervey on the basis that her marriage to him was invalid. There was more than a suspicion that this decree was obtained in collusion with Mr. Hervey. Afterwards when she was tried for bigamy, she set up the ruling of the ecclesiastical courts as conclusive to show that her first marriage was invalid, but she failed. The judges held that a suit for jactitation of marriage

"is ranked as a cause of defamation only and not as a matrimonial cause"; •

and a sentence in favour of the petitioner in such a suit is not conclusive as to the existence or non-existence of the marriage: see the *Duchess of Kingston's Case* (6) (2 Smith L.C., 13th ed., at pp. 650, 651. After that case suits for jactitation fell into disrepute: see BURN'S ECCLESIASTICAL LAW, vol. 2, at p. 500; and I do not think we ought to revive them today to support a declaratory order. It would be absurd if a petitioner had to insert a fictitious or unjustified claim for jactitation in order to get a declaratory order. I prefer to hold simply that under the modern rules the Divorce Courts have jurisdiction to make a declaratory order even though no other relief is sought.

The second question is whether this declaratory jurisdiction can be exercised in the present case. The couple here were both domiciled in Israel at the time of the divorce. If they had both remained domiciled in Israel after the divorce the English courts would clearly have had no jurisdiction to pronounce on its validity. Even if the wife was resident in England, nevertheless, if she had remained domiciled in Israel, the English courts would have no jurisdiction: see *De Reneville v. De Reneville* (8), overruling *Robert (otherwise De La Mare) v. Robert* (9); unless she could bring herself within s. 18 of the Act of 1950, which is not the case here. But it is said that the wife has, since the divorce, resumed her English domicile and that that is sufficient to give these courts jurisdiction to declare her status, just as domicile gave jurisdiction in *White (otherwise Bennett) v. White* (10), as explained in *De Reneville v. De Reneville* (8). That involves a nice question, whether she has resumed her English domicile, and that depends on whether the divorce was valid or not. If the divorce was valid, she was free to resume her English domicile, and she has in fact resumed it; but if the divorce was invalid, she is still married to her husband and she retains his domicile. So the jurisdiction of the court depends on the validity of the divorce; and that depends in turn on the law of Israel. I do not think that we should send the wife to Israel to determine that question. The English courts can hear evidence of Israel law and can decide whether the divorce was valid by that law or not. If it was valid by that law, then the English courts have jurisdiction to declare it to be so. A similar course was envisaged in *De Reneville v. De Reneville* (8), where LORD GREENE, M.R., said that the English courts could hear evidence of French law to decide whether a French marriage was void or voidable, and hence whether the English courts had jurisdiction or not. I do not place any reliance on the fact that the bill of

divorcement was delivered in England. That does not make English law applicable to determine the status of the wife. The parties were at the time of the divorce domiciled in Israel, and the validity of the divorce must depend on the law of Israel and not on the law of England. Nevertheless, accepting that the status depends on the law of Israel, I see no reason why the English courts should not hear evidence on the law of Israel and pronounce on it. Over a hundred and fifty years ago in *Lindo v. Belisario* (11) SIR WILLIAM SCOTT tried the validity of a Jewish marriage according to Jewish law. (That was, incidentally, a suit for jactitation.) So there is no reason today why the courts of this country should not decide on the validity of a Jewish divorce according to the law of Israel.

In conclusion, I would only say that the petitioner is an Englishwoman resident in this country, intending to make her life here, and she wants to know how she stands in this country. All she asks the English courts to do is to tell her whether she is to be regarded in this country as a single or as a married woman. It is a matter of the utmost importance to her and to others, and I see no reason why she should be forced to go to Israel to have the matter determined. In my opinion, the English courts have jurisdiction to determine her status, and should do so. The appeal should be allowed accordingly.

HODSON, L.J.: This is an appeal from a decision of BARNARD, J., dated Oct. 29, 1952 (given on a summons for leave to proceed with a petition and for directions) whereby he dismissed the summons and the petition. The petition, presented on May 16, 1952, is unusual in form. No relief is asked for against the respondent. The petition recited, inter alia: (i) the marriage, which took place in the State of Israel; (ii) a divorce in England, said to be valid according to the law of Israel, the country of the husband's domicile; (iii) the petitioner's English domicile; and prayed for a declaration that the marriage had been validly dissolved and no longer subsisted. Order 25, r. 5, of the Rules of the Supreme Court, is relied on as applicable by virtue of the terms of r. 80 of the Matrimonial Causes Rules, 1950. It is pointed out that declarations of this kind have recently been made in proceedings for jactitation of marriage, namely, in *Schuck v. Schuck* (1), and *Igra v. Igra* (7). In each of these cases, although relief was asked for in the form of an injunction to restrain the respondent from asserting the marriage, such relief was refused and naked declarations were made. I do not think it can be said that the fact that no relief is sought in the case now under consideration is a valid reason for distinguishing those cases. It might, perhaps, be argued that those cases were wrongly decided and that Ord. 25, r. 5, does not extend the jurisdiction of the court to enable it to act as the petitioner desires. This argument is not, I think, open since the decision of this court in *Guaranty Trust Co. of New York v. Hannay & Co.* (2) which shows that the rule does not enlarge jurisdiction, but has only to do with practice and procedure. Any doubts as to the correctness of the decisions in the two recent cases mentioned which may be based on a reading of the judgment in *Countess De Gasquet James v. Duke of Mecklenburg-Schwerin* (4), are, I think, set at rest when it is appreciated that this decision was given before 1924 when the Matrimonial Causes Rules, r. 97, first made the Rules of the Supreme Court applicable to matrimonial causes. Nothing I have said is intended to encourage applications for what may be called naked declarations where no sensible purpose is served thereby; but in the circumstances of this case, and on the footing that the petitioner is domiciled in England and is genuinely uncertain as to her status, I see no reason why the rule should not be invoked.

The learned judge did not, however, rest only on the ground that Ord. 25, r. 5, was inapplicable. He took the further point that the petition is analogous to a petition for nullity, and that the petitioner is not entitled to invoke the jurisdiction of the court simply on the ground that she is resident in England.

He quoted LORD GREENE, M.R., in *De Reneville v. De Reneville* (8) ([1948] 1 All E.R. 63):

"That a wife who is resident but, *ex hypothesi*, not domiciled here can compel her husband who is both domiciled and resident abroad to come to this country and submit the question of his status to the courts of this country appears to me to be contrary both to principle and to convenience."

This passage deals only with residence and does not cover the case of a wife domiciled in England who seeks a decree of nullity from a husband domiciled elsewhere.

Such a case was *White (otherwise Bennett) v. White* (10), discussed and approved on the relevant point by the Master of the Rolls (*ibid.*, 61) in the *De Reneville* case (8):

"In *White v. White* (10) BUCKNILL, J., used words with which (save as regards the reference to residence which was, in my opinion, unnecessary) I respectfully agree. He said ([1937] 1 All E.R. 713): ' . . . it seems to me just to the petitioner, and also in the public interest, that the petitioner, being domiciled and resident in this country, should have her status as a single or as a married woman judicially established by this court . . . ' This view does, of course, theoretically at least, open up the possibility of conflicting judgments by the courts of the respective domicils, but, if it be not the right view and if the only court with jurisdiction is a court in a country where both are domiciled, the problem of jurisdiction based on domicile in the case of a void marriage where the domicils are different would appear to be insoluble."

In *White's* case (10) the crucial fact that the marriage was bigamous was assumed, so giving the wife an English domicile *ab initio* up to and including the date of the petition, although on a failure to establish the fact the wife would not have been domiciled in this country. Similarly here, on the face of the petition, the crucial fact that the wife has been validly divorced must be assumed so as to give her an English domicile at the material date, namely, the date of the institution of these proceedings. The petitioner, in my opinion, is, therefore, in as good a position as was the petitioner in *White's* case (10) to invoke the jurisdiction of this court notwithstanding the risk of conflicting judgments by the courts of the respective domicils envisaged by the Master of the Rolls in *De Reneville's* case (8).

I should add that the petitioner in *De Reneville's* case (8) failed in her attempt to invoke the jurisdiction of this court against a respondent domiciled abroad because she could not establish an English domicile, but only an English residence. She took the domicile of her husband on the marriage, which was voidable, not void, and the court refused to relate back the decree which she claimed so as to treat her as entitled to an independent domicile at the time of the institution of the proceedings. I do not think that the *De Reneville* case (8) is an authority for refusing jurisdiction to the petitioner in this case, although I agree with BARNARD, J., that petitions for nullity are analogous, and I think that questions of jurisdiction in such cases as this should be decided on the same principles as questions of jurisdiction in nullity cases. It is also to be noticed that in nullity cases the question of jurisdiction in cases where the parties have not the same domicile is left open by the decision of the House of Lords in *Salvesen (or Von Lorang) v. Austrian Property Administrator* (12),

VISCOUNT HALDANE there said ([1927] A.C. 654):

"Whether there cannot be jurisdiction which is not that of the domicile in restricted instances to entertain a suit for nullity is a question we have not before us for determination."

I would allow the appeal.

Appeal allowed.

Solicitor: *G. Parry-Jones* (for the wife).

[*Reported by MISS PHILIPPA PRICE, Barrister-at-Law.*]

Re CONSOLIDATED GOLD FIELDS OF NEW ZEALAND, LTD.

[CHANCERY DIVISION (Roxburgh, J.), March 2, 3, 1953.]

Company—Winding-up—“Debt”—Dividend due to past member—Companies Act, 1948 (c. 38), s. 212 (1) (g).

A “Member.” of a company in the Companies Act, 1948, s. 212 (1) (g), includes a past member, and so a sum due to a past member by way of dividends declared while he was a member is not to be treated as a debt of the company ranking for dividend in competition with the unsecured debts of the company due to ordinary creditors, i.e., to persons otherwise than in their capacity as past or present members of the company.

B Dicta of TURNER, L.J., in *Re Anglesea Colliery Co.* (1866) (1 Ch. App. 559), applied.

Re Aidall, Ltd. ([1933] Ch. 323), not applied.

AS TO SUMS DUE TO MEMBERS AS SUCH, see HALSBURY, 1949 Edn., Vol. 5, p. 724, para. 1169, and p. 765, para. 1247; and FOR CASES, see DIGEST, Vol. 10, pp. 956-958, Nos. 6556-6565.

Cases referred to:

- C**
- (1) *Re Anglesea Colliery Co.*, (1866), 1 Ch. App. 555; 35 L.J.Ch. 809; 15 L.T. 127; 30 J.P. 692; 10 Digest 909, 6215.
 - (2) *Re Aidall, Ltd.*, [1933] Ch. 323; 102 L.J.Ch. 150; 148 L.T. 233; 18 Tax Cas. 617; Digest Supp.
 - (3) *Re New Chile Gold Mining Co.*, (1890), 45 Ch.D. 598; 60 L.J.Ch. 90; 63 L.T. 344; 10 Digest 925, 6342.

D ADJOURNED SUMMONS by the liquidator of the company, in the creditors' voluntary winding-up, to determine whether, having regard to the Companies Act, 1948, s. 212, he should treat a sum of £65, due to a past member of the company by way of unclaimed dividends declared while she was a member, as a debt of the company ranking for dividend in competition with the unsecured debts of the company due to persons otherwise than in their capacity as members or past members of the company.

E *J. A. Wolfe* for the liquidator.

Hesketh for an ordinary creditor.

L. H. L. Cohen for a past member, claiming to be a creditor in respect of unpaid dividends.

F **ROXBURGH, J.:** The liquidator of the company, in the creditors' voluntary winding-up, has taken out a summons asking whether, having regard to the provisions of the Companies Act, 1948, s. 212, he should treat the sum of £65 due to the respondent, Xenia N. Field, by way of unclaimed dividends declared while she was a member of the company as a debt of the company ranking for dividend in competition with the unsecured debts of the company due to persons otherwise than in their capacity as members or past members of the company. In the affidavit in support of the application, the liquidator, after stating the date of the winding-up resolution, namely, Nov. 30, 1951, says:

H “The cash available for payment of the creditors of the company will, so far as I can at present ascertain, amount to approximately £6,000 and is likely to be insufficient to pay in full all creditors of the company including those having claims in respect of unclaimed dividends, though it may possibly be sufficient to pay all the ordinary creditors of the company and to leave some balance available for creditors in respect of unclaimed dividends. The total sum due by the company in respect of unpaid dividends amounts to £852, of which £128 is due to persons no longer members of the company and £724 to present members thereof.”

Having regard to the many revisions which have been made in the Companies Acts and the many decisions which have been given on the construction of the various Companies Acts, it is remarkable that the question which is now before me should still be enveloped in fog, but, of course, it is not often that the amount of unpaid dividends is large in proportion to the sums involved in the liquidation, and that, no doubt, is the reason why the question is in this state of uncertainty.

The Companies Act, 1948, s. 212 (1) provides:

"In the event of a company being wound-up, every present and past member shall be liable to contribute to the assets of the company to an amount sufficient for payment of its debts and liabilities, and the costs, charges and expenses of the winding-up, and for the adjustment of the rights of the contributories among themselves, subject to the provisions of sub-s. (2) of this section and the following qualifications . . . (g) a sum due to any member of a company, in his character of a member, by way of dividends, profits or otherwise shall not be deemed to be a debt of the company, payable to that member in a case of competition between himself and any other creditor not a member of the company, but any such sum may be taken into account for the purpose of the final adjustment of the rights of the contributories among themselves."

That provision has existed without any material variation since the Companies Act, 1862: see s. 38 (7) of that Act. There is no doubt what constitutes membership of a company. Section 26 of the Act of 1948 makes that clear. By s. 26 (1) the subscribers of the memorandum become members of the company on its registration, and by s. 26 (2):

"Every other person who agrees to become a member of a company, and whose name is entered in its register of members, shall be a member of the company."

Therefore, at first blush, I should have said, without hesitation, that the word "member" did not include so-called past members who, in fact, are not members at all, but persons who, having been members, have ceased to be such. But it is never safe to construe an Act of Parliament by paying undue attention to the meaning of words. If s. 26 stood by itself, there could, I think, be no doubt about it, but the matter has a long history, and, curiously enough, one of the most important chapters in the history, which relates to a decision of the Court of Appeal, viz., *Re Anglesea Colliery Co.* (1), seems for many years to have escaped notice. This, I think, to some extent accounts for the uncertainty which exists today.

By s. 213 of the Act of 1948:

"The term 'contributory' means every person liable to contribute to the assets of a company in the event of its being wound-up . . ."

Reading the opening words of that section, I should, again, immediately have said that it does not include people who are not liable to contribute to the assets of the company in the event of its being wound-up. In *Re Aidall, Ltd.* (2) MAUGHAM, J., must have been of that opinion, because he observed ([1933] Ch. 329) that the word "contributories", as used in the similar section of the Companies Act, 1908, viz., s. 124, meant "the holders of partly paid shares." But, in *Re Anglesea Colliery Co.* (1), in 1866, the Court of Appeal decided that s. 74 of the Act of 1862, which was in similar terms to s. 124 of the Act of 1908 and s. 213 of the Act of 1948, did not mean what it appeared to say and that "contributories", within the meaning of s. 74, included the holders of fully paid-up shares. Indeed, it seems to me on close inspection that this apparently forgotten decision of the Court of Appeal covers the point which I have to decide, and that is why I am not reserving my judgment. By the Companies Act, 1862, s. 74:

"The term 'contributory' shall mean every person liable to contribute

to the assets of a company under this Act, in the event of the same being wound-up . . .”

It is plain, therefore, that there is no material difference between that section and s. 213 of the Act of 1948. By s. 38 (7) of the Act of 1862:

A “No sum due to any member of a company, in his character of a member, by way of dividends, profits, or otherwise, shall be deemed to be a debt of the company payable to such member in a case of competition between himself and any other creditor not being a member of the company; but any such sum may be taken into account, for the purposes of the final adjustment of the rights of the contributories amongst themselves.”

B Thus, there is no material difference between s. 38 (7) of the Act of 1862 and s. 212 (1) (g) of the Act of 1948.

In the *Anglesea* case (1), TURNER, L.J., delivering the leading judgment of the Court of Appeal, said (1 Ch. App. 558):

C “The substantial question raised by this appeal is, whether the holders of the paid-up shares in companies to which the Act of 1862 applies, fall within the description of contributories contained in that Act . . . This question depends, as it seems to me, peculiarly upon [s. 74] and [s. 38] of the Act.”

After reading s. 74 his Lordship said (*ibid.*):

D “This section, therefore, in no way defines the persons on whom the liability created by it is to attach; but it refers to a liability under the Act, and leaves it to be collected from other parts of the Act on whom the liability was intended to be fixed. Upon examining the other parts of the Act, there is nothing, that I can find, which at all describes the persons who are to be liable, except what is contained in [s. 38], and it is, therefore, to the description contained in that section that [s. 74] must, as I think, be taken to refer.”

E The opening words of s. 38 of the Act of 1862 are:

F “In the event of a company formed under this Act being wound-up, every present and past member of such company shall be liable to contribute to the assets of the company to an amount sufficient for payment of the debts and liabilities of the company, and the costs, charges, and expenses of the winding-up, and for the payment of such sums as may be required for the adjustment of the rights of the contributories amongst themselves, with the qualifications following; (that is to say,) . . .”

There is no substantial difference, for present purposes, between the opening portion of s. 38 of the Act of 1862 and the opening portion of s. 212 (1) of the Act of 1948. After reading s. 38 TURNER, L.J., said (*ibid.*, 559):

G “Reading this section apart from the qualifications, there can, as it seems to me, be no doubt upon whom the liability is fixed. It is clearly fixed upon the ‘present and past members’ of the company, and the present and past members of the company must, therefore, be contributories within the meaning of [s. 74]. This part of [s. 38] is, in effect, descriptive of the persons to whom [s. 74] refers. The question then must be, what is the effect of the qualification contained in [s. 38 (4)], and, in my opinion, it does not derogate from the previous description. On the contrary, the qualifying clauses assume the members to be liable, and merely provide in what cases, and to what extent, the liability is to be enforced against them. I think, therefore, that, notwithstanding this qualification, all the members must be considered to be contributories. Upon these sections alone, therefore, I can hardly doubt that all members of a company, and there can be no doubt that the holders of paid-up shares are members, ought to be held to fall within the description of contributories . . .”

H

It appears to me, first, that this passage was part of the ratio decidendi of *Re Anglesea Colliery Co.* (1). It is, therefore, binding on me, and it seems to me to show plainly that s. 74 of the Act of 1862—now s. 213 of the Act of 1948—does not mean what, on the face of it, it would appear to mean, but that, on the contrary, all past and present members of the company, without limitation, are contributories within the meaning of s. 74 of the Act of 1862 and s. 213 of the Act of 1948. Therefore, while I have been much troubled by the decision of MAUGHAM, J., in *Re Aidall, Ltd.* (2), which was confirmed by the Court of Appeal, I think I ought to give effect to the long-standing decision of the Court of Appeal in *Re Anglesea Colliery Co.* (1), and not to the ratio decidendi of *Re Aidall, Ltd.* (2). I think it is quite clear that the *Anglesea* case (1) was not cited in *Re Aidall, Ltd.* (2). If it had been, MAUGHAM, J., was, I think, bound by it, unless he was able to distinguish it, but he did not purport to distinguish it, and there is no reason to suppose that he was aware of it. Section 123 to s. 128 of the Act of 1908 correspond to s. 212 to s. 217 of the Act of 1948.

MAUGHAM, J., said ([1933] Ch. 328):

“In the series of sections, ss. 123 to 128 [of the Act of 1908], which are headed with the word ‘Contributories’, I am of opinion that the word ‘contributories’ is used in the narrow sense—namely, the holders of partly paid shares . . .”

I think I am bound to arrive at the conclusion that he said that per incuriam, because, as far as I can see, it is quite irreconcilable with the decision of the Court of Appeal in the *Anglesea* case (1). I feel that I must say, with all respect and humility, that I think that, when the Court of Appeal approved of his reasoning, they also were not aware of the *Anglesea* case (1), which they did not seek to explain or distinguish, and that they must have approved the decision of MAUGHAM, J., per incuriam. I do not think that this is a case in which I ought to adopt the later decision of the Court of Appeal in preference to the earlier decision by reason of the artificial doctrine that what comes last is to be preferred to that which went before. The more probable explanation is that the earlier decision was accidentally overlooked. In the *Anglesea* case (1) TURNER, L.J., said (1 Ch. App. 560):

“Throughout the Act [of 1862] we find members and contributories used interchangeably; I refer particularly to s. 38 (7) . . .”

and certain other sections. Section 38 (7) of the Act of 1862 corresponds to s. 212 (1) (g) of the Act of 1948 which I have to construe, and TURNER, L.J., says that in the former sub-section “members” and “contributories” are used interchangeably. He has already said that “contributories” includes all members past and present, and KNIGHT BRUCE, L.J., was of the same opinion. Therefore, I think that the Court of Appeal, in the *Anglesea* case (1), have answered the question which I am now asked.

I should have reserved judgment but for that decision, but it is the view to which I was tending by a quite independent line of approach. The opening words of s. 212 (1) of the Act of 1948 are stated therein to be subject to “the following qualifications”. Apart from s. 212 (1) (g), which I have read, the qualifications are:

“(a) a past member shall not be liable to contribute if he has ceased to be a member for one year or upwards before the commencement of the winding-up.”

There is not the least doubt that “member” is there used in its true sense.

“(b) a past member shall not be liable to contribute in respect of any debt or liability of the company contracted after he ceased to be a member.”

There, again, “member” is used in its true sense.

"(c) a past member shall not be liable to contribute unless it appears to the court that the existing members are unable to satisfy the contributions required to be made by them in pursuance of this Act."

Why "existing members"? Why not "members"? A past member is not a member at all. He is a person who has ceased to be a member. Here is the genesis of the confusion. The draftsman is clearly thinking of "members" as a category or genus of which there are two species—past members and existing members. The word "existing" would otherwise be otiose and unnecessary. Section 212 (1) (d) shows plainly that that is the process of the draftsman's mind, because the paragraph reads:

"in the case of a company limited by shares, no contribution shall be required from any member exceeding the amount, if any, unpaid on the shares in respect of which he is liable as a present or past member."

There the transition is complete, because the word "member" there must mean present or past member. A past member is not a member, and the use of the word "member" can only be explained on the hypothesis that the draftsman is treating membership as a genus of which there are two species, present and past. Section 212 (1) (e) provides:

"in the case of a company limited by guarantee, no contribution shall, subject to the provisions of sub-s. (3) of this section, be required from any member exceeding the amount undertaken to be contributed by him to the assets of the company in the event of its being wound-up."

Am I to say that "member" there is used in the strict sense in which it is used in para. (a) and para. (b), or in the inaccurate sense in which it is used in para. (c) and para. (d)? I have no doubt that it is used in the inaccurate sense in which it is used in para. (c) and para. (d), because otherwise there seems to me to be a lacuna in regard to the limitation of the liability to contribute which rests on a past member of a company limited by guarantee. Section 212 (1) (f) is:

"nothing in this Act shall invalidate any provision contained in any policy of insurance or other contract whereby the liability of individual members on the policy or contract is restricted . . ."

Considering the word "members" there, is it used in the strict sense or the inaccurate sense? Again, though this one is not by any means so clear, the inaccurate sense is, I think, to be preferred as making a more rational arrangement. Then comes s. 212 (1) (g), which I have read, and which is the vital paragraph.

By s. 212 (2):

"In the winding-up of a limited company, any director or manager, whether past or present, whose liability is, under the provisions of this Act, unlimited, shall, in addition to his liability (if any) to contribute as an ordinary member, be liable to make a further contribution as if he were at the commencement of the winding-up a member of an unlimited company . . ."

Does the expression "ordinary member", which is there used for the first time in the section, include past members or is "member" to be read there in its strict sense? There, again, there is no possibility of justification, as far as I can see, for drawing a distinction between a member and a past member, and I have little doubt that "member" is to be read there in the unusual sense in which it is to be read in para. (c), para. (d), para. (e) and para. (f). Section 212 (3) reads:

"In the winding-up of a company limited by guarantee which has a share capital, every member of the company shall be liable, in addition

to the amount undertaken to be contributed by him to the assets of the company in the event of its being wound-up, to contribute to the extent of any sums unpaid on any shares held by him."

I think that it is more difficult to decide the sense in which "member" is used in that sub-section, and I propose to say nothing. Anything that I might say would be obiter.

Quite apart from authority, I should reach the conclusion that, though the primary meaning of the word "member" is clearly applicable in para. (a) and para. (b) of s. 212 (1), it is clearly inapplicable in para. (c) and para. (d) of the sub-section, and that the unusual meaning is preferred in para. (e) and para. (f) of the sub-section and in s. 212 (2), and ought also to be preferred in para. (g) of s. 212 (1), and, therefore, I should have reached the conclusion by that line of reasoning that "member" in para. (g) includes, in an artificial manner, past members. That seems to me to be what the Court of Appeal decided in the *Anglesea* case (1).

In *Re New Chile Gold Mining Co.* (3), STIRLING, J., who was dealing with a question somewhat similar to that which I have to determine, said (45 Ch.D. 604):

"First of all, then, I have to consider whether the applicant is a member of the company within the meaning of [s. 38 (7) of the Act of 1862]; and I confess that, having repeatedly considered the question whether a past member is to be treated as a member for the purposes of that sub-section, it appears to me to be one of very considerable difficulty. I do not, however, think it is necessary on the present occasion to express a concluded opinion as to the meaning of that sub-section; but, having regard to the last words of it, 'but any such sum may be taken into account for the purposes of the final adjustment of the rights of the contributories amongst themselves', it would seem to mean that the sum which is sought to be proved must be such as in its nature is susceptible of being taken into account for the purpose of the final adjustment of the rights of the contributories amongst themselves; and it is difficult to see how that can be done where the person who claims is not a past member liable to be made a contributory of the company . . ."

What surprises me is that neither in *Re New Chile Gold Mining Co.* (3), nor, presumably, on the previous occasions on which STIRLING, J., had considered the question, was the *Anglesea* case (1) cited, because it seems to be clear that STIRLING, J., was construing s. 74 of the Act of 1862, which is now s. 213 of the Act of 1948, in the way in which one might well construe it but for the decision in *Re Anglesea Colliery Co.* (1). If he had construed it in the manner in which the *Anglesea* case (1) shows that it should be construed, the difficulty which appeared to confront him would have disappeared. It seems to me that the passage which I have read from his judgment in the *Chile* case (3) cannot stand as an obstacle to my decision, in view of what the Court of Appeal said in the *Anglesea* case (1) and the reasoning by which I have endeavoured to supplement the decision of the Court of Appeal in that case.

Order accordingly.

Solicitors: *Birkbeck, Julius, Coburn & Broad* (for all parties).

[Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.]

PRACTICE NOTE.

HEARN v. HEARN AND JARVIS.

A [PROBATE, DIVORCE AND ADMIRALTY DIVISION (Davies, J.), March 6, 1953.]

*Divorce—Practice—Petition—Form of petition—“Previous proceedings”—
Orders made by justices—Need for counsel to see certified copies—Matrimonial Causes Rules, 1950 (S.I., 1950, No. 1940), r. 4 (1) (h).*

B *Justices—Husband and wife—Maintenance and separation orders—Copies—
Duty to supply properly certified copies.*

UNDEFENDED PETITION by the husband for dissolution of marriage on the ground of the wife's adultery.

C Interim and final orders had been made in favour of the wife by a court of summary jurisdiction under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1949, but had later been revoked on the wife's application. The husband pleaded in his petition the original and the revocation orders as “previous proceedings” in accordance with the Matrimonial Causes Rules, 1950, r. 4 (1) (h). At the hearing of the suit, the husband produced a proper copy of the revocation order. DAVIES, J., asked for copies of the interim and final orders, which, on production, proved to be documents signed by the clerk, but not stamped or sealed.

D *Scholfield (G. B. M. Reed with him) for the husband.*

E DAVIES, J., in the course of his judgment said that when clerks to magistrates or justices were asked to supply copies of orders made under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1949, they were under a duty to supply properly authenticated copies, bearing the seal or stamp of the magistrate or justices or otherwise properly certified so as to show clearly their source and authenticity, and that it was improper to supply copies not so authenticated. Counsel should not draft divorce petitions until they had such copies available to them.

Solicitors: *Hargreaves* (for the husband).

[Reported by ANTHONY CRIPPS, Esq., Barrister-at-Law.]

RIDLEY v. RIDLEY.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Barnard, J.), March 4, 1953.]

Husband and Wife—Maintenance—Application to High Court—“Reasonable maintenance”—Deductions from husband’s gross income—Infant children provided for under deed of covenant—Jurisdiction to order maintenance for children while living with wife—Matrimonial Causes Act, 1950 (c. 25), s. 23 (1).

On June 1, 1952, the husband entered into a deed of covenant to provide a monthly sum of £91 13s. 4d. for the maintenance and education of the two infant children of the marriage. On June 5, 1952, he wrote to the wife intimating that he would never return to live with her, and on July 8, 1952, he wrote offering to pay her “£3 a week, tax paid at the standard rate, which is equivalent to some £300 a year”. The husband’s income for 1950 was approximately £1,900, but for 1951 and 1952, it was over £3,000 in each year. In addition to the payments under the deed of covenant, he also paid premiums on certain insurance policies covering his own life and on other policies for the benefit of the infant children. On a summons by the wife under s. 23 (1) of the Matrimonial Causes Act, 1950,

HELD: (i) even assuming in the husband’s favour that his spendable income was only £1,500 a year, his offer to pay £3 a week was not reasonable and he was guilty of wilful neglect to provide reasonable maintenance for the wife within s. 23 (1).

(ii) although, in view of the deed of June 1, 1952, he was not guilty of wilful neglect to provide reasonable maintenance for the infant children of the marriage, nevertheless the court had jurisdiction under s. 23 (1) to order him to make periodical payments to the wife for the maintenance, not only of herself, but also of the infant children while they were living with her.

(iii) in assessing the amount of the order, the gross income should be based on the last year’s income only, and in arriving at the net figure to be ordered it was wrong to deduct either (a) the sums paid by the husband under the deed of covenant or (b) the premiums on the policies.

FOR THE MATRIMONIAL CAUSES ACT, 1950, s. 23, see HALSBURY’S STATUTES, Second Edn., Vol. 29, p. 410.

Case referred to:

(1) *Scott v. Scott*, [1951] 1 All E.R. 216; [1951] P. 245; 2nd Digest Supp.

SUMMONS for maintenance by the wife under s. 23 (1) of the Matrimonial Causes Act, 1950.

On Nov. 7, 1952, the summons was heard by WILLMER, J., who adjourned it for a report by the registrar on the means of the parties. In a report, dated Feb. 4, 1953, the registrar found that the husband’s spendable income was £1,500 a year, and the matter was then restored and came for hearing before BARNARD, J.

John Latey for the wife.

Colin Duncan for the husband.

BARNARD, J.: This is a summons under s. 23 (1) of the Matrimonial Causes Act, 1950, by the wife against her husband. The question is whether or not the husband has been guilty of wilfully neglecting to provide reasonable maintenance for his wife or his infant children.

The parties were married in April, 1940. After the marriage they lived together, finally at 11, Devonshire Terrace, in London, and there are two children of the marriage, both girls, one born in February, 1942, and the other in March, 1947. Both those girls are now at boarding school. In October, 1949, the wife took proceedings against her husband for restitution of conjugal

rights, and the husband put in an answer to the wife's petition in which he alleged just cause for refusing to live with her. That petition, on the application of the wife herself, was dismissed, because the parties became reconciled. Unfortunately, the reconciliation lasted a very short time. In May, 1952, the husband left the matrimonial home for a holiday in Majorca, and on June 5, 1952, on his return from the holiday he wrote to his wife a letter which makes it perfectly clear that he was never going to return to her, that he could not afford to continue to pay the rent of the flat where she was then living, and that he had given notice to terminate the tenancy on July 6. He enclosed £10 to cover her expenses until July 6. The wife was not able to find other accommodation before July 6, and it is only fair to the husband to say that she remained in the flat and he paid the rent up to some time in August. In the letter to which I have referred the husband says that he will consider what he can do, within reason, by way of a regular allowance. In a letter from the husband on July 8, he says:

"I am able to pay you £3 a week, tax paid at the standard rate, which is equivalent to some £300 a year. If you will let me know your address I will forward this to you regularly. You will, of course, claim income tax as you have done formerly."

It was suggested that the wife was wrong in issuing this summons. I cannot see that she did anything wrong. By issuing the summons she did not shut the door on negotiations, but was merely properly protecting her own interests. The matter came in due course before WILLMER, J., who, on Nov. 7, 1952, adjourned it for a report by the registrar on the means of the parties. I now have that report before me. The report is dated Feb. 4, 1953. The husband maintains that, on the figures, one cannot say, bearing in mind the fact that he is paying for the school fees of the two children, that the £3 a week is unreasonable. Counsel for the husband referred me in support of his argument to a passage in the judgment of HODSON, J., in *Scott v. Scott* (1), where the learned judge said ([1951] 1 All E.R. 217):

"In my view, the question what is reasonable maintenance for the wife and children has to be considered with reference to the husband's common law liability to maintain his wife and children, and, no doubt, the word 'reasonable' has to be interpreted against the background of the standard of life which he previously has maintained."

I unhesitatingly agree with these remarks. I have come to the conclusion that, even accepting the registrar's report at its face value, which would give the husband a spendable income of £1,500 per annum (and it is only out of his spendable income that the wife's allowance must come), the husband's offer was not a reasonable one. In those circumstances I have no hesitation here in finding the husband guilty of wilful neglect to provide reasonable maintenance for his wife.

The other proposition that was put before me was that I could not find him guilty of wilfully neglecting to provide reasonable maintenance for the infant children of the marriage, because, on June 1, 1952, he had entered into a deed of covenant with trustees to provide a monthly sum of £91 13s. 4d. for the maintenance and education of the two children. I think that this is purely a theoretical point which is not of any practical value, because s. 23 (1) of the Matrimonial Causes Act, 1950, provides:

"Where a husband has been guilty of wilful neglect to provide reasonable maintenance for his wife or the infant children of the marriage, the court, if it would have jurisdiction to entertain proceedings by the wife for judicial separation, may, on the application of the wife, order the husband to make to her such periodical payments as may be just . . ."

If that section were to be read in a narrow way, limiting what I think is its true meaning, I could always take into account the fact that the wife was going to have the children to stay with her during a portion of the holidays and add that amount to the sum that the husband be ordered to pay his wife, but I feel convinced that I have to regard that section broadly, and it is more convenient that there should be a definite order against the husband to provide periodical payments for the wife and further to pay her certain sums for the maintenance of the two children while they are living with her. An order in that form is also of advantage to the husband, and is an order which I have no doubt the court has jurisdiction to make under the section, although, if I only had to decide whether he had been guilty of neglecting to provide reasonable maintenance for the children, in view of this deed I should obviously answer that in the negative.

The only other matter I have to deal with is the question of the order itself. I have had statements of accounts put in and I have the affidavits and the registrar's report. Neither counsel has gone into the figures thoroughly, and quite properly so, because I have had to decide the issue between husband and wife before any question of amount arises, and I think that it would be more satisfactory if a registrar were to determine exactly what the order should be. The registrar appears to have taken a three years' average. In the first of those three years the husband, who is an ophthalmic surgeon, only earned approximately £1,900, but in 1951 and 1952 his gross income was over £3,000 in each year, and, therefore, I think it would be wrong to take a three years' average. If one comes to the conclusion that it is not right to take a three years' average to arrive at what, in all probability, is the average income of the husband and is going to be his average income for the immediate future, one ought to act on the figure relating to the last year, and I think that the registrar should, in arriving at a figure, base it, in this particular case, on the last year's income only. In arriving at what is the proper figure on which to base the wife's allowance, the registrar has deducted the £1,100 a year which the husband pays under the deed of covenant of June 1, 1952. I have come to the conclusion that that is entirely wrong. The deed merely provides for the maintenance and education of the two children, and it would be wholly wrong and against all the principles of this court, to find what the husband ought to pay in regard to his children first and then deduct that from his income before you begin to arrive at a figure which the wife should have. I do not think it helps the husband as against the wife to have provided for his children by a deed, more particularly when one looks at the deed and sees that it can be terminated at the end of a year, that is, by June, 1953. I notice also that the registrar has allowed deductions for premiums on policies. That, again, is not a proper deduction, unless—and I see no evidence of it here—those policies were, for example, pledged to the bank to secure a loan, but where the policies are free and the husband is paying premiums on them, it is not right he should put forward those premiums as an allowable deduction against his wife.

Order accordingly.

Solicitors: *Boxall & Boxall* (for the wife); *McMillan & Mott* (for the husband).

[Reported by A. T. HOOLAHAN, Esq., Barrister-at-Law.]

BRITISH TRANSPORT COMMISSION v. LONDON COUNTY COUNCIL.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Jenkins and Romer, L.JJ.), March 3, 4, 5, 1953.]

Transport Tribunal—Appeal from order—Jurisdiction of Court of Appeal to entertain—Transport Act, 1947 (c. 49), sched. X, para. 5—Railway and Canal Commission (Abolition) Act, 1949 (c. 11), s. 8 (2).

By the Railway and Canal Traffic Act, 1888, s. 17 (2), an appeal lay to the Court of Appeal from a decision of the Railway and Canal Commission on a question of law. The Railways Act, 1921, s. 20, established the Railway Rates Tribunal, and s. 26 provided that s. 17 of the Act of 1888 “shall apply in respect of appeals from the Rates Tribunal in like manner as it applies to appeals from the Railway and Canal Commission.” By the Transport Act, 1947, s. 72 (1), the Railway Rates Tribunal became known as the Transport Tribunal, and, by sched. X, para. 5, to the Act, s. 26 of the Act of 1921 “shall apply with respect to the jurisdiction conferred on the Transport Tribunal by this Act as [it applies] with respect to the jurisdiction conferred on them by [the Act of 1921].” By the Railway and Canal Commission (Abolition) Act, 1949, s. 8 (2): “The enactments mentioned in the schedule to this Act are hereby repealed . . . and any other enactment in so far as it applies any enactment so repealed shall cease to have effect.” Section 17 of the Act of 1888 was among the enactments mentioned in the schedule. On the question whether an appeal from a decision of the Transport Tribunal now lay to the Court of Appeal,

HELD (per SIR RAYMOND EVERSLED, M.R.): schedule X, para. 5, to the Act of 1947 made “applicable” to the Transport Tribunal, not the provisions of s. 17 of the Act of 1888, but the provisions of s. 26 of the Act of 1921, which were derived from and contained in the Act of 1921 although they took their origin from the provisions of s. 17 of the Act of 1888, and, therefore, sched. X, para. 5, was not an enactment applying s. 17 of the Act of 1888, within the meaning of s. 8 (2) of the Act of 1949, and the right of appeal to the Court of Appeal from a decision of the Transport Tribunal was unaffected by s. 8 (2).

Per JENKINS and ROMER, L.JJ.: on the true construction of s. 8 (2) of the Act of 1949, the words “any other enactment in so far as it applies any enactment so repealed” meant, in relation to s. 17 of the Act of 1888, any other enactment in so far as it gave, by reference to s. 17, any right of appeal from the Railway and Canal Commission to the Court of Appeal; s. 26 of the Act of 1921 applied s. 17 of the Act of 1888, not for the purpose of giving any right of appeal from the Railway and Canal Commission, but for the purpose of giving a right of appeal to the Court of Appeal from an entirely new tribunal; therefore, notwithstanding the use of the word “apply” in s. 26 of the Act of 1921, the section was not an enactment which “applied” s. 17 of the Act of 1888 within the meaning of s. 8 (2) of the Act of 1949, and it did not cease to have effect by reason of s. 8 (2); a fortiori, sched. X, para. 5, to the Act of 1947 was untouched by s. 8 (2) of the Act of 1949, and an appeal lay to the Court of Appeal from a decision of the Transport Tribunal.

British Transport Commission—Charges scheme—New scheme as distinct from alteration of existing scheme—Body of new scheme similar to that of existing scheme, but alteration of schedules by increasing charges—Application for confirmation of new scheme within twelve months of coming into force of existing scheme—Transport Act, 1947 (c. 49), s. 79 (1), proviso (i).

By an order, dated Feb. 27, 1952, the Transport Tribunal confirmed the British Transport Commission (Passenger) Charges Scheme, 1952,

and ordered that it was to come into effect, as far as the London area was concerned, on Mar. 2, 1952. The essence of the scheme was to be found in the charges which it prescribed and which were contained in the schedules thereto, the body of the scheme being mainly administrative machinery. On Jan. 5, 1953, the British Transport Commission made an application to the tribunal to confirm the draft British Transport Commission (Passenger) Charges Scheme, 1953, whereby the scheme of 1952 was expressed to be revoked. The body of the scheme of 1953 was similar to that of the scheme of 1952, but the individual charges in the schedules were, in a large number of cases, increased. It was estimated that, if the proposed scheme were confirmed, the new charges would increase the annual revenue of the commission by over five million pounds. The London County Council contended that under the Transport Act, 1947, s. 79 (1), proviso (i), the Transport Tribunal had no jurisdiction to entertain the application of Jan. 5, 1953, as it was not an application for confirmation of a charges scheme within the meaning of s. 76, s. 77 and s. 78 of the Act of 1947, but was an application for the alteration of a charges scheme (viz., the scheme of 1952), within s. 79 (1) of the Act.

HELD: by s. 76 and s. 77 of the Act of 1947 the commission were required to prepare and submit charges schemes, and under those sections they had an unfettered discretion to prepare and submit schemes from time to time as and when they might find it necessary and expedient to do so in performance of their statutory duty; s. 79 of the Act, which dealt with applications for the alteration of charges schemes, gave to the commission certain advantages if they desired to proceed under that section instead of under s. 76, and, at the same time, imposed certain restrictions, including that in proviso (i) to s. 79 (1), on their right to do so, but it did not in any way limit the powers of the commission under s. 76 and s. 77; the commission's application of Jan. 5, 1953, came within the provisions of s. 76 to s. 78 of the Act, and was not an alteration of a scheme within s. 79; and, therefore, the Transport Tribunal had jurisdiction to entertain the application, notwithstanding that it was made within twelve months of the coming into force of the scheme of 1952.

FOR THE TRANSPORT ACT, 1947, s. 76-s. 79, and sched. X, para. 5, see HALSBURY'S STATUTES, Second Edn., Vol. 19, pp. 1073-1077, and p. 1128.

Case referred to:

- (1) *Cox v. Hakes*, (1890), 15 App. Cas. 506; 54 J.P. 820; *sub nom. Bell-Cox v. Hakes*, 60 L.J.Q.B. 89; 63 L.T. 392; 42 Digest 633, 367.

APPEAL by the London County Council from an order of the Transport Tribunal, dated Feb. 17, 1953, rejecting a preliminary objection by the county council to the hearing by the tribunal of an application by the British Transport Commission for confirmation of a draft charges scheme.

The county council contended that the application was not an application for confirmation of a charges scheme within the meaning of the Transport Act, 1947, s. 76, s. 77 and s. 78, but an application for the alteration of the British Transport Commission (Passenger) Charges Scheme, 1952, and that, therefore, under s. 79 (1), proviso (i), the tribunal could not entertain it, less than twelve months having elapsed since the scheme of 1952 came into force. By an order of the Transport Tribunal, dated Feb. 27, 1952, the scheme of 1952 was to come into force, as to the Parts thereof relating to the London area, on Mar. 2, 1952, and, as to the remainder thereof, on May 1, 1952. The draft scheme of 1953 was expressed to revoke the scheme of 1952.

Before hearing the appeal, the Court of Appeal considered whether, having regard to the Railway and Canal Commission (Abolition) Act, 1949, s. 8 (2), and schedule, they had jurisdiction to entertain the appeal.

Lloyd-Jones, Q.C., and L. MacLaren for the London County Council.
Russell, Q.C., and Fay for the British Transport Commission.

SIR RAYMOND EVERSLED, M.R.: On Jan. 5, 1953, the British Transport Commission made an application to the Transport Tribunal for the approval by that tribunal of what is called the "Draft British Transport Commission (Passenger) Charges Scheme, 1953". The presentation of the application provoked a number of bodies and persons to oppose it. One of those opponents, the London County Council, by a document dated Jan. 30, 1953, gave notice that they wished to raise a preliminary objection to the hearing by the tribunal of the commission's application. The grounds of the objection are stated in the notice as follows:

"This application is not an application for a confirmation of a charges scheme within the meaning of s. 76, s. 77 and s. 78 of the Transport Act, 1947. It is an application for the alteration of the British Transport Commission (Passenger) Charges Scheme, 1952. The application is not one which the Transport Tribunal can entertain by reason of the provisions of s. 79 (1) of the Transport Act, 1947, the application having been made by the applicants less than twelve months after the coming into force of the scheme of 1952."

It was directed by the tribunal that the objection should be first heard as a preliminary question and it was heard on Feb. 16 and 17, 1953. On the latter date the tribunal made an order that:

"... so much of the objections lodged by the London County Council [and certain other objectors who associated themselves with the London County Council] as relates to the jurisdiction of the tribunal to hear this application be rejected."

The London County Council served notice of appeal against that order and asked that the application of the commission be dismissed on the ground stated in the notice of objection of Jan. 30.

It seemed to the court, at first sight, that there was a possible objection to the hearing of the appeal in that there might not be any right to appeal on this matter from the Transport Tribunal to this court. Counsel for the London County Council argued that such a right of appeal lay, and it has been made apparent by counsel for the British Transport Commission that, on this particular point, he desired to support the submission of the county council. We heard argument from counsel for the county council, and, in the circumstances, we also thought it proper to ask counsel for the commission if he desired to add anything to the argument of counsel for the county council. It need hardly be said that, if there is by statute no jurisdiction in this court to hear the appeal, jurisdiction cannot be conferred by the joint request or submission of two interested parties. Though it was obvious that both parties before us desired the substantive appeal to be heard, it seemed to us that it would clearly be wrong for the court to entertain the appeal on its merits unless we were first satisfied that we had jurisdiction to hear it. I must, therefore, deal first with that aspect of the matter. To do so adequately, it is necessary to embark (though briefly) on some historical review so far as it is relevant to the present matter.

The Railway and Canal Traffic Act, 1888, s. 2, provided:

"On the expiration of the provisions of the Regulation of Railways Act, 1873, with respect to the commissioners therein mentioned, there shall be established a new commission, styled the Railway and Canal Commission (in this Act referred to as the commissioners), and consisting of two appointed and three ex officio commissioners . . ."

The Act then went on to vest in the commissioners so appointed a considerable jurisdiction in matters mentioned in the Act of 1888. Section 17 of the Act provided:

- "(1) No appeal shall lie from the commissioners upon a question of fact, or upon any question regarding the locus standi of a complainant.
(2) Save as otherwise provided by this Act, an appeal shall lie from the commissioners to a superior court of appeal."

By s. 55, the definition section, the term "superior court of appeal" means, so far as England is concerned, the English Court of Appeal. By s. 17 (6):

- "Save as provided by this Act, an order or proceeding of the commissioners shall not be questioned or reviewed, and shall not be restrained or removed by prohibition, injunction, certiorari, or otherwise, either at the instance of the Crown or otherwise."

The Railways Act, 1921, s. 20, established, for certain limited purposes (e.g., particularly the approval and confirmation of railway rates), a new tribunal known as the Railway Rates Tribunal. It is, however, vital to bear in mind that the Railway and Canal Commission were not thereby superseded nor were their functions brought to an end. Indeed, they continued to exercise their original jurisdiction over a considerable field. But, as regards railway charges, the powers which previously had been exercised by the Railway and Canal Commission were transferred to the newly created Railway Rates Tribunal. The functions of the tribunal are specified in s. 28 of the Act and for present purposes I need not refer to them further. The vital section is s. 26, which provides:

- "Section 17 of the Railway and Canal Traffic Act, 1888, shall apply in respect of appeals from the Rates Tribunal in like manner as it applies to appeals from the Railway and Canal Commission . . ."

The effect of that section, as I understand it, is not in doubt, and it is this. In respect of matters brought within the jurisdiction of the Railway Rates Tribunal a right of appeal to the Court of Appeal in England was constituted which was in all respects similar to the right of appeal from the Railway and Canal Commission conferred by s. 17 (2) of the Act of 1888.

The third Act which has to be considered (and which is, for present purposes, the vital Act) is the Transport Act, 1947. That is the Act which, in popular language, among other things, nationalised the British railways. Among other of its provisions it adopted for its own purposes the Railway Rates Tribunal, but gave it a new name or title, namely, the Transport Tribunal: see s. 72 (1). It also transferred to the Transport Tribunal part, but by no means the whole, of the remaining jurisdiction hitherto exercised by the Railway and Canal Commission: see s. 75. Section 72 (2) contains certain amendments to the Railways Act, 1921, and s. 72 (3) provides:

- "The provisions of sched. X to this Act shall have effect with respect to the powers and procedure of the Transport Tribunal."

Schedule X is headed "Provisions as to the Transport Tribunal". Paragraph I is:

- "The Transport Tribunal shall, for the purposes of the exercise of any of their functions under this or any other Act, have full jurisdiction to hear and determine all matters whether of law or of fact, and shall, as respects the attendance and examination of witnesses, the production and inspection of documents, the enforcement of their orders, the entry on and inspection of property and other matters necessary or proper for

the due exercise of their said jurisdiction, have in England all such powers, rights and privileges as are vested in the High Court and in Scotland all such powers, rights and privileges as are vested in the Court of Session, and execution may be had in England on any of their orders as if it were an order of the High Court."

Paragraph 5 reads:

A "Subject to the provisions of this Act, s. 22 to s. 26 of the Railways Act, 1921 (which contains provisions with respect to the constitution and procedure of, and appeals from, the Transport Tribunal) shall apply with respect to the jurisdiction conferred on the Transport Tribunal by this Act as they apply with respect to the jurisdiction conferred on them by that Act."

B For present purposes the relevant section of those referred to is s. 26 of the Act of 1921 which made applicable to the old Railway Rates Tribunal, and to matters which were heard by that tribunal, the provisions as regards appeal which formerly had been applicable to the Railway and Canal Commission by s. 17 of the Act of 1888. If, therefore, the matter had rested there, it cannot, I conceive, be in doubt that, after the passing of the Act of 1947, there would have been a right of appeal to the Court of Appeal in England on matters of law, and so forth, from the decisions or orders of the Transport Tribunal.

C It may be convenient to pause at this stage to deal with the following matter. The question which is sought to be brought before this court in the present appeal has been described as a question of the jurisdiction of the Transport Tribunal. The question, therefore, was raised whether, if the Transport Tribunal acted, or purported to act, in excess of its jurisdiction or held that it had jurisdiction when it had not, there would be an appeal from such a conclusion to the Court of Appeal. On that general question it is unnecessary to express any opinion. The problem which has arisen in this case, as formulated by the notice of objection, though it is, in a sense, one of jurisdiction, is not a question of jurisdiction in the sense in which the phrase is used where a tribunal has purported deliberately to go altogether outside the ambit or scope of its powers. The question of substance raised on this preliminary question really is whether the particular application made by the Transport Commission falls within s. 76 or within s. 79 of the Act of 1947. The Transport Tribunal decided that it fell within s. 76, and, as will appear hereafter, that is a matter of the construction of the Act and a question of law. I, therefore, feel no doubt that, if the matter rested with the Transport Act, 1947, alone, the order made on Feb. 17, 1953, would be an order subject to the right of appeal to this court on the part of the party dissatisfied.

F From what I have said it will have been appreciated that the provisions as to appeal from the various commissions and tribunals have been conferred by Acts of Parliament making use of the device, common enough in these days, of what is called referential legislation. It has been said that this method of legislation, however convenient it is in the interests of brevity, sometimes may contain a trap for the unwary. If, in the present instance, the draftsmen and legislators may be said to have dug a pit, they have come ominously near to falling into it themselves. For the first question with which I have to deal is, in brief, whether certain words used by the legislature in the Railway and Canal Commission (Abolition) Act, 1949, have succeeded in destroying all rights of appeal from the Transport Tribunal, formerly the Railway Rates Tribunal, to this court. It is pertinent to read the long title to the Act, which is:

"An Act to abolish the Railway and Canal Commission and make provision for the future exercise and performance of their functions; to amend and repeal certain enactments relating to their functions; and for purposes connected with the matters aforesaid."

I have already said that, though a substantial part of the jurisdiction formerly exercised by the Railway and Canal Commission had by this time been transferred to the Transport Tribunal (and it may be elsewhere), there still remained an appreciable residuum of jurisdiction in the old commission. The long title to the Act of 1949 makes, I think, tolerably plain the fact that Parliament was intending to direct itself exclusively to getting rid of that commission and making provision for the exercise and performance elsewhere of the functions which still remained with them, and in that connection to doing other incidental matters. A perusal of the eight sections of the Act strongly supports that view of the exclusive intention of the legislature. A reference to s. 2 in no way tends towards the view that Parliament was, in any way, proposing to limit any existing rights of appeal. On the contrary, the section made express provision for a substituted right of appeal from the tribunal to whom the functions specified in s. 2 were transferred. However that may be, when s. 8 is reached Parliament proceeded to express itself in these terms:

"(1) This Act may be cited as the Railway and Canal Commission (Abolition) Act, 1949 . . . (2) The enactments mentioned in the schedule to this Act are hereby repealed to the extent specified in column 3 of that schedule and any other enactment in so far as it applies any enactment so repealed shall cease to have effect."

Among the many Acts mentioned in the schedule was the Railway and Canal Traffic Act, 1888, the Act with which I began this historical review. As regards that Act the extent of the repeal, so far as relevant, was expressed thus: "Section 17 . . . except so far as [it extends] to Northern Ireland".

It follows, therefore, that s. 17 of the Act of 1888 is beyond question repealed, subject to the exception which is irrelevant for present purposes. But s. 8 (2) of the Act of 1949 also provided that any enactment "in so far as it applies" s. 17 of the Act of 1888 (to make particular reference to the matter in question) "shall cease to have effect". At first sight it would seem difficult to have thought of more precise and express language wherein to indicate that all statutory provisions which, on the face of them, "applied" s. 17 of the Act of 1888, should, from the date when the Act of 1949 came into force, cease to have any effect. It seemed to me, therefore, on a first view of s. 8 (2) of the Act of 1949, that Parliament had succeeded in destroying the right of appeal which, in the Act of 1947, it had taken some pains to preserve and, so far as necessary, to re-state in reference to the re-named Transport Tribunal. But, after hearing the arguments of counsel, I have come to the conclusion that, viewed in their context and with proper regard to the historical matters to which I have alluded, that is not the true meaning of the words used. There can be no doubt of the propriety of paying regard to these matters of context and history. *Cox v. Hakes* (1) will serve as sufficient authority for that statement. I have already indicated in my historical references that, at the time when the Act of 1949 came to be passed, the Railway and Canal Commission was still in existence. There still belonged to it a certain jurisdiction. The obvious and declared purpose of the Act of 1949 was the limited one of removing altogether from the legal scene this somewhat emasculated commission and all its remaining powers, and making provision for other tribunals to assume the functions which had formerly been vested in the commissioners. There is no hint anywhere in the Act of any intention on the part of Parliament to deal at all with the Transport Tribunal, with any of their functions or jurisdiction, or with the appeal from that tribunal which was regulated by the other Acts, particularly by the Act of 1947. On the contrary, I have already said that s. 2 of the Act seems to me to point clearly in the other direction, showing, as it does, that Parliament was not intending to take away a right of appeal which had previously existed.

The only question, as I understand it, which this court has to decide in this case is whether s. 8 (2) of the Act of 1949 operates on sched. X, para. 5, to the Act of 1947, so as to have the result that that paragraph ceases to have effect. I will read again the relevant terms of para. 5:

“ . . . s. 26 of the Railways Act, 1921 (which contains provisions with respect to . . . appeals from, the Transport Tribunal) shall apply with respect to the jurisdiction conferred on the Transport Tribunal . . . ”

A

Was that enactment an enactment “applying” s. 17 of the Act of 1888? I have come to the conclusion that it was not. It seems to me, in the light of what I have stated, that the phrase “in so far as it applies any enactment so repealed”, in s. 8 (2) of the Act of 1949, must mean “in so far as it makes applicable to some other circumstance or tribunals or functions the provisions of s. 17 of the Act of 1888”.

B

Paragraph 5 of sched. X to the Act of 1947 can only be said, in any event, to have that effect obliquely or at one remove. Paragraph 5 does not “make applicable” to the Transport Tribunal, or to the functions which that tribunal perform, the terms and provisions of s. 17 of the Act of 1888. It says in terms that what it is making applicable with respect to the jurisdiction conferred on the Transport Tribunal are the provisions of s. 26 of the Act of 1921. In other words, it is making applicable as regards the Transport Tribunal the provisions as to appeal which had applied as regards the Railway Rates Tribunal. And those provisions derived their force from and were contained in the Act of 1921, albeit that they took their origin from the earlier provisions of s. 17 of the Act of 1888. It is, no doubt, a somewhat fine distinction, but, having regard to the context and other relevant matters,

C

it seems to me a distinction which it is necessary to make unless a conclusion is to be reached that is plainly in conflict with the purpose and substance of the Act of 1949. Nor do I think that the words of s. 8 (2) of the Act of 1949 are so clear and compelling as to exclude my construction. It may be possible to go further and to say that s. 26 of the Act of 1921 itself cannot strictly be called an enactment “applying” s. 17 of the Act of 1888 to anybody or anything within the meaning of the Act of 1949, that s. 26 was merely conferring on persons who had come within the jurisdiction of the Railway Rates Tribunal a right of appeal analogous to—indeed, in all respects, *mutatis mutandis*, the same as—the right of appeal which an aggrieved person had from the orders of the Railway and Canal Commission in respect of matters which fell within the jurisdiction of that commission. It is, however, not strictly necessary to express a view on that and I prefer not to do so. It is sufficient, for present purposes, to say that, whatever may be the effect of s. 8 (2) of the Act of 1949 on s. 26 of the Act of 1921, it did not, in my judgment, have the effect of making sched. X, para. 5, to the Transport Act, 1947, ineffective and inoperative from the date from which the Act of 1949 came into operation. That conclusion, therefore, disposes of the first question, namely, whether we now have any jurisdiction to hear the present appeal.

D

Having answered that question affirmatively, I must state a little more precisely what is the nature of the issue of substance raised in the appeal. It is a question which depends on the effect of the Transport Act, 1947, s. 76 to s. 80, inclusive. Section 76 is headed “Charges schemes” and it provides:

E

“The [Transport] Commission shall from time to time prepare, and submit to the Transport Tribunal for confirmation, drafts of schemes (hereafter in this Act referred to as ‘charges schemes’) for determining . . . (a) the charges which are to be made by the commission; and (b) where it is necessary or expedient so to do, the other terms and conditions which are to be applicable to the provision of those services and facilities . . . and it shall be the duty of the commission, within two years from the passing of this Act or such longer period as the Minister may allow, to

F

“The [Transport] Commission shall from time to time prepare, and submit to the Transport Tribunal for confirmation, drafts of schemes (hereafter in this Act referred to as ‘charges schemes’) for determining . . . (a) the charges which are to be made by the commission; and (b) where it is necessary or expedient so to do, the other terms and conditions which are to be applicable to the provision of those services and facilities . . . and it shall be the duty of the commission, within two years from the passing of this Act or such longer period as the Minister may allow, to

G

“The [Transport] Commission shall from time to time prepare, and submit to the Transport Tribunal for confirmation, drafts of schemes (hereafter in this Act referred to as ‘charges schemes’) for determining . . . (a) the charges which are to be made by the commission; and (b) where it is necessary or expedient so to do, the other terms and conditions which are to be applicable to the provision of those services and facilities . . . and it shall be the duty of the commission, within two years from the passing of this Act or such longer period as the Minister may allow, to

H

“The [Transport] Commission shall from time to time prepare, and submit to the Transport Tribunal for confirmation, drafts of schemes (hereafter in this Act referred to as ‘charges schemes’) for determining . . . (a) the charges which are to be made by the commission; and (b) where it is necessary or expedient so to do, the other terms and conditions which are to be applicable to the provision of those services and facilities . . . and it shall be the duty of the commission, within two years from the passing of this Act or such longer period as the Minister may allow, to

prepare and submit the draft of a scheme or, as the case may be, drafts of a series of schemes . . .”

dealing (inter alia) with the services and facilities provided by the commission, under s. 2 (1) (a) to s. 2 (1) (c) of the Act, in regard to railway transport. Section 77 states what are to be the contents of the charges scheme:

“(1) A charges scheme may, as respects any of the services and facilities to which it relates, adopt such system for the determination of the charges, or, as the case may be, the charges and other terms and conditions, which are to be applicable as may appear desirable, and in particular and without prejudice to the generality of the foregoing words, any such scheme may . . . (a) provide . . . for fixed charges, maximum charges, or standard charges . . . (b) provide in any such case for minimum charges; (c) provide for alternative sets of terms and conditions . . . (2) A charges scheme may revoke or amend any previous charges scheme.”

Section 78 deals with the functions of the Transport Tribunal when a scheme is submitted. It also specifies various representative bodies which may object to the scheme: see s. 78 (2) and (3). By s. 78 (6):

“It shall be the duty of the commission to give to the tribunal all such assistance as is necessary or as the tribunal may require for the purpose of deciding whether or not to confirm the scheme with or without alterations.”

Section 79 (1) reads:

“An application for the alteration of a charges scheme may be made to the Transport Tribunal either—(a) by the commission; or . . .”

by other persons or bodies of persons, specified in paras. (b), (c) and (d) of the sub-section. I pause to note that, whereas the commission, and the commission only, may put forward a draft charges scheme, an application for alteration of a charges scheme may be made not only by the commission but by those other persons and bodies who may be affected by it. There is a proviso to s. 79 (1), and it is the first limb of the proviso that has given rise to the present question:

“Provided that the tribunal shall not entertain any application under this section for the alteration of any scheme if—(i) less than twelve months have elapsed since the coming into force of the scheme; or (ii) in their opinion the application relates to a matter which has been the subject of consideration by the tribunal within the twelve months immediately preceding the making of the application; or (iii) in their opinion the alteration is one which owing to its magnitude ought not to be made except by an amending scheme or as the result of such a review as is provided for by the next succeeding section.”

The rest of s. 79 deals with procedure on an application for the alteration of a scheme, and the important point to have in mind is that objections to an application for alteration are limited to the subject-matter of the alteration and do not entitle the objector to make his objections range over the whole subject-matter covered by the scheme. Finally, s. 80 deals with a third and independent matter. By s. 80 (1):

“The Minister may at any time require the Transport Tribunal to review the operation of any charges scheme.”

It is to be noted that this may be done although no application for a new scheme has been made by the commission and although no application for alteration has been made by the commission or by any other qualified person.

The question is whether the application which the commission has now made to the Transport Tribunal is properly within the ambit of s. 76, s. 77, and s. 78 as being a submission of a draft charges scheme. The London County Council and those who support them submit that, although at first sight it may look like a scheme, on closer analysis it is, in truth, nothing but an application to alter in certain respects the already existing scheme, each alteration being individually trifling. In other words, they say that it is, according to the substance of the matter, not a scheme but merely an alteration of an existing scheme, and, therefore, as it is put forward within twelve months of the coming into force of the existing scheme, the tribunal has no jurisdiction to entertain the application. The so-called scheme which the commission have presented is a document consisting of many pages. There are forty-one paragraphs followed by ten schedules, of which sched. II to sched. X contain scales of charges applicable to a number of different sets of circumstances. If comparison is made between that document and the order dated Feb. 27, 1952, confirming the British Transport Commission (Passenger) Charges Scheme, 1952, it is at once apparent that the two documents follow each other very closely in what may be called their design or method of approach to the problems with which they deal. It is, indeed, plain that no original or inventive ideas as regards the principles on which charges should be levied have found expression in the new draft scheme of 1953. Counsel for the commission conceded that it followed the previous scheme. The differences lie (and for practical purposes may be taken to lie exclusively) in the scaling up of the individual charges in the schedules, or in an appreciable number of them. We have been informed that, if the altered schedules operate according to expectation, they will increase the annual revenue of the Transport Commission by the not negligible sum of between five and six million pounds per annum. Thus can so many halfpennies achieve so great a global result.

The question then is: Since it may fairly be said that the new "scheme" is the old scheme with the individual charges altered so as to produce this extra revenue, does it, therefore, become disqualified from the right of presentation under s. 76 to s. 78? The argument of the London County Council may be briefly stated thus. They say that one must look at the substance of the matter, and, if one does so, one finds that there is nothing but "alteration" of the old scheme. A "scheme" within the meaning of the Act (they say) necessarily involves the idea of pattern and design and, so long as the pattern and design in the new "scheme" remain the same as they were before, it is impossible to say that the new scheme is anything more than a mere alteration of the old scheme, the old scheme being altered to look like a new scheme. They say that, if what is proposed is mere alteration of an existing scheme, then the proposal falls within the express language of s. 79 and cannot, therefore, be entertained by the tribunal until the period of twelve months from the coming into operation of the old scheme has elapsed. If the contention of the county council were correct, it would, necessarily, mean that the subject-matter of s. 76 to s. 78, on the one hand, and the subject-matter of s. 79, on the other, are mutually exclusive; that is to say, that, if what is sought is mere alteration of an existing charges scheme, the thing which is to effect the alteration cannot itself be a charges scheme within s. 76 to s. 78. The tribunal decided that question adversely to the London County Council and, in my judgment, rightly so decided. There is nothing in s. 76 to s. 80 which, in terms, makes s. 76 to s. 79 mutually exclusive or, so far as I can see, which indicates any such intention. Indeed, proviso (iii) to s. 79 (1) makes it, in my judgment, quite plain that there is no such exclusive character in what is called, in s. 79, an "alteration". [HIS LORDSHIP read the proviso, and continued:] The words of proviso (iii) clearly show that an amending scheme, and, therefore, a scheme, may be constituted by the alteration of a pre-existing scheme.

Looking at it, as it were, from the other end, again I can find nothing in s. 76, s. 77, and s. 78 which requires that, when once a scheme has been brought into operation, a second scheme is to have any particular character, such as that it must contain some new matter of principle, some new idea, some new design or pattern. It has never to be forgotten that, whereas an application for alteration of an existing scheme may be made either by the commission or by one of a number of other bodies or persons, to the commission alone belongs the right to prefer a scheme. I can, therefore, see good reason why there should be a time limit imposed on the right (which is possessed by many persons or bodies with particular interests) to apply for alterations in some detail in an existing scheme, whereas the commission (whose functions and duties include that of trying to make the undertaking pay its way) should be entitled at such time or times as they think fit to prepare and submit such schemes as they think desirable.

The contention of counsel for the commission was to this effect. The London County Council themselves say that the document of 1952 is a scheme, and, therefore, it follows that the document of 1953, which is very like that of 1952, is also a scheme. That, says counsel, is the relevant, and a sufficient, test. If that argument is carried to its logical conclusion, it would, of course, follow that the commission could, if they desired, prefer a new draft scheme which only differed from an existing scheme in that there was some trifling alteration in one figure in one part of one of the schedules. If they took that course, they would, of course, invite all who were competent to do so to raise objections to any part of the scheme and not only to that figure which it was proposed to alter. In other words, the commission would throw again, as it were, to the wolves the whole contents of the scheme. It may well be said, therefore, that it would not be a very likely thing for the commission to do, but it may be necessary and proper to test the question by such a case as that. I do not find it necessary to express any view as to what the result would be if the commission took such a course as that which I have suggested. I certainly do not wish now to suggest that, if the commission were in any sense abusing the process of the tribunal, the tribunal would not have power to deal summarily with any application which might have that effect, for I am quite satisfied that this case, at any rate, cannot possibly be described as of that character. It is true that, in a document to which counsel for the London County Council referred us, the commission, by emphasising the smallness of the changes which they proposed, were gilding the philosophic pill for those who have to swallow it. But the alterations in the charges which they proposed to make cannot by any stretch of imagination, I should have thought, be called mere trivialities when their effect is to produce an increase of five or six million pounds per annum in the revenue of the commission. If the subject-matter to be dealt with is the charges to be made for the facilities, the obvious method of making a new scheme is to alter the figures in the various schedules in which the charges are set out. The art and skill of the scheme and its fairness will be found and judged in the way in which the various small charges are related together so as to form part of a coherent and comprehensive whole. Whatever, therefore, might be the fate of an application for a new draft scheme, the substance of which was identical with the pre-existing scheme save for one relatively trivial alteration, I think that there is ample justification for the view that this application falls fairly and squarely within the provisions of s. 76 to s. 78 which the Transport Commission have sought to invoke. This is plainly not the occasion to say more about the scheme itself. The numerous objectors who are likely now to raise their voices in opposition will, no doubt, deal with the provisions of the scheme on their merits. For the reasons which I have stated, I think that the tribunal were rightly of opinion that the application was not one which fell within s. 79 and that it was not one, therefore,

which they were bound to reject. In my judgment, the appeal fails and should be dismissed.

JENKINS, L.J.: I agree. The question whether any appeal now lies to this court from a decision of the Transport Tribunal, having regard to the provisions of the Railway and Canal Commission (Abolition) Act, 1949, turns on the true construction in its context of s. 8 (2) of that Act. [His LORDSHIP read s. 8 (2), and continued:] The enactments repealed, set out in the schedule, include s. 17 of the Railway and Canal Traffic Act, 1888. The question is whether s. 26 of the Railways Act, 1921, "applies" s. 17 of the Act of 1888, within the meaning of s. 8 (2) of the Act of 1949, and, if so, whether the Transport Act, 1947, sched. X, para. 5, referring, as it does, to s. 26, amongst other sections, of the Railways Act, 1921, itself "applies"—though at one remove, so to speak—s. 17 of the Act of 1888, in any relevant sense. The repealed enactment here in question, namely, s. 17 of the Railway and Canal Traffic Act, 1888, is an enactment providing for an appeal from the Railway and Canal Commission to the Court of Appeal, subject to certain limitations and restrictions set out in that section. What, in the context afforded by the Act of 1949 as a whole, does s. 8 (2) of that Act mean by the words "in so far as it applies any enactment"? In my view, those words, considered in relation to the repealed enactment here in question, mean, in effect, "any other enactment in so far as it gives by reference to s. 17 of the Act of 1888 any right of appeal from the Railway and Canal Commission to the Court of Appeal". That, in my judgment, is what is meant by the words used by s. 8 (2) when considered in their context and related to the relevant repealed enactment. It should be noted that the phrase is "in so far as it applies any enactment so repealed", "applies" being used simpliciter without any explanation of the meaning to be attached to it beyond what is afforded by the context in which it appears.

If I am right in the construction which I have placed on s. 8 (2), it follows that s. 26 of the Railways Act, 1921, has not ceased to have effect under that sub-section, because it has not, within the meaning of that sub-section, applied s. 17 of the Act of 1888. [His LORDSHIP read s. 26 of the Act of 1921, and continued:] At first sight, a difficulty is raised by the circumstance that s. 26 makes use of the very word "apply" which is used in s. 8 (2) of the Act of 1949. But, although that might make it appear, on a first and uncritical reading of s. 26, that that section must cease to have effect by virtue of s. 8 (2) of the Act of 1949, that impression is, to my mind, dispelled by a further consideration of the language used. It is true that s. 26 says that s. 17 of the Act of 1888 "shall apply", but it goes on to qualify those words in a vital respect by adding the words

" . . . in respect of appeals from the Rates Tribunal in like manner as it applies to appeals from the Railway and Canal Commission."

Thus, although, in a sense, it is applying s. 17 of the Act of 1888, and expressly says that it is applying s. 17, it is applying that section by no means in its existing form or for its existing purpose, but with an essential modification, in that it applies s. 17, not for the purpose of giving a right of appeal from the Railway and Canal Commission to the Court of Appeal on any matter, but for the purpose of giving a right of appeal to the Court of Appeal from a wholly different tribunal which had never existed before, namely, the Railway Rates Tribunal. In other words, I think that the real meaning and effect of s. 26 of the Act of 1921 is that it is creating a new right of appeal, which never existed before, from a newly constituted tribunal, and, for convenience of drafting, is expressing the terms of that right of appeal by reference to the provisions of s. 17 of the Railway and Canal Traffic Act, 1888. Accordingly, notwithstanding the use of the word "apply" in s. 26, I think that s. 26 is not an enactment which "applies" s. 17 of the Act of 1888 within the meaning

of s. 8 (2) of the Act of 1949. It is an enactment which creates a wholly new right of appeal to the Court of Appeal, and does so by borrowing (if I may use that expression) and adapting to that new purpose the language of s. 17 of the Act of 1888. If I am right in the view which I have expressed as to the meaning and effect of s. 8 (2) of the Act of 1949 and s. 26 of the Railways Act, 1921, a fortiori it follows that sched. X, para. 5, to the Transport Act, 1947, is untouched by the provisions of s. 8 (2) of the Act of 1949, for it can be only said, in any sense, to have applied s. 17 of the Act of 1888 by reason of the reference it contains to s. 26 of the Railways Act, 1921. As, in the view which I take, s. 26 has not ceased to have effect by virtue of the provisions of s. 8 (2) of the Act of 1949, the provisions of sched. X, para. 5, to the Act of 1947 are clearly unaffected. Therefore, although I confess that the question is one on which I have felt considerable difficulty, I have come to the conclusion, with SIR RAYMOND EVERSHED, M.R., that we should hold that there is here a right of appeal to this court.

As regards the substance of the appeal itself, I have very little to add to what SIR RAYMOND EVERSHED, M.R., has said. Looking at s. 76 and s. 77 of the Act of 1947, to my mind it is abundantly plain that, so far as those two sections are concerned, the Act empowers, and, indeed, enjoins, the Transport Commission to prepare and submit schemes, and, further, invests them with an unfettered discretion to prepare and submit schemes from time to time as and when they may find it necessary or expedient to do so in performance of their statutory duty. There is no doubt that, so far as those sections are concerned, the Transport Commission would be perfectly entitled to submit a series of schemes dealing with the same subject-matter, even though each scheme might differ from its predecessor only in some comparatively minor respect. Section 77 (2) expressly provides: "A charges scheme may revoke or amend any previous charges scheme". Accordingly, in my view, the appeal must fail unless it can be said that the provisions of s. 79 of the Act, which deal with applications for the alteration of charges schemes, should be construed as limiting and restricting in some way the powers of the Transport Commission under the preceding sections. What s. 79 does is to give, subject to certain restrictions, a right to certain persons to apply to the Transport Tribunal for the alteration of a charges scheme. The persons who can make such an application include the commission and, in addition, various other persons or bodies of persons. If that procedure is followed, regard must be had to the proviso to s. 79 (1). [HIS LORDSHIP read the proviso and continued:] It seems to me that the effect of s. 79 so far as the Transport Commission is concerned is this. The commission may, if so minded, apply for an alteration of a scheme under that section. If the commission chooses to take that course, which may have certain advantages by way of restricting the scope of the ensuing inquiry, then their application will be subject to the restrictions stated in the proviso to s. 79 (1), and, in particular, must comply with proviso (i) to the effect that the application cannot be entertained if less than twelve months have elapsed since the coming into force of the scheme. But I am at a loss to understand why it should be held that, because the commission has the option to proceed in that way, they are obliged to proceed in that way instead of adopting the alternative course of proceeding by way of application for confirmation of a new charges scheme. I cannot find anything in the Act which would justify the restriction of the commission's powers under s. 76 and s. 77 by reference to the provisions of s. 79. I agree with SIR RAYMOND EVERSHED, M.R., that this appeal should be dismissed.

ROMER, L.J.: I also agree. The question whether the right to appeal to this court from a decision of the Transport Tribunal still exists, notwithstanding the Act of 1949, appears to me to be a short one of the construction of s. 8 (2) of that Act, to be resolved in the light of all relevant circumstances

and the whole of the Act itself. It might be a matter for surprise that a right of appeal which was expressly conferred by the Act of 1947 should be taken away, and taken away, as it were, by a side-wind, by an Act two years later, which was directed to an essentially different subject-matter. But, if that is in truth the result of the Act of 1949, the mere fact that the result is a surprising one must be regarded as irrelevant. When one considers the Act of 1949 one sees that its sole object, as one ascertains from its long title and from its terms, was to abolish the Railway and Canal Commission, to deal with the consequences which might result from that abolition, and to clear up any residual remains of legislation which affected that moribund body. Also one is entitled to note that neither the British Transport Commission nor the Transport Tribunal are referred to from first to last in that Act. [His LORDSHIP read s. 8 (2) of the Act, and continued:] In my judgment, on the true construction of that sub-section, only enactments cease to have effect which apply a repealed enactment to the Railway and Canal Commission itself. The Act of 1921, by s. 26, applied s. 17 of the Act of 1888, but it applied it to the Railway Rates Tribunal. Therefore, in my judgment, s. 26 of the Act of 1921 did not cease to have effect by reason of s. 8 (2) of the Act of 1949. Similarly, sched. X, para. 5, to the Act of 1947 applied s. 26 of the Act of 1921, and, therefore, referentially applied also, it may be, s. 17 of the Act of 1888. It did not, however, apply it to the Railway and Canal Commission, but applied it to the Transport Tribunal. I think that on ordinary canons of construction, without having to resort to the special canons of construction in MAXWELL ON INTERPRETATION OF STATUTES, 9th ed., pp. 25, 63, 236, to which we were referred, when we find here that the legislature has expressed itself elliptically, as I think it has, because it uses the word "apply" and provides expressly the subject-matter of the word, which is repealed enactments, but does not provide the object of the word, then that is a hiatus which the court is entitled to fill and, in doing that, to have regard to the purpose of the Act as a whole, the history of the matter and the probabilities. In the light of those considerations, I have come to the conclusion that the word "applies", in s. 8 (2), has as its object the Railway and Canal Commission, which is the sole subject-matter of the Act of 1949, and that it has no other object. Therefore, I agree that this court had power to entertain this appeal and that appeals from the Transport Tribunal are still preserved.

On the main point I have only a word to say. It appears to me that a charges scheme for the purposes of the Act of 1947 is primarily and in reality a scheme which prescribes charges. The schemes are to prescribe charges on a sufficient scale to achieve an object, with regard to which the legislature was very solicitous, namely, sufficient charges to enable the commission

" . . . to secure that their revenue is not less than sufficient for making provision for the meeting of charges properly chargeable to revenue taking one year with another . . . "

I take that language from s. 85 of the Act of 1947, which is an echo of s. 3 (4). The essence of the scheme of 1952 is to be found in the charges which it prescribed. Those charges, primarily, are to be found in the schedules to the scheme, although there are references also in the body to the same subject. The attack, as I understand it, on the present proposal is that, although it alters the schedules, it does not alter the structure or the body of the presently existing scheme and, therefore, must be regarded merely as an alteration and not as a new scheme in itself. As I say, I think the essence of the 1952 scheme was the prescribing of charges. The body of the scheme itself operates almost entirely through the medium of the schedules and, in so far as it does not do that, it is mainly administrative machinery. Therefore, where one finds, as one does find, under this new proposed scheme, that the essence of the existing one, namely, the charges, is being completely altered, it seems to me difficult,

if not impossible, to say that the new scheme is merely an alteration and falls short of being a new scheme. It is, in effect, altering the structure of the existing scheme in the most material possible respect, namely, in the revision and alteration of the entire scale of charges. I, accordingly, think that it is difficult to take any view other than that which my brethren have already expressed, namely, that this is a new scheme properly brought up and introduced by the commission under s. 76 and not merely an alteration of an existing scheme. It is further to be observed, as was pointed out in argument, that there is no provision in the Act making alterations and new schemes mutually exclusive. Indeed, s. 79 (1), proviso (iii), of the Act envisages the conversion of an "alteration", if it is of sufficient magnitude, into a new "scheme". That tends to show what is apparent, I think, already from the Act, that there is no element of mutual exclusion as between those two conceptions. Therefore, I think that this scheme is, in fact, what it purports to be, a new scheme, and is proper subject-matter for consideration by the tribunal. I, accordingly, agree that this appeal fails.

Appeal dismissed.

Solicitors: *J. G. Barr* (for the London County Council); *M. H. B. Gilmour* (for the British Transport Commission).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

BECK v. SCHOLZ.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Jenkins and Romer, L.JJ.), March 6, 1953.]

Rent Restriction—Possession—Personal occupation—Occupation as "home"—House in country and flat in London—Occupation for sleeping five or six times a year.

The landlord claimed possession of a flat in London which was within the ambit of the Rent Restrictions Acts on the ground that the tenant was not in personal occupation of the premises. The tenant and her husband had a home in Luton where the husband carried on his business. The tenant kept her furniture in the flat and her licensees lived there as caretakers. The tenant and her husband slept occasionally in the flat, the tenant on four or five occasions during the year preceding the summons and her husband some six times in that period.

HELD: the question posed, and to be answered by ordinary common-sense standards, was whether the premises were in the personal occupation of the tenant as her home, or, if the tenant had more than one home, as one of her homes; occupation merely as a convenience for occasional visits would not be occupation as a home so as to entitle the tenant to the protection of the Rent Acts.

Langford Property Co., Ltd. v. Athanassoglou ([1948] 2 All E.R. 722), distinguished.

AS TO POSITION OF STATUTORY TENANT, see HALSBURY, Hailsham Edn., Vol. 20, p. 334, paras. 400, 401; and FOR CASES, see DIGEST, Replacement Vol. 31, pp. 658-661, Nos. 7600-7626.

Cases referred to:

- (1) *Langford Property Co., Ltd. v. Athanassoglou*, [1948] 2 All E.R. 722; *sub nom. Langford Property Co., Ltd. v. Tureman*, [1949] 1 K.B. 29; [1949] L.J.R. 461; 31 Digest, Replacement, 660, 7620.
- (2) *Skinner v. Geary*, [1931] 2 K.B. 546; 100 L.J.K.B. 718; 145 L.T. 675; 95 J.P. 194; 31 Digest, Replacement, 659, 7612.
- (3) *Hallwood Estates, Ltd. v. Flack*, (1950), 66 (pt. 2) T.L.R. 368; 31 Digest, Replacement, 661, 7622.

(4) *Menzies v. MacKay*, 1938 S.C. 74; 31 Digest, Replacement, 646, 2528.

(5) *Wigley v. Leigh*, [1950] 1 All E.R. 73; [1950] 2 K.B. 305; 31 Digest, Replacement, 661, 7623.

APPEAL by the landlord from a decision of His Honour JUDGE BENSLEY WELLS at Marylebone County Court dated Dec. 16, 1952, dismissing a summons against the tenant, a married woman, for possession of a flat within the Rent Restrictions Acts.

H. H. Harris for the landlord.

D. S. Hunter (Hawser with him) for the tenant.

SIR RAYMOND EVERSHED, M.R.: This is an appeal from a judgment of His Honour JUDGE BENSLEY WELLS whereby he refused to make an order for possession on the application of the landlord against the tenant of a flat, No. 11 Canfield Gardens, Hampstead, London, which comes within the scope of the Rent Restrictions Acts. The case is another illustration of one of the more difficult problems which have emerged from the rent restriction legislation, namely, the problem of the so-called "two-home man". The classic instance of that type of case is provided by the decision of this court in *Langford Property Co., Ltd. v. Athanassoglou* (1). In that case the tenant had a home at Great Missenden in Buckinghamshire, but he had to work during the week in London, and it was proved that during the working week he had "habitually" (the word used by TUCKER, L.J.) slept at a flat in London. In that respect the tenant ordered his life in the same way as do many other people who have a house in the country and, as they carry on their business or profession in London, also have some abode in London. In such cases it can be fairly and truthfully said that both the country house and the London abode is the man's "home".

In the present case, the facts, so far as they have been elucidated by the learned judge, seem to me far less in favour of a "two-homes" result than were the facts in the *Langford* case (1). It is apparent from the evidence of the tenant not only that her husband carries on his business at Luton in Bedfordshire, but that they both, not long ago, bought a house at Luton which is their home. It also appears that the flat at No. 11 Canfield Gardens has been kept on in the sense that the tenant's furniture is still there and two persons live there as her licensees. They are said to be caretakers. They keep the flat in good condition, but they pay nothing for the privilege of using it. Then there is evidence, of not too clear a character, of actual occupation by the tenant or her husband. According to the tenant's evidence, during the year immediately preceding the issue of the summons she had slept in the flat, perhaps, four or five times, but it also appeared that she had suffered from arthritis to a serious extent and had been under treatment both abroad and in England. It may be that as the consequence of her illness the tenor of her life had been disturbed—whether and to what extent does not appear. As regards the tenant's husband, he said that he had to come to London on business three or four days a week, but it is plain that, unlike the tenant in the *Langford* case (1), those visits have not meant that he had to stay in London. In answer to a question the husband gave as the figure of actual occupation by him during the twelve months before the issue of the summons "two to ten" times. Taking the mean, that is six times or once every two months.

On those facts the judge concluded in these terms:

"The evidence left me in no doubt that, though the defendant and her husband made little use of the flat during the past twelve months, they were anxious to retain it as a pied-à-terre."

Counsel for the landlord has justly pointed out that the phrase "pied-à-terre" is in itself ambiguous. It is sometimes used to mean simply a convenient resort.

In another context a man may refer to his home as a pied-à-terre, particularly if it is of small dimensions. But, whatever it means in this context or in other contexts, it appears to me that the learned judge took the view that the decision in the *Langford* case (1) compelled him to hold as a matter of law that, provided there was an intention to retain the premises for any purpose, including that of mere convenient occupation on occasions, and provided that that intention was evidenced by a corpus possessionis such as the instalment of a licensee or caretaker and the retention of personal furniture, he was bound to hold in favour of the tenant. I feel a certain sympathy with the judge, for in the *Langford* case (1) this court came to the conclusion that the same judge had been in error in deciding against the tenant, and he is, perhaps, reluctant to appear to do anything which might seem to be a departure from the *Langford* decision (1). Nevertheless, I cannot see that it is in accordance with the main principle and purpose of the rent restriction legislation that a man may have statutory protection for premises to which he may occasionally find it convenient to resort and in which he may keep his furniture and install a caretaker when in no true sense of the term are those premises his home, e.g., where they are merely used as a matter of convenience on occasional visits. After all, the purpose of the Acts, as SCRUTTON, L.J., forcibly pointed out in *Skinner v. Geary* (2), is to protect occupying tenants against the hardship occasioned by the shortage of houses. In *Hallwood Estates, Ltd. v. Flack* (3) I ventured to suggest (66 (pt. 2) T.L.R. 369) that

“the case of the ‘two home’ man . . . should be regarded with some reserve.”

That passage is cited in MEGARRY ON THE RENT ACTS, 6th ed., p. 153, where, in my judgment, he correctly summarises this topic.

The question which the judge had to answer may, I think, properly be called a jury question to be determined by applying ordinary common sense. The word “home” itself is not easy of exact definition, but the question posed, and to be answered by ordinary common-sense standards, is whether the particular premises are in the personal occupation of the tenant as his or her home, or, if the tenant has more than one home, as one of his or her homes. Occupation merely as a convenience for such occasional visits as I have suggested would not, I venture to think, according to the common sense of the matter, be occupation as a home. Counsel for the landlord has drawn our attention to the analogous cases where a man who is, perhaps, shortly about to retire seeks the protection of the Act for a place which he has been maintaining and to which he intends to go when his retirement takes effect. Those cases are developments of the classic example given, again by SCRUTTON, L.J., of the sailor who has to go on long voyages abroad but who retains his home in England none the less: see *Skinner v. Geary* (2) ([1931] 2 K.B. 562). In those cases, it is, no doubt, true to say that the test is an animus possidendi plus a corpus possessionis, but, as JENKINS, L.J., observed during the argument, the mere use of the phrase animus possidendi requires the further explanation, animus possidendi as what?—as a convenience, as a resort, or as a home?

In the present case the learned county court judge quoted from the leading judgment of TUCKER, L.J. ([1948] 2 All E.R. 724) in *Langford Property Co., Ltd. v. Athanassoglou* (1):

“In my view, there was no evidence on which the learned judge could come to the conclusion at which he arrived, namely, that the defendant, Athanassoglou, was not in personal occupation of this flat. The facts found by the county court judge were that he habitually used it as a place in which to sleep when on business in London. His bona fides and truthfulness are not attacked. The fact that he has a house at Great Missenden

which is also his home does not in any way prevent other premises which he may have occasion to use from also being his home."

Then TUCKER, L.J., refers to *Skinner v. Geary* (2) and continues (ibid.):

A "It [that is the London flat] contained his furniture, and he slept there whenever he required to do so for the purpose of his business, which was on an average twice a week, and his friends were residing there with his permission. Although I appreciate that there may be borderline cases, I think it is quite clear that the present case falls on the side of the dividing line which makes it amount to personal occupation by Mr. Athanassoglou."

B Having cited that passage the learned judge concluded (though obviously with regret): "In face of that I do not think I should be doing my duty if I decided in the plaintiff's favour in this case." I think (in view of the earlier finding which I have already read that this flat was but a pied-à-terre) that the learned judge took the view that the *Langford* case (1) was conclusive in favour of a tenant where the tenant's occupation was merely that of a place of convenient resort and where it could not fairly be said, as a common-sense matter, that the premises in question were the home of the tenant and were in his personal occupation as such. I do not think the *Langford* case (1) has that effect.

C I hope I have made tolerably clear what I conceive to be the principle involved in the *Langford* case (1) and the extent to which it can be treated as covering cases where protection is sought for a second establishment. As I have already said, I think the question is a jury question to be decided in accordance with good sense and it seems to me that on the present facts we are unable to conclude that question. The judge, taking, as I think, a view of the *Langford* case (1) which was not justified, was not concerned, perhaps, to go more fully into the facts. I should not feel satisfied on the material before me that I could give a just conclusion on the facts. I think, therefore, that this court should take the somewhat unusual course of allowing this appeal and then referring it back to the judge to answer the question of fact, whether, as a matter of common sense, this flat was personally occupied at the material dates by the defendant as a home. That being the conclusion at which I arrive, this appeal should be allowed and an order remitting the case to the county court judge should be made, coupled with a direction that it will be open to the parties to bring such further evidence as the judge may think proper to allow. That matter is entirely one for the judge's discretion on the re-hearing. I think that the costs of the trial from which this appeal comes, and the costs of the further hearing, should be in the discretion of the learned county court judge.

JENKINS, L.J.: I agree.

ROMER, L.J.: I also agree.

Appeal allowed.

G Solicitors: *Howard Smith & Harston* (for the landlord); *Arnold & Co.* (for the tenant).

[Reported by F. GUTTMAN, ESQ., Barrister-at-Law.]

Re ST. JOHN THE DIVINE, RICHMOND.

[SOUTHWARK CONSISTORY COURT (E. Garth Moore, Esq., Chancellor of the Diocese), February 26, March 16, 1953.]

Ecclesiastical Law—Altar—Need to be immovable—Materials of construction—Canon 92 and rubric at beginning of Book of Common Prayer.

The combined effect of the 82nd canon and the rubric at the beginning of the Book of Common Prayer is that, in accordance with the rubric, an altar should stand in the chancel and that, in accordance with the canon, that altar should be movable, though neither the canon nor the rubric, singly or in combination, places any prohibition on the provision of additional side altars, whatever their material, and whether fixed or movable. If an altar is not the principal altar in the church, there is no reason why it should not be constructed of stone or of any other suitable material or combination of materials, and no reason why it should not be fixed.

Per curiam: No doctrinal significance should be attached to the name by which the article is called, whether table or altar, nor to its material, nor to its position in the church.

AS TO HOLY TABLES, see HALSBURY, Hailsham Edn., Vol. 11, p. 792, para. 1455, and FOR CASES, see DIGEST, Vol. 19, p. 435, No. 2762.

Cases referred to:

- (1) *Faulkner v. Litchfield & Stearn*, (1845), 1 Rob. Eccl. 184; 5 L.T.O.S. 21; 163 E.R. 1007; 19 Digest 437, 2772.
- (2) *Liddell v. Westerton*, (1857), 29 L.T.O.S. 54; 21 J.P. 499; *sub nom. Westerton v. Liddell & Horne. Beal v. Liddell, Parke & Evans*, Moore's Special Report 1; *subsequent proceedings, sub nom. Liddell v. Beal*, (1860), 14 Moo. P.C.C. 1; 15 E.R. 206; 19 Digest 435, 2762.
- (3) *Re St. Hilary, Cornwall. Roffe-Silvester v. King*, [1938] 4 All E.R. 147; [1939] P. 64; 159 L.T. 546; Digest Supp.

PETITION for a faculty.

The vicar and churchwardens of St. John the Divine, Richmond, sought to substitute for a holy table of pitch-pine wood (which was movable) one of Ancaster stone which would be substantially of the same measurements and placed in the same position, but would be immovable. In his evidence the vicar stated that it was felt that the present altar was ugly and unworthy of the church, but that it was normally concealed by its hangings, as would be the stone altar, save during Holy Week. All the other material facts appear sufficiently in the judgment.

Wigglesworth for the petitioners.

The petition was unopposed.

Cur. adv. vult.

Mar. 16. THE CHANCELLOR (E. GARTH MOORE, ESQ.) read the following judgment. This is a petition by the vicar and churchwardens of the church of St. John the Divine, Richmond, for a faculty to place in the church a stone altar in substitution for one made of heavy pitch-pine which at present serves as the principal or high altar. The petition is unopposed and has received the unanimous support of the parochial church council and appears to be generally approved in the parish. The proportions of the proposed new altar are such that it will be capable of taking the frontals which are used on the present altar. In the Lady Chapel of the church is another altar, made of oak, with a marble top, and light enough in weight to be easily moved. A large part of the money required for the project is already in hand, though not specifically allocated to this purpose. The vicar gave evidence and said

that he thought that the present altar was ugly and unworthy of the church and less suitable to the character of the church than a stone one would be. He added, however, that it was normally concealed by its hangings, as would be the stone altar, if substituted, save, perhaps, during Holy Week.

A Had I been satisfied that I had a discretion in the matter, I should have granted the faculty as prayed without more ado, but, when the petition was first lodged in the registry, I was doubtful about the legality of the object sought, and the cause was, accordingly, put down for hearing in open court where it has been fully argued by counsel for the petitioners and now falls for determination.

B In the course of his evidence the vicar said that he attached no doctrinal significance to the material of which the altar is made. I echo that opinion and go further. No doctrinal significance should be attached to the name by which the article is called, whether table or altar, nor to its material, nor to its position in the church. The words "altar" and "table" have been used interchangeably at many times in history, both before and after the Reformation, and the material used has varied considerably from age to age and from place to place. Some pre-Reformation altars were made of wood, and stone altars have been erected in both England and Ireland since the Reformation, even in the eighteenth century. The most which can be said about all these things is that they are capable of being employed in a way which emphasises one or other of the many aspects which the richness of eucharistic doctrine provides. But it is as uncharitable as it is untrue to confuse emphasis with exclusion or to seek to interpret a rule for good order and uniformity as necessarily carrying a doctrinal and exclusive implication.

D It so happens that in this particular instance the legislation which is germane to the question in hand is legislation of the seventeenth century. That was a time when feeling ran high and further schism was a very present danger. This led the wiser heads in the church towards counsels of caution in an attempt to keep as many within the single fold as possible. It accounts for the quite deliberate lack of precision in the formularies of the church on many points of doctrine. It accounts equally, I think, for many of the provisions concerning ceremonial, which is the handmaid of doctrine. The rules concerning holy tables, and the language in which those rules were framed, no doubt were more acceptable—intentionally so—to those who tended to emphasise the festal rather than the sacrificial nature of the eucharist. But that is not to say that the sacrificial view was rejected, and evidence of its retention need be sought no further than the Order for the Administration of the Lord's Supper in the Book of Common Prayer, and, indeed, simply, perhaps, in the use of the term "priest" to signify the officiating minister. I, therefore, approach the solution of the problem which this petition raises with the express disclaimer that any doctrinal significance whatever attaches to my decision, which is based to the best of my ability on the ordinary rules of construction used in all the courts of this realm.

G The point in question is, I think, governed by two pieces of legislation, namely, the 82nd canon and the rubric at the beginning of the Book of Common Prayer. The first, in effect, demands the provision of a movable table for the celebration of the Holy Communion, while the second stipulates that "the chancels shall remain as they have done in times past". Both have been the object of judicial consideration.

H In his classic judgment in *Faulkner v. Litchfield* (1) the Dean of the Arches, SIR HERBERT JENNER FUST, appeared to hold that, since the table envisaged by the 82nd canon must be movable, as a corollary it could not be of stone, and this decision was emphatically endorsed by the Privy Council in *Liddell v. Beal* (2). It is to be noted that neither of these cases decides that there is anything illegal about a stone altar. They decide merely that the 82nd canon

is not satisfied unless the church is provided with a movable table. This left the field clear for counsel to argue in *Re St. Hilary, Cornwall* (3), that in that case it was unnecessary for a faculty to issue for the removal of the principal altar which was made of stone and that all that was required was that a faculty should be sought for the introduction of a movable table which did conform to the requirements of the 82nd canon. By a parity of reasoning counsel in the present case has invited me to hold that I can grant the present application on the ground that the Church of St. John the Divine is already furnished with a movable altar in the Lady Chapel and that the canon is thereby already satisfied.

Apart from the fact that this side altar is not wholly of wood, and, therefore, in the light of *Faulkner v. Litchfield* (1) and *Liddell v. Beal* (2), may not itself comply with the canon, the difficulty in accepting this argument lies in the fact that, while it takes account of the requirement of the 82nd canon that the table should be movable, it fails to take account of the rubric which requires that "the chancels shall remain as they have done in times past", namely, furnished with an altar. The combined effect of the 82nd canon and of this rubric appears to me to demand that, in accordance with the rubric, an altar should stand in the chancel and that, in accordance with the canon, that altar should be movable, though neither the canon nor the rubric, singly or in combination, places any prohibition on the provision of additional side altars, whatever their material, and whether fixed or movable. This difficulty appears to have been shared by the learned deputy Dean of the Arches in *Re St. Hilary, Cornwall* (3), for, while he refused to order the removal of five side altars, each made of stone, he did order the removal of the principal altar, also made of stone, and held that the law required that that altar must be movable and made of wood. In deciding that the principal altar must be made of wood the learned deputy dean was merely following dicta in *Faulkner v. Litchfield* (1) and *Liddell v. Beal* (2). I think it possible, though not certain, that that particular question may still be open to argument, but the point is immaterial to the present discussion. What matters is that the Court of the Arches has held that the canon requires the altar in the chancel to be movable while the altar proposed in the present petition would, if built, be immovable. That decision is binding on me and, if I may say so with respect, was, in my view, inevitable, when one considers not merely the canon, but also the rubric.

In these circumstances I have not thought it necessary to give further consideration to a number of cases in other dioceses, not reported and not binding on me, in which faculties have issued for the erection of stone altars. These cases, if one could have ascertained their facts, would have been of persuasive authority if the matter had not been already clearly concluded by binding authority. Counsel has invited my attention to a number of pronouncements from weighty sources, episcopal and otherwise, indicating a happy indifference to the material of which an altar may be made. I can give no practical effect, however, to such pronouncements, but they certainly strengthen me in the opinion that, rightly viewed, these matters are not of doctrinal significance. My attention has also been directed to the fact that the proposed new Canon 97 will, if enacted, permit an altar to be of stone. But it has not been enacted, and, in the words of their Lordships in the Privy Council who heard the appeal in *Liddell v. Beal* (2),

"... courts of justice ... are bound to enforce the law as they find it, leaving it to the legislature, if it sees fit, in any manner to alter it."

For these reasons I am compelled, with great reluctance, to reject the present petition.

It is, I think, as well to make it clear that I am constrained to this course first and foremost by the legislation of the Church in Convocation, and, secondly,

by the Book of Common Prayer. This is no judge-made law, and it has not been imposed from without. It is in full measure the Church's own regulation. It was enacted, not to enshrine a principle, but as a matter of policy to meet a particular situation, and it may well be that it has outlived its usefulness. Indeed, in these days, when it would be highly eccentric to move the holy table for a celebration of the Sacred Mysteries, the requirement that the table should be movable smacks of unreality. But, until the regulation, born of ecclesiastical legislation, is by legislation repealed, the courts have no option but to comply with it, even though in the meantime it may mean that half the wooden altars in England, by reason of their weight and consequent immobility, fail to comply with the canon—a consideration which may, perhaps, urge our legislative assemblies to greater speed. I think I should also make clear both what I am deciding and what I am not deciding.

I am deciding no more than this: that, in my judgment, the law of the Church of England requires the high altar or principal holy table in a parish church to be movable, and, inasmuch as the altar proposed by this petition would not be movable, I cannot sanction it. There is no other matter which falls for determination. I am certainly not deciding that a stone altar is contrary to law. If it is not the principal altar in the church, I know of no reason why it should not be constructed of stone or of any other suitable material or combination of materials, and I know of no reason why it should not be fixed. My sympathies are entirely with the petitioners, and, if they think that the Court of the Arches can discover a way which has eluded me to give them what they want, they may tell that court that, if I had thought that I had a discretion in the matter, that discretion would have been exercised in their favour. But, if they do not wish to test the issue in a higher court, they must draw what comfort they can from the consideration that no question of conscience is involved and that, in a matter of no great moment, they are being afforded an opportunity to exhibit a virtue for which no school of thought in the Anglican Communion is conspicuously noted, namely, obedience to rule.

Solicitors: *Trollope & Winckworth* (for the petitioners).

[*Reported by* W. H. EWART JAMES, Esq., *Barrister-at-Law.*]

NICOLENE, LTD. v. SIMMONDS.

[COURT OF APPEAL (Singleton, Denning and Hodson, L.JJ.), March 4, 5, 1953.]

Contract—Enforceable contract—Meaningless clause—Rejection.

By a letter dated Aug. 10, 1951, the plaintiffs offered to buy from the defendant specified goods on certain terms and conditions set out in an enclosed order. On Aug. 16, 1951, the defendant wrote a letter accepting the offer, the letter containing, inter alia, the following words: "I assume that we are in agreement that the usual conditions of acceptance apply". There were no "usual conditions" in operation between the parties. The defendant having failed to deliver the goods, in an action by the plaintiffs for breach of contract,

HELD: since there were no such "usual conditions" and hence nothing to which the clause could apply, it was meaningless, and, being clearly severable from the rest of the contract, and capable of being rejected without impairing the sense or reasonableness of the contract as a whole, it should be rejected; the defendant's letter of Aug. 16, constituting an unqualified acceptance of the plaintiff's offer; and, therefore, there was a concluded agreement between the parties.

Semble, aliter in the case of a clause the terms of which have yet to be agreed by the parties which may result in there being no concluded contract.

AS TO UNCERTAINTY OF TERMS OF CONTRACT, see HALSBURY, Hailsham Edn., Vol. 7, p. 330, para. 458.

Cases referred to:

- (1) *British Electrical & Associated Industries (Cardiff), Ltd. v. Patley Pressings, Ltd. (Reid Bros. (Glasgow), Ltd. Third Party, Douglas Scott, Ltd., Fourth Party)*, [1953] 1 All E.R. 94.
- (2) *Scammell (G.) & Nephew, Ltd. v. Ouston*, [1941] 1 All E.R. 14; [1941] A.C. 251; 110 L.J.K.B. 197; 164 L.T. 379; 2nd Digest Supp.
- (3) *Re Vince. Ex p. Baxter*, [1892] 2 Q.B. 478; 61 L.J.Q.B. 836; 67 L.T. 70; 4 Digest 483, 4345.
- (4) *Love & Stewart, Ltd. v. Instone (S.) & Co., Ltd.*, (1917), 33 T.L.R. 475; 12 Digest, Replacement, 97, 581.
- (5) *Bishop & Baxter, Ltd. v. Anglo-Eastern Trading & Industrial Co., Ltd.*, [1943] 2 All E.R. 598; [1944] K.B. 12; 113 L.J.K.B. 26; 169 L.T. 351; 12 Digest, Replacement, 98, 587.

APPEAL by the defendant from an order of SELLERS, J., dated Nov. 12, 1952.

On Aug. 10, 1951, the plaintiff company, Nicolene, Ltd., who were desirous of purchasing three thousand tons of reinforcing bars of West German origin, wrote to the defendant in the following terms: "We enclose our detailed order and require your written confirmation of acceptance of the order . . ." They enclosed an order setting out, inter alia, details of the goods required, the price and quality thereof, the mode of payment and shipment, and stipulating that all packages of the goods were to be marked with certain numbers. On Aug. 16 the defendant wrote a letter in reply from his private address, as follows:

"I thank you for your letter and order of Aug. 10 for three thousand tons of . . . reinforcing bars of West German origin in mixed sizes of 6/30 millimetres, at £45 14s. 5d. per ton of 1,016 kilos. As you have made the order direct to me; I am unable to confirm on my usual printed form which would have the usual force majeure and war clauses, but I assume that we are in agreement that the usual conditions of acceptance apply . . . I am pleased to inform you that my suppliers state they are certain they will be able to ship at least twenty-five per cent. of the order before the end of the month and might even be able to ship considerably more

than this, and they will let me know further in a day or so. I thank you very much indeed for entrusting this contract to me and assure you I will give the matter my personal attention, and you need have no anxieties that the order will be executed to your entire satisfaction. I hope this will be the first of many transactions to our mutual advantage . . .”

On Aug. 29 the plaintiff company replied:

- A “Re three thousand (long tons reinforcing bars, Karachi. We confirm that we have instructed United Marine (1939) Ltd. . . . who are our forwarding agents, to arrange for shipping space to take the three thousand tons, and have asked you to get into direct communication with the director of United Marine who is looking after the business . . . Mr. Peachey, in order that they get into direct communication with your German steel mills in accordance with your instructions. I am now awaiting a pro forma invoice covering the three thousand tons from you or from your steel mills which should give all the details which were embodied in my order to you. I am also awaiting your instructions regarding in whose favour the credit is to be opened and confirmation from you as to with what bank the three per cent. performance bond is being opened in our favour and the full wording of the performance bond which should cover not only a guarantee of delivery but also the sizes will be equally divided. The markings are as follows . . .”
- B
- C

The letter was signed by the managing director of the plaintiff company. The plaintiffs alleged that these letters comprised a contract in writing between them and the defendant for the sale of the specified goods. They further alleged that the defendant was in breach of the contract in that he failed to make the necessary deliveries as a result of which they were unable to re-sell the goods and suffered loss of profit and damage. The defendant, in his defence, admitted the letters of Aug. 10, 16, and 29, 1951, but denied that they constituted a concluded contract between the parties.

- D
- E SELLERS, J., giving judgment for the plaintiffs, held that there should be implied into the contract the usual force majeure and war clauses as contained in the “printed form” referred to by the defendant and that there was a concluded contract between the parties.

Diplock, Q.C., and *Littman* for the defendant.

- F *S. H. Noakes* for the plaintiffs.

- SINGLETON, L.J.*, stated the facts and continued: We have had authorities cited to us to help us to form a view whether or not on the documents it can be said that there was a concluded contract between the parties. I do not propose to refer to them at length, but I would mention the judgment of *McNair, J.*, in *British Electrical & Associated Industries (Cardiff), Ltd. v. Patley Pressings, Ltd.* (1), where a contract note in relation to a sale of steel contained the following clause:
- G

“subject to force majeure conditions that the government restricts the export of the material at the time of delivery.”

- H There was a variety of force majeure conditions in the trade, and no evidence that any particular ones had been agreed on. The buyers relied on the note as evidencing a contract, and it was held by *McNair, J.*, that because the words of the force majeure clause in the note were too obscure to be capable of any definite or precise meaning and because “conditions” in the phrase “force majeure conditions” meant “clauses” or “stipulations” and not “contingencies” or “circumstances”, and it not being agreed which conditions applied, there was no consensus ad idem, and, therefore, no completed contract. The learned judge cited (*ante*, p. 95) some words of *VISCOUNT MAUGHAM* and

of LORD WRIGHT in *G. Scammell & Nephew, Ltd. v. Ouston* (2), where LORD MAUGHAM ([1941] 1 All E.R. 16) said:

“In order to constitute a valid contract, the parties must so express themselves that their meaning can be determined with a reasonable degree of certainty”;

and LORD WRIGHT said (*ibid.*, 25):

“The first [ground on which the court ought to hold on the facts of that case that there was no contract] is that the language used was so obscure and so incapable of any definite or precise meaning that the court is unable to attribute to the parties any particular contractual intention.”

Counsel for the defendant submitted that, applying those words to the documents in this case, we ought to hold that the parties had not entered into a contract and there was no concluded agreement between them. Citing a later passage from the judgment of McNAIR, J., in the *British Electrical* case (1) (*ante*, p. 96) he submitted that, even though the parties thought, and acted on the basis, that a contract existed between them, no consensus *ad idem* would be held to exist where there still remained to be negotiated and agreed the exact form of a clause or conditions. I have referred to that judgment because in it McNAIR, J., considered the authorities over a considerable period and all the relevant questions, but the case before him was quite different from the one with which we have to deal.

It is submitted by counsel for the defendant that the letter of Aug. 16 was not an acceptance of the offer made in the plaintiffs' letter of Aug. 10, but was at the most a qualified acceptance by reason of the following important paragraph:

“As you have made the order direct to me, I am unable to confirm on my usual printed form which would have the usual force majeure and war clauses, but I assume that we are in agreement that the usual conditions of acceptance apply.”

I regard that letter of Aug. 16 as an acceptance of the offer, and I do not think it ought to be treated as a qualified acceptance. It was acted on by the parties later, and it was accepted by the plaintiffs in their letter of Aug. 29 in which no mention is made of the paragraph in the letter of Aug. 16 to which I have referred. It may well be that the managing director, replying on behalf of the plaintiff company, did not think that particular paragraph called for any answer. It seems to me that in that paragraph the defendant was saying that he was contracting with the plaintiffs direct and that he was unable to confirm on the printed form generally used by a company in which he played a leading part, which form would contain the usual force majeure and war clauses and that those clauses did not come into this contract. He added: “but I assume that we are in agreement that the usual conditions of acceptance apply”. The plaintiffs, in reply, say nothing as to that. There is a contract, and they and the defendant assume that the usual conditions of acceptance apply, whatever they may be. Counsel for the defendant submitted that those words imply that there was something to be settled between the parties before there could be a contract. SELLERS, J., thought that there ought to be implied into the contract a force majeure and war clause of a kind to be determined by the conditions which the defendant used on his company's printed form. I do not think that is right, but I have reached the same conclusion as SELLERS, J., by another mode of approach.

In my view, the document of Aug. 16 was an acceptance of the contract, both parties assuming that the usual conditions of acceptance applied. The words: “I assume we are in agreement that the usual conditions of acceptance apply” are, to my mind, meaningless, and ought to be ignored. Counsel for the defendant further submitted that we must give a meaning to all the

words in the documents, but when parties are writing letters which are sometimes long it is not easy to give a meaning to all that they write. In my view, this appeal fails. There was a contract between the parties which was broken by the defendant, and the learned judge was right in awarding damages against the defendant in respect of his breach of contract.

DENNING, L.J.: This case raises a short, but important, point which
A can be stated quite simply. There was a contract for the sale of three thousand tons of steel reinforcing bars; the seller broke his contract, and when the buyer claimed damages the seller set up the defence that, owing to a sentence in one of the letters which were alleged to constitute the contract, there was no contract at all. The material words are: "We are in agreement that the usual conditions of acceptance apply". There were no usual conditions of acceptance
B and so it is said that those words are meaningless, that there is nothing to which they can apply, and that, therefore, there was never any contract between the parties.

In my opinion, a distinction must be drawn between a clause which is meaningless and a clause which is yet to be agreed. A clause which is meaningless can often be ignored, while still leaving the contract good, whereas a clause which
C has yet to be agreed may mean that there is no contract at all, because the parties have not agreed on all the essential terms. I take it to be clear law that, if one of the parties to a contract inserts into it an exempting condition in his own favour which the other side agrees and it afterwards appears that that condition is meaningless or is so ambiguous that no ascertainable meaning can be given to it, that does not render the whole contract a nullity. The only
D result is that the exempting condition is a nullity and must be rejected. It would be strange, indeed, if a party could escape every one of his obligations by inserting a meaningless exemption from some of them. The proposition which I have stated is supported by the numerous cases where it has been held that, if a man signs a contract expressly as agent for a named company and there is no such company in existence, the courts do not hold that there
E is no contract, but only reject the meaningless words "as agent for the company" and hold that the individual himself was a party to the contract. So, also, if a person signs "as agent" and has no principal, the words "as agent" are rejected and the contract is held to be a good contract between the parties.

As I read it, *Re Vince. Ex p. Baxter* (3) is an authority in support of what
F I have said. The contract of loan itself was good, but the vague and unintelligible clause was rejected. The other cases which were relied on can all be explained on the ground that there was a clause yet to be agreed. In *Love & Stewart, Ltd. v. S. Instone & Co., Ltd.* (4), where there was a strike clause yet to be agreed, LORD SUMNER said (33 T.L.R. 477), at p. 477, that the case was "one of continuing negotiations broken off in medio"; in *G. Scammell & Nephew, Ltd. v. Ouston* (2), where there were hire-purchase terms yet to be agreed, LORD WRIGHT said ([1941] 1 All E.R. 26) the "agreement was inchoate, and never got beyond negotiations." In *Bishop & Baxter, Ltd. v. Anglo-Eastern Trading & Industrial Co., Ltd.* (5), where there was a war clause yet to be agreed, this court held that, until the parties agreed on a particular form of war clause, there could be no consensus ad idem. As I read them, those were
G all cases where there was a clause yet to be agreed, the matter was still in negotiation, and there was no concluded contract. I would just say a word about the recent decision of McNAIR, J., in *British Electrical & Associated Industries (Cardiff), Ltd. v. Patley Pressings, Ltd.* (1), where the contract note contained the clause "subject to force majeure conditions". If the true construction of the documents in that case was that an essential term had yet to be agreed, it would fall within the cases to which I have already referred, but, if the true view was that the exempting clause was agreed, but was "so
H

vague and uncertain as to be incapable of any precise meaning" (which is how McNAIR, J., described it (ante, at p. 95)) I should have thought that it could be ignored without impairing the validity of the contract. It was clearly severable from the rest of the contract, whereas the term in *G. Scammell & Nephew, Ltd. v. Ouston* (2) was not.

In the case before the court there was nothing yet to be agreed. There was nothing left to further negotiation. The parties merely agreed that "the usual conditions of acceptance apply". That clause was so vague and uncertain as to be incapable of any precise meaning. It is clearly severable from the rest of the contract, and can be rejected without impairing the sense or reasonableness of the contract as a whole, and it should be so rejected. The contract should be held to be good and the clause should be ignored. The parties themselves treated the contract as subsisting, and they regarded it as creating binding obligations between them and it would be most unfortunate if the law should say otherwise. SELLERS, J., interpreted the sentence in the letter somewhat differently. He thought it meant that the usual force majeure and war clauses applied. Even so, the clause is still meaningless, because there are no such usual clauses. It is not a case where the clauses had yet to be agreed, and there was nothing left to further negotiation. On this interpretation, therefore, the same position is reached. The sentence is meaningless and must be ignored, but the contract, nevertheless, remains good. I agree that the appeal should be dismissed.

HODSON, L.J.: I also agree. It was contended by the defendant that this is one of those cases in which the parties have left open for future agreement a term in a contract with the result that there is no contract. I am of opinion that the letter of Aug. 16 contains an unqualified acceptance by the defendant of the plaintiffs' offer and does not contain a qualified acceptance amounting to a counter-offer. It is unnecessary for me to add anything further to what my Lords have said on this subject, or to re-read the paragraph which has been much discussed. It is true, as counsel for the defendant points out, that the language used in the paragraph is, if not a qualification of an acceptance, meaningless, but I do not accept the proposition that because some meaningless words are used in a letter which contains an unqualified acceptance of an offer, those meaningless words can be relied on by the acceptor as enabling him to obtain a judgment in his favour on the basis that there has been no acceptance at all. I agree, therefore, that the appeal should be dismissed.

Appeal dismissed.

Solicitors: *Gouldens* (for the defendant); *Lucien Fior* (for the plaintiffs).

[Reported by MISS PHILIPPA PRICE, *Barrister-at-Law.*]

IZUORA v. REGINAM.

[PRIVY COUNCIL (Lord Porter, Lord Tucker, Lord Asquith of Bishopstone),
February 17, 18, 19, March 16, 1953.]

Counsel—Contempt of court—Act of discourtesy.

Privy Council—Nigeria—Contempt of court—Right of appeal to West African Court of Appeal—“Convicted”—Person in contempt ordered to pay fine, with imprisonment in default—West African Court of Appeal Ordinance (c. 229 of the Laws of Nigeria), s. 10.

- A A barrister practising in Nigeria, who was appearing in a divorce case, was absent from court on the day on which judgment was to be given, permission to be absent, which had been previously granted by the judge, having been withdrawn. He was summoned to attend the Supreme Court of Nigeria, which fined him £10 and ordered that, in default of payment, he be imprisoned for two months, for contempt of court. He appealed to the West African Court of Appeal, which struck out the appeal on the ground of lack of jurisdiction. Section 10 of the West African Court of Appeal Ordinance (which deals with appeals in criminal cases) provides: “A person convicted by or in the Supreme Court . . . may appeal to the Court of Appeal . . .”

C HELD: while an act of discourtesy may amount to contempt of court, yet summary punishment should be used sparingly; the appellant’s conduct was clearly discourteous, and it may have been in dereliction of his duty to his client; but it did not amount to contempt of court.

D Per curiam: the Supreme Court of Nigeria adjudged the appellant’s conduct to amount to contempt of court of a criminal nature, and, therefore, the order for payment of a fine and imprisonment in default was a “conviction” within the meaning of s. 10 of the West African Court of Appeal Ordinance, and, accordingly, the West African Court of Appeal had jurisdiction to hear the appeal.

E AS TO ACTS CONSTITUTING CONTEMPT OF COURT BY A BARRISTER, see HALSBURY, Hailsham Edn., Vol. 2, p. 510, para. 693.

Cases referred to:

- (1) *Poku and Another*, (Nov. 16, 1951), West African Court of Appeal, (unreported).
(2) *R. v. Gray*, [1900] 2 Q.B. 36; 69 L.J.Q.B. 502; 82 L.T. 534; 64 J.P. 484; 16 Digest 21, 166.
F (3) *Nokes v. Doncaster Amalgamated Collieries, Ltd.*, [1940] 3 All E.R. 549; [1940] A.C. 1014; 109 L.J.K.B. 865; 163 L.T. 343; 2nd Digest Supp.
(4) *O’Shea v. O’Shea & Parnell*, (1890), 15 P.D. 59; 59 L.J.P. 47; 62 L.T. 713; 16 Digest 8, 11.
(5) *Parashuram Detaram Shamdasani v. King-Emperor*, [1945] A.C. 264; 114 L.J.P.C. 95; 173 L.T. 400; 2nd Digest Supp.

G APPEAL from an order of the West African Court of Appeal, dated Nov. 23, 1951.

The appellant, Joseph Orakwue Izuora, was a barrister practising in Nigeria. On Sept. 4, 1951, at the conclusion of the hearing of a divorce case in which he represented the respondent, judgment was reserved by the trial judge until the following day. The appellant thereupon applied to the judge that he might be excused from attendance next day, and his application was granted. Counsel for the petitioner then asked that he also might be excused. The judge stated that the court could not carry on in the absence of counsel for both parties, withdrew the permission for the appellant to be absent, and ordered that counsel for both parties attend the next day. At the sitting of the court the next day counsel for the petitioner was present, but not the appellant and no communication had been received by the court from him. The judge ordered

that the appellant be summoned to attend the court to show cause why he should not be committed for contempt of court.

On Sept. 10, 1951, a summons was issued, and was later duly served on the appellant, calling on him to appear before the court to show cause why he should not be committed for contempt of court, the contempt being:

"Your failure, without leave of the court, to attend the court sitting at Okene on Wednesday, Sept. 5, 1951, in suit No. B/34/50—Cole v. Cole—in which you were engaged as counsel for the respondent, in defiance of the court and in disobedience of an order of court made on Tuesday, Sept. 4, 1951, for counsel for the parties to appear at the resumed hearing on Sept. 5, 1951."

On Sept. 18, 1951, the appellant attended the court sitting as the Supreme Court of Nigeria in the Benin judicial division. He was represented by counsel who submitted on his behalf that no contempt had been intended and that there had been a misunderstanding. In giving judgment, the judge observed that, but for the appellant's inexperience, he would not have hesitated to commit him to prison. He fined him £10 and ordered that in default he be imprisoned for two months.

The appellant appealed to the West African Court of Appeal, and, in support of his appeal, swore an affidavit in which he set out at length the circumstances in which he came to absent himself. By his notice of appeal he submitted, inter alia, that his action in the circumstances did not, and could not, amount to contempt of court. On Nov. 23, 1951, the West African Court of Appeal struck out the appeal on the ground of lack of jurisdiction, considering themselves bound by a previous decision of that court in *Poku and Another* (1). The appellant obtained special leave to appeal to Her Majesty in Council by order dated June 24, 1952.

Cope Morgan, Q.C., and F. R. McQuown for the appellant.
D. A. Grant for the Crown.

Mar. 16. **LORD TUCKER** stated the facts as set out above and continued: Before proceeding to consider (i) whether the West African Court of Appeal had jurisdiction to entertain the appeal, and (ii) whether the conduct complained of was capable in law of amounting to contempt of court, it may be convenient to refer to certain statutory provisions which give disciplinary powers to the courts in Nigeria over barristers and solicitors.

The Legal Practitioners Ordinance, Part II (c. 110 of the Laws of Nigeria), establishes a legal practitioners' committee which can, at the instance of the Attorney-General, inquire into allegations of misconduct against a legal practitioner. This committee reports to the Supreme Court who may admonish, suspend or strike the name of the offender from the roll of the court. The court can also exercise their powers independently without previous reference to the committee. Section 56 (1) (b) (ii) of the Supreme Court Ordinance (c. 211 of the Laws of Nigeria) also gives power to make rules of court for regulating "the discipline, employment in causes and fees of legal practitioners". In pursuance thereof, Ord. 16 of the Supreme Court (Civil Procedure) Rules gives power to the court in certain circumstances to suspend any barrister or solicitor or to strike his name off the roll. Rule 11 of Ord. 16 is as follows:

"Every barrister or solicitor who shall be engaged in any cause shall be bound to conduct the same on behalf of the plaintiff or defendant, as the case may be, for whom he shall have been so engaged, until final judgment, unless allowed by the court for any special reason to cease from acting therein; but he shall not be bound, except under express agreement, or unless re-engaged, to take any proceedings in relation to any appeal from such judgment."

Rule 19 reads:

- A “Any barrister or solicitor who commits any breach of any of the said provisions of this order or fails to comply with any of the said provisions for which breach or non-compliance no specific penalty is provided shall be liable for a first offence to a fine not exceeding £20, and for any subsequent offence to a fine not exceeding £50, without prejudice to the powers of the court to suspend any barrister or solicitor or strike his name off the roll for professional misconduct.”

Their Lordships have thought it proper to refer to these provisions to show that the courts in Nigeria possess wide—and, no doubt, very necessary—disciplinary powers over barristers and solicitors, which, it is to be observed, however, do not include the power to imprison.

- B Turning now to the question of the jurisdiction of the West African Court of Appeal, s. 10 of the West African Court of Appeal Ordinance (c. 229 of the Laws of Nigeria), which deals with appeals in criminal cases, is as follows:

- C “A person convicted by or in the Supreme Court or a native court may appeal to the Court of Appeal—(a) against his conviction on any ground of appeal which involves a question of law alone; and (b) with the leave of the Court of Appeal, or upon the certificate of the judge who tried him or, in the case of a person convicted by a native court, who heard his appeal to the Supreme Court, that it is a fit case for appeal against his conviction on any ground of appeal which involves a question of fact alone, or a question of mixed law and fact, or on any other ground which appears to the court to be a sufficient ground of appeal . . .”

- D Section 9 of the West African Court of Appeal (Gold Coast) Ordinance (c. 5 of the Laws of the Gold Coast), which was the relevant ordinance in *Poku and Another* (1), reads:

“A person convicted by or in a Divisional Court or by any judge may appeal to the Court of Appeal . . .”

- E The material word in each case is, for present purposes, the word “convicted”. It is clear that the appellant’s conduct was treated by the judge as being contempt of a criminal kind, viz.:

“any act done . . . calculated to bring a court or a judge of the court into contempt or to lower his authority”

- F or something “calculated to obstruct or interfere with the due course of justice or the lawful process of the courts”: see *R. v. Gray* (2) ([1900] 2 Q.B. 40). Was the order made by him, including the order for imprisonment in default of payment of the fine, a “conviction” within the meaning of s. 10 of the ordinance? The West African Court of Appeal, following the decision of the full court in *Poku’s* case (1), held that it was not. This decision was based on the view that the ordinance was modelled on the English Criminal Appeal Act, 1907, and was to be interpreted accordingly. The English Act gives a right of appeal only in the case of a person “convicted on indictment”. In the Nigerian ordinance the words “on indictment” are omitted. It was thought that this omission was due to the fact that indictments do not form part of the criminal process in Nigeria and that the ordinance must, therefore, be interpreted as limiting the word “convicted” to convictions resulting from process analogous to the English procedure by way of indictment. Reliance was placed on a passage in the speech of VISCOUNT SIMON, L.C., in *Nokes v. Doncaster Amalgamated Collieries, Ltd.* (3), where, in dealing with ambiguous words, he said ([1940] 3 All E.R. 554):

“where, in construing general words the meaning of which is not entirely plain, there are adequate reasons for doubting whether the legislature could have been intending so wide an interpretation as would disregard

fundamental principles, then we may be justified in adopting a narrower construction."

Their Lordships do not consider there is any ambiguity in the word "convicted". Nor do they accept the view that to interpret it as giving a right of appeal in the case of criminal contempt involves the disregard of any fundamental principle merely because the English Act is so worded as clearly to exclude such a case. They consider that the governing principle to be applied in the present case is that stated by VISCOUNT SIMON in *Nokes'* case (3) where he said (*ibid.*, 553):

"The golden rule is that the words of a statute must *prima facie* be given their ordinary meaning."

Dealing with the question whether an appeal lies to the Court of Appeal in England, where appeals "in any criminal cause or matter" are expressly excluded by s. 31 (1) (a) of the Supreme Court of Judicature Act, 1925 (formerly s. 47 of the Supreme Court of Judicature Act, 1873) LINDLEY, L.J., in *O'Shea v. O'Shea & Parnell* (4), said (15 P.D. 64):

"We must not, therefore, be misled by the words 'contempt' and attachment, but we must look at the substance of the thing. In the present case I have no doubt that the proceeding is a summary conviction for a criminal offence, and therefore no appeal lies."

In the present case an order for payment of a fine and for imprisonment in default has been made by a judge in the Supreme Court for conduct adjudged by him to amount to contempt of court of a criminal nature, and their Lordships feel no doubt that such order was a "conviction" within the meaning of s. 10 of the Nigerian Ordinance, and that both *Poku's* case (1) and the present case were wrongly decided in the West African Court of Appeal. In these circumstances, if their Lordships had been of opinion that the appellant's conduct could amount to contempt, it might have been necessary to consider whether the proper course would not have been for the case to be remitted to the West African Court of Appeal to hear and determine the appeal. As, however, their Lordships take the contrary view, such a course is not necessary.

It is not possible to particularise the acts which can or cannot constitute contempt in the face of the court, but in this connection it is desirable to bear in mind what was said in the judgment of the Board delivered by LORD GODDARD in *Parashuram Detaram Shamdasani v. King-Emperor* (5), where these words are to be found ([1945] A.C. 270):

"Their Lordships would once again emphasise what has often been said before, that this summary power of punishing for contempt should be used sparingly and only in serious cases. It is a power which a court must of necessity possess; its usefulness depends on the wisdom and restraint with which it is exercised, and to use it to suppress methods of advocacy which are merely offensive is to use it for a purpose for which it was never intended."

It is not every act of discourtesy to the court by counsel that amounts to contempt, nor is conduct which involves a breach by counsel of his duty to his client necessarily in this category. In the present case, the appellant's conduct was clearly discourteous, it may have been in breach of r. 11 of Ord. 16, and it may, perhaps, have been in dereliction of his duty to his client, but, in their Lordships' opinion, it cannot properly be placed over the line that divides mere discourtesy from contempt.

Their Lordships will accordingly humbly advise Her Majesty that the appeal be allowed, the order of MANYO-PLANGE, J., set aside, and the fine of £10 repaid to the appellant. The appellant must be paid his costs of the proceedings before the West African Court of Appeal and of his petition for special leave to appeal, and one-half of his costs of the appeal.

Solicitors: *Rexworthy, Bonser & Wadkin* (for the appellant); *Burchells* (for the Crown).

[Reported by G. A. KIDNER, ESQ., Barrister-at-Law.]

CAMPBELL v. THOMPSON AND ANOTHER.

[QUEEN'S BENCH DIVISION (Pilcher, J.), March 3, 4, 1953.]

Practice—Parties—Representation order—Members' club—Action in tort—Claim for damages by servant of club for injury on club premises—Assistant honorary secretary and chairman of house committee made defendants—Order authorising them to defend action in representative capacity—R.S.C., Ord. 16, r. 9.

The plaintiff, who was employed by an unincorporated members' club as a cleaner, sustained injuries when she fell down some stairs, which she was engaged in cleaning, on the club's premises. In an action for damages for breach by the members of the club of the duty owed by them to the plaintiff at common law to take reasonable care of her safety as an invitee and/or as a servant of the members the plaintiff sued as defendants the assistant honorary secretary and the chairman of the house committee of the club at the material time.

HELD: the members of the club had a common interest in resisting the plaintiff's claim, and, consequently, it was a proper case for an order under Ord. 16, r. 9, authorising the defendants to defend the claim on behalf and for the benefit of all the members of the club who were members at the date of the accident.

AS TO LIABILITIES OF MEMBERS' CLUBS IN TORT, see HALSBURY, Hails- ham Edn., Vol. 4, p. 503, para. 931; and FOR CASES, see DIGEST, Vol. 8, pp. 518, 519, Nos. 89-91.

D Cases referred to:

- (1) *Adams v. Naylor*, [1946] 2 All E.R. 241; [1946] A.C. 543; 115 L.J.K.B. 356; 175 L.T. 97; 2nd Digest Supp.
- (2) *Brown v. Lewis*, (1896), 12 T.L.R. 455; 8 Digest 518, 89.
- (3) *London Asscn. for Protection of Trade v. Greenlands, Ltd.*, [1916] 2 A.C. 16; 85 L.J.K.B. 698; 114 L.T. 434; 42 Digest 976, 67.
- (4) *Taff Vale Ry. Co. v. Amalgamated Society of Railway Servants (1900)*, [1901] A.C. 426; 70 L.J.K.B. 905, n.; 83 L.T. 474; *revsd.* C.A., [1901] 1 K.B. 170; 70 L.J.Q.B. 219; 83 L.T. 474; 64 J.P. 788; *restored*, H.L., [1901] A.C. at p. 434; 43 Digest 92, 957.
- (5) *Mercantile Marine Service Asscn. v. Toms*, [1916] 2 K.B. 243; 85 L.J.K.B. 311; 114 L.T. 124; 43 Digest 126, 1288.
- (6) *Temperton v. Russell*, [1893] 1 Q.B. 435; 62 L.J.Q.B. 300; 68 L.T. 425; 57 J.P. 518; 43 Digest 126, 1287.
- (7) *Wood v. McCarthy*, [1893] 1 Q.B. 775; 62 L.J.Q.B. 373; 69 L.T. 431; 43 Digest 126, 1286.
- (8) *Walker v. Sur*, [1914] 2 K.B. 930, 934; 83 L.J.K.B. 1188, 1190; 109 L.T. 888; Digest, Practice, 420, 1165.

G ACTION for damages for personal injuries.

On June 29, 1949, the plaintiff, Rose Florence Campbell, who was employed by the City Livery Club as a cleaner, was engaged in cleaning a flight of stone steps on the club's premises when she slipped and fell to the bottom of the flight and sustained injuries. The City Livery Club was a members' club, and the plaintiff sued as defendants one Thompson, the assistant honorary secretary, and one Surtees Shill, the chairman of the house committee, both on their own behalf and on behalf of all other members of the club.

S. M. Stewart for the plaintiff.

F. H. Lawton for the defendants.

PILCHER, J., stated the facts and continued: A members' club is an association of persons, an unincorporated body, which has no legal entity. When the case was called I was informed by counsel for the defendants that

the City Livery Club was in fact insured under some appropriate policy with Lloyd's underwriters against the risk of damages of the type which they might have to pay if the plaintiff was successful in this case. Counsel for the defendants made it clear that his clients, whoever they might be, had no desire to take any technical point or to avoid any proper legal liability which lay on them. He stated that he was merely anxious, and so, indeed, was counsel for the plaintiff, that there should be no doubt that the defendants were properly named and described in the title to this action. Counsel had regard more particularly to the decision in *Adams v. Naylor* (1) where it was made quite clear by the House of Lords that, however friendly the parties might be and however anxious and willing the defendants might be to appear and answer a claim made by the plaintiff, it was essential that they should be properly named or properly described in the writ and in the proceedings in the action. VISCOUNT SIMON, in the course of his speech in that case, after dealing with the nominal defendants, said ([1946] 2 All E.R. 244):

"The courts before whom such a case as this comes have to decide it as between the parties before them and have nothing to do with the fact that the Crown stands behind the defendant."

Adams v. Naylor (1) was a case where the defendant was a nominal defendant whose name had been given by the appropriate government department as a suitable defendant to the action. LORD SIMON went on (*ibid.*):

"For the plaintiffs to succeed, apart from the statute, they must prove that the defendant himself owes a duty of care to the plaintiffs and has failed in discharging that duty."

There is a passage also in LORD UTHWATT'S speech (*ibid.*, 247) in which he says this:

"VISCOUNT SIMON has emphasised that the establishment of a duty owed by the defendant to the plaintiffs was essential to the plaintiffs' success in the action and, with LORD SIMONDS, I express my complete concurrence with his observations. It was not open to the parties to this suit by agreement to have the matter dealt with on the footing, proved to be false, that the defendant was in occupation of the land in question."

Having regard to the observations made in *Adams v. Naylor* (1), counsel in this case were anxious that the defendants should be properly described. The plaintiff's claim here is in tort, and it is founded on an alleged breach of duty by the members of the club as a body to take reasonable care through their appropriate officers or servants for her safety, either in her quality as a servant of the members of the club or in her quality as an invitee to the club premises of which the members are occupiers.

No application had been made by the plaintiff under R.S.C., Ord. 16, r. 9, to allow the named defendants to be sued in their representative capacity. Order 16, r. 9, is in the following terms:

"Where there are numerous persons having the same interest in one cause or matter, one or more of such persons may sue or be sued, or may be authorised by the court or a judge to defend in such cause or matter, on behalf or for the benefit of all persons so interested."

Counsel for the plaintiff, with, I think, the full support of counsel for the defendants, accordingly invited me to entertain an application under this rule before the case commenced and to authorise one or more of the named defendants to defend this case in a representative capacity on behalf of all the other members of the club. In this connection I was referred to para. 931 in HALSBURY'S LAWS OF ENGLAND, Hailsham ed., vol. 4, p. 503 which deals with the position of members of a club and I will read out the material portion of it.

"The question how far the members of a club are liable in tort for the wrongful acts and omissions of the committee, or of officers or servants

of the club, is one in regard to which there is practically no authority. In the case of proprietary and incorporated clubs, it would seem that the ordinary rules as to the liability of a master or principal for the torts of his servants or agents apply. As to unincorporated members' clubs, the only reported case is one where the committee of a football club had employed an incompetent person to repair a stand for the accommodation of visitors to view matches, and a visitor, who had sustained injury by the collapse of the stand, brought an action for damages against the committee as representing the whole club. The county court judge at the trial amended the claim and gave judgment against the members of the committee personally, and on appeal the judgment was affirmed, on the ground that the members of the committee were the persons primarily liable."

A

B It will be seen that the case referred to—*Brown v. Lewis* (2)—is really of no assistance to me here.

I am satisfied that all the members of the City Livery Club have, both as employers of the plaintiff and as technical occupiers of the club premises, the same common interest in resisting the plaintiff's claim. I am told that the club membership is about two thousand, five hundred. It is clear that it would be impossible to have two thousand, five hundred, defendants as a practical measure, and it is equally clear that the club cannot be sued by name. For that proposition I refer to *London Asscn. for Protection of Trade v. Greenlands, Ltd.* (3). Another matter which is clear is that the only members of the club who can properly be sued by the plaintiff in these proceedings are those persons who were members of the club at the time of the plaintiff's accident on June 29, 1949. It is the fact, as is stated in the passage from HALSBURY'S LAWS OF ENGLAND which I have just read, that there is no direct authority on how far the members of an unincorporated members' club are liable in tort. I was referred to a passage in LORD MACNAGHTEN'S speech in *Taff Vale Ry. Co. v. Amalgamated Society of Railway Servants* (1900) (4) where he says ([1901] A.C. 438):

C

D

E

"Then, if trade unions are not above the law, the only remaining question, as it seems to me, is one of form. How are these bodies to be sued? I have no doubt whatever that a trade union, whether registered or unregistered, may be sued in a representative action if the persons selected as defendants be persons who, from their position, may be taken fairly to represent the body."

F

G

H

I was also referred to *Mercantile Marine Service Asscn. v. Toms* (5). In that case the Mercantile Marine Service Association, a body to which ships' officers belonged, sued three persons, namely, Toms, Moore and Grace on their own behalf and on behalf of all other members of another merchant service officers' association called the Imperial Merchant Service Guild. The subject-matter of the action was libel, and it was, therefore, an action in tort, and the plaintiffs sought authority from the court under R.S.C., Ord. 16, r. 9, to sue the three named persons in the representative capacity which I have already indicated. The Court of Appeal refused to make any order on the ground that the general body of members of the guild had not the same common interest in resisting the particular proceedings which were being brought. SWINFEN EADY, L.J., in the course of his judgment, said ([1916] 2 K.B. 246):

"I have great difficulty in seeing that in this case there are numerous persons having the same interest in this cause or matter within the meaning of the rule. The action is for libel, and the plaintiffs must prove who published the libel, and prima facie only those who have published it either by themselves or by their servants or agents or have authorised its publication are liable. The various members of this association may be in a wholly different position . . . In my opinion this rule is not

intended to apply to such a case as this. I think that the observation of LINDLEY, L.J., in *Temperton v. Russell* (6) ([1893] 1 Q.B. 438) is applicable to this case where he says—I am paraphrasing it to make it applicable to the present case—that the persons assumed to be represented by these three officers, the chairman, vice-chairman, and secretary, have no such interest as is contemplated by the rule. I asked during the course of the argument whether there is any authority in the case of an action of tort, because this is pure tort, for the application of this rule, and no case has been referred to, and so far as I know there is no case in the books in which it has been done. In *Wood v. McCarthy* (7) WILLS, J., referring to the observation of LINDLEY, L.J. on Ord. 16, r. 9, in *Temperton v. Russell* (6) ([1893] 1 Q.B. 438), said that the lord justice was referring to the well-established practice in the Court of Chancery, and was pointing out the distinction in that respect between actions of contract and actions of tort. LINDLEY, L.J., in the passage referred to by WILLS, J. said this: ‘This expression only extends, we think, to persons who have or claim some beneficial proprietary right, which they are asserting or defending in the cause or matter. The plaintiff in this case sues for damages, and the action . . . is founded on tort’. It is true that the limitation of the rule stated by LINDLEY, L.J., namely, that the expression ‘having the same interest in one cause or matter’ only extends to persons who have or claim some beneficial proprietary right which they are asserting or defending in the cause or matter, has been dissented from, and is no longer law. But apart from that the decision in *Temperton v. Russell* (6) is good law. In *Wood v. McCarthy* (7) WILLS, J., was of opinion that Ord. 16, r. 9, did not apply to actions of tort, and I am not aware that the rule has ever been applied in cases of the kind, and one can see many reasons why it should not be so applied. The judgments of BUCKLEY, L.J. and of KENNEDY, L.J., in *Walker v. Sur* (8) illustrate this. There are, no doubt, dicta in *Taff Vale Ry. Co. v. Amalgamated Society of Railway Servants* (1900) (4), especially in the speech of LORD MACNAGHTEN, which indicate that in a proper case it is possible that an order of that kind may be made; but I am quite satisfied that the present case is not one of those cases, and no order ought to be made here.”

It will be seen from that passage from the judgment of SWINFEN EADY, L.J., that the question whether or not it is possible in an appropriate case to make an order for defendants to be sued in their representative capacity under R.S.C., Ord. 16, r. 9, in an action for tort has given rise to some difference of judicial opinion. However, in this case I am quite satisfied that the two members of the City Livery Club whose names appear on the writ are persons who can fairly be taken, in the words of LORD MACNAGHTEN, “to represent the body” of club members, and they and all the other club members have the “same interest”, in the words of the rule, in resisting the plaintiff’s claim. I am, therefore, prepared to make the order under Ord. 16, r. 9, which I have been invited to make. I direct that the two named defendants be appointed to represent all the persons who were members of the City Livery Club on June 29, 1949, i.e., on the date of the plaintiff’s accident, and the writ and, accordingly, all other proceedings in the action, will be amended by adding the words “on June 29, 1949”, after the words “City Livery Club” in the description of the case. [His LORDSHIP then dealt with the case on its merits and held that the defendants had not been negligent and were not in breach of their common law duties to the plaintiff as a servant or invitee.]

Judgment for defendants.

Solicitors: *W. B. Blackwell & Co.* (for the plaintiff); *Kimber, Williams, Sweetland & Stinson* (for the defendants).

[Reported by MICHAEL MALONEY, Esq., Barrister-at-Law.]

*Re MILLS (deceased).*MIDLAND BANK EXECUTOR AND TRUSTEE CO., LTD. AND
ANOTHER *v.* BOARD OF GOVERNORS OF THE UNITED
BIRMINGHAM HOSPITALS AND OTHERS.

[CHANCERY DIVISION (Upjohn, J.), February 24, March 11, 1953.]

A *National Health Service—Hospital—Endowment of bed—Absence of recognised amount and scheme—Acceptance by governors of sum subject to conditions of will.*

By her will, dated May 19, 1922, A.M., who died on Mar. 5, 1929, bequeathed her residuary estate to her sister C.M. for life and after her death she bequeathed "such a sum as shall be necessary to endow a bed in the Children's Hospital Birmingham to the trustees of that institution upon trust for such endowment the bed to be known at all times as the 'Mills' bed . . ." On Feb. 10, 1950, C.M. died. Since the coming into force on July 5, 1948, of the National Health Service Act, 1946, there had been no recognised sum and no recognised scheme for endowing a bed in the hospital, although for thirty years before that date the hospital had required £1,000 to name a bed. The board of governors indicated their willingness in return for £1,000 to name a bed in the hospital in perpetuity, and that they would invest that sum in authorised investments and apply the income thereof for the purposes of the hospital.

D HELD: the existence of a scheme for the endowment of a bed such as that in force at the date of the death of the testatrix was not an essential condition of the gift, and, it being admitted that the amount of such a gift was never intended to be ascertained by reference to the average cost of maintaining a bed in the hospital, but was merely a conventional sum in return for which prior to July, 1948, the hospital had been prepared to name a bed, there was no difficulty, despite the absence of a published scheme, in ascertaining the appropriate amount of the legacy by asking the hospital authorities what sum they were prepared to accept subject to the conditions mentioned in the will, and, therefore, the bequest was a valid legacy of £1,000.

E AS TO PRINCIPLES OF CONSTRUCTION OF A WILL, see HALSBURY, Hails-ham Edn., Vol. 34, pp. 187-198, paras. 240-253; and FOR CASES, see DIGEST, Vol. 44, pp. 530-550, Nos. 3472-3685.

F Cases referred to:

- (1) *Re Morgan's Will Trusts*, [1950] 1 All E.R. 1097; [1950] Ch. 637; 2nd Digest Supp.
- (2) *Re Ginger*, [1951] 1 All E.R. 422; [1951] Ch. 458; 2nd Digest Supp.
- (3) *A.-G. v. Belgrave Hospital*, [1910] 1 Ch. 73; 79 L.J.Ch. 75; 101 L.T. 628; 8 Digest 300, 784.

G ADJOURNED SUMMONS to determine, inter alia, whether, on the true construction of the will of Ann Mills, deceased, and in the events which had happened, under a gift contained in the will of "such a sum as shall be necessary to endow a bed in the Children's Hospital Birmingham . . . the bed to be known at all times as the 'Mills' bed in memory of my father, mother and brother", the board of governors of the United Birmingham Hospitals were entitled to receive any, and, if so, what, sum of money as a legacy.

H *Grove* for the plaintiffs, the trustees of the will.

J. W. Mills for the first defendants, the board of governors of the United Birmingham Hospitals.

Denys B. Buckley (Clauson with him) for the second defendant, the Attorney-General.

R. J. S. Thompson for the third and fourth defendants, persons beneficially interested under the will of Ann Mills.

UPJOHN, J.: This summons raises points of construction on the will of Ann Mills, who died on Mar. 5, 1929, and on the will of Clara Mills, a sister of Ann, who died on Feb. 10, 1950. Ann Mills's will, which was dated May 19, 1922, so far as relevant is in these terms:

"I devise and bequeath all other my real and personal estate whatsoever and wheresoever unto and to the use of my said sister Clara Mills during her life, and after the decease of the said Clara Mills I bequeath such a sum as shall be necessary to endow a bed in the Children's Hospital Birmingham to the trustees of that institution upon trust for such endowment the bed to be known at all times as the 'Mills' bed in memory of my father, mother and brother."

She gave the rest of her estate on trust for such persons as Clara should by deed or will or codicil appoint. Clara's will, which was dated May 7, 1946, was a more complicated document. By cl. 8 Clara gave no less than seventy-four legacies of varying amounts which totalled between £26,000 and £27,000. Among those legacies was one in these terms:

"To Birmingham Children's Hospital such a sum as with the amount directed to be given by the will of my late sister Ann (otherwise Annie) Mills will make the sum of £1,500."

Having regard to the very large number and amount of the legacies which Clara gave, there will, I understand, have to be some abatement in the amount of the legacies given by her will. I should add that the will exercised the power of appointment given to Clara by the will of her sister Ann.

The Children's Hospital, Birmingham, is a well known hospital. There is no doubt about its identity. Its strict title, until the coming into force of the National Health Service Act, 1946, was the Children's Hospital, King Edward VII Memorial, Birmingham, but it was commonly known as the Children's Hospital. Since the coming into force of that Act, the work of the hospital has been carried on in the same building. It is conceded by counsel for the third and fourth defendants that, having regard to the terms of the National Health Service Act, 1946, s. 60, and to the authorities of *Re Morgan's Will Trusts* (1), a decision of the Court of Appeal, and *Re Ginger* (2), a decision of ROXBURGH, J., no difficulty arises on the true construction of Ann's will, except for the vital circumstance that no fixed sum is mentioned in the will as being given to endow a bed. Had it been a gift of a fixed sum, counsel for the third and fourth defendants concedes that it would be valid and effectual, provided, of course, that the successors of the hospital (who are the board of governors of the United Birmingham Hospitals) were prepared to accept the gift on the terms and conditions on which it was given. It is further conceded that a gift of a sum to endow a bed does not, again having regard to the authorities, mean a gift of a sum sufficient to maintain and "service" a particular bed in a particular place in a hospital. It does not even mean a gift of a sum ascertained by capitalising the total annual expenses of the hospital divided by the number of beds. It is a purely conventional sum and there was no difficulty in ascertaining it before the coming into force of the National Health Service Act, 1946, because this hospital, like many other hospitals, held themselves out as being ready to accept legacies to endow a bed—i.e., in effect, to name it—for £1,000. It is conceded that, quite apart from the Act, when a person gave a sum to endow a bed, it meant no more than that the sum was given to the hospital, the capital to be treated as part of the permanent funds of the hospital, the income to be expended for the general purposes of the hospital, subject to such condition as might be found in the will of the testator with regard to naming a bed. In some cases, the hospital was willing to comply with a condition whereby the testator's executors had the right to nominate the persons to occupy the bed, as in *A.-G. v. Belgrave Hospital* (3).

- Counsel for the third and fourth defendants submits that, having regard to the passing of the National Health Service Act, 1946, it is now impossible to give effect to the gift, there being no sum mentioned, because the gift contemplates a state of affairs where there is a scheme in force at the time that the gift takes effect—that is, in this case, the death of Clara in 1950—whereby it is recognised that any charitably minded person can, for a sum advertised by the hospital, endow a bed and name it. There must, he says, be a recognised sum and a recognised scheme, and he points out that since 1948 the evidence shows that there has been no recognised sum and no recognised scheme. I allowed the matter to stand over for further evidence to be filed on this point, and it is clear from the affidavits which have now been filed that the appropriate board of governors have not since 1948 had to consider the question what sum they would require in order to carry out the condition of holding that sum as a part of the permanent investments of the hospital and naming a bed in the hospital. The board of governors of the United Birmingham Hospitals say that they think that the proper sum to ask for naming a bed in the hospital now—i.e., in March, 1953—is £1,000, and if they receive that sum, they will undertake to name in perpetuity a bed to be known as “The Mills Bed”, in memory of the father, mother and brother of Ann Mills in the Children’s Hospital at Ladywood in the city of Birmingham, or any other building to which the Children’s Hospital may be removed, and they are prepared, further, to undertake to invest the said sum in investments for the time being authorised by law and to apply the income for purposes of hospital services rendered by the Children’s Hospital at Ladywood or in any other building to which it may be removed.
- The whole question on the will of Ann Mills that I have to consider is whether the testatrix contemplated that there would be in existence at her death a recognised scheme and a recognised sum readily ascertainable by any person charitably minded, or whether that was not an essential condition of the gift. On the whole, I have come to the conclusion that it is not such an essential condition. The gift is of “such a sum as shall be necessary to endow a bed in the hospital”. Once it be admitted (as it is) that that is not a gift to be ascertained by reference to the actual cost of running the hospital, but is a conventional sum which used to be asked by the hospital as a condition for naming a bed, then I see no difficulty in ascertaining that sum by asking the hospital authorities today what sum they are prepared to accept on the conditions I have already mentioned. That sum in the present case is £1,000. It was said that that is the evidence as of today, but that there is no evidence as to what the hospital authorities would have thought necessary in 1950. Again, I do not think that is, in the circumstances of this case, a tenable argument. For thirty years before 1948 the old hospital had asked for £1,000 to name a bed. On the first occasion which has arisen since 1948—i.e., this occasion—the board of governors are asking for the same amount. I cannot doubt that, had they directed their minds to the question in 1950, they would have asked for £1,000. Accordingly, it seems to me that it is possible to give effect to this gift, and in the result it is a gift of £1,000, the hospital authorities giving the undertaking which I have already stated at length. In the circumstances, £1,000 having been directed in effect to be given by the will of Ann, £500 remains to be given by the will of Clara. That is a gift to the hospital authorities for their general purposes and without any conditions attached, and the latter sum of £500 is, of course, subject to abatement.

Order accordingly.

Solicitors: *P. F. Walker*, agent for *Collis, Higgs & Sons*, Stourbridge (for the plaintiffs); *Burton, Yeates & Hart*, agents for *Johnson & Co.*, Birmingham (for the first defendants); *Treasury Solicitor* (for the second defendant); *Edwin Coe & Calder Woods* (for the third and fourth defendants).

[*Reported by R. D. H. OSBORNE, Esq., Barrister-at-Law.*]

Re HARROW LITERARY INSTITUTION.

[CHANCERY DIVISION (Vaisey, J.), March 10, 1953.]

Literary and Scientific Institution—Application of funds on lapsing of activities.

The applicants were the trustees of funds representing the proceeds of sale of the property of a literary institution governed by the provisions of the Literary and Scientific Institutions Act, 1854. In 1894 the activities of the institution ceased and it purported to be dissolved, but the three-fifths majority required by s. 29 of the Act for a dissolution was not obtained. Later, the property of the institution was sold, the proceeds being vested in trustees. On an application by the trustees for an order as to the application of the money,

HELD: no order for dissolution could be made as the institution had already dissolved itself, but, on the assumption that the institution had ceased to exist, the trustees would be authorised to transfer the funds to the local authority for use for providing and maintaining a local museum.

FOR THE LITERARY AND SCIENTIFIC INSTITUTIONS ACT, 1854, ss. 29 and 30, see HALSBURY'S STATUTES, Second Edn., Vol. 14, pp. 23, 24.

MOTION for an order (i) that the Harrow Literary Institution be dissolved, and (ii) that the trustees be authorised to transfer the sums of stock and cash specified in the schedule to the motion (those being the whole of the assets of the institution) to the Middlesex County Council.

The Harrow Literary Institution was founded in 1847. By 1894, or thereabouts, its useful life had come to an end and a purported dissolution took place, but the requisite majority of not less than three-fifths of the members specified by s. 29 of the Literary and Scientific Institutions Act, 1854, was not obtained. In or about July, 1894, the property of the institution was sold, the proceeds, amounting to about £2,000, being vested in trustees, and since that date the institution had carried on no further activities and had remained dormant. In October, 1951, the trustees in whom the funds (represented by three share investments and a sum of cash) were then vested applied to the judge of the Willesden County Court for an order for the application of the funds under s. 30 of the Act. The learned judge held that he could not exercise jurisdiction in the matter since it was not expressly conferred on him by the terms of the Act, and he adjourned the application generally. The trustees now applied to the Chancery Division.

D. E. P. Evans for the trustees.

VAISEY, J.: This is an originating motion of a somewhat unusual character. It relates to the affairs of the Harrow Literary Institution which has long since been, if not defunct, at any rate, dormant. It is said to have been founded in 1847 and I think there is no doubt that it is an institution which comes within the provisions of the Literary and Scientific Institutions Act, 1854. Such organisations were useful and popular in former days, but times have changed, and it appears that by some time in 1894 the period of useful life of this institution had come to an end. Its property has been sold, no person who was a member is known to exist, and all that remains are three small investments and a sum of cash, which represent the proceeds of sale of its property and certain accumulated income.

The position now is that three persons who admit that they are trustees of this property are seeking directions as to what they are to do with it. It is difficult to find any very clear guidance on the point in the Act of 1854 because the purported dissolution, which took place many years ago, was not a dissolution within the meaning of the Act, inasmuch as the necessary majorities for a dissolution were not obtained.

Section 29 of the Act appears to place the discretion as to dissolution and matters relating to dissolution in the judge of the county court of the district, but for the reason which I have indicated it seems that what is now sought to be done is not within the Act at all. The learned judge of the Willesden County Court has come to the conclusion that he ought not to attempt to exercise jurisdiction in this matter, as it is not expressly conferred on him by the terms of the Act. It is now suggested that this court, having a wider jurisdiction, can supply the deficiency and make an order for the purposes which I have mentioned.

This motion, therefore, comes before me on the application of the trustees, Mr. Wasbrough and Mr. Hewlett, who are solicitors, and Mr. Laborde, who is a schoolmaster, and they ask, first, for an order that the institution be dissolved. I do not think I can make that order as I think that it has dissolved itself and has vanished into thin air, but I will order, on the assumption that the institution no longer exists, that the trustees be authorised to transfer the sums of stock and cash specified in the schedule to the notice of motion (those being the whole of the assets of the institution) to the county council of the administrative county of Middlesex. The purpose for which it is proposed to place the funds in the hands of that public authority is clearly within the sense and meaning of the Act of 1854.

As I have said, these institutions, though they did good service in former days, have now outlived their usefulness, but one of the objects which I think they were intended to secure was that an interest should be taken by inhabitants of particular places in the history and antiquities of their native town or district. Therefore, the proposal, with which I have the fullest sympathy, is that the county council will hold these funds for the purpose of contributing to the cost of providing, equipping and maintaining a Harrow museum in one or more of the rooms of a county library. Such a library is at present carried on in a temporary building, I am told, and there is an intention to establish it in a permanent building at Harrow. I can imagine no better way of disposing of the money of the institution and I think that the county council can be safely entrusted with the duty of applying it in the best possible way for the purpose which I have indicated.

Order accordingly.

Solicitor: *Sir Clifford Radcliffe*, clerk to the Middlesex County Council (for the trustees).

[*Reported by MISS PHILIPPA PRICE, Barrister-at-Law.*]

ROSENFELD *v.* NEWMAN AND OTHERS.

[QUEEN'S BENCH DIVISION (Parker, J.), March 11, 12, 1953.]

Estoppel—Res judicata—Possession claim—Claim in county court on ground of trespass by defendants, and, alternatively, assignment to them without landlord's consent—Claim in trespass beyond jurisdiction of county court—Election to proceed on alternative ground—Subsequent claim in trespass in High Court.

In 1940 the plaintiff, who was the owner of a dwelling-house, let it on separate tenancies to B. and T. Thereafter the defendants came to live on the premises with B. and T. By 1946 both B. and T. had left the premises, leaving in possession the defendants who continued to pay the rent. On discovering the position in 1951 the plaintiff brought an action in the county court for possession on the ground (i) that the defendants were trespassers, and, alternatively, (ii) that, if the defendants were within the protection of the Rent and Mortgage Interest Restrictions Acts, the premises had been unlawfully assigned or sub-let to them by the original tenants without the plaintiff's consent within the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, sched. I, para. (d). On the trial of the action it was found that the annual value of the property was over £100, and, accordingly, the county court judge had no jurisdiction so far as the action was based in trespass, and the plaintiff then elected to proceed on the alternative ground, but judgment was given for the defendants. In a subsequent action in the High Court for possession on the ground of trespass,

HELD: (i) if and so far as the county court judge found that the defendants were trespassers, that could not amount to *res judicata* between the parties because he had no jurisdiction so to find and that matter had been abandoned as the basis of the claim before him.

(ii) in the absence of an agreement between the parties that the abandonment in the county court of the claim for trespass was to be without prejudice to the plaintiff's right to raise it again at a later stage, the abandonment amounted to a final election, and, consequently, the plaintiff was estopped from calling evidence before the High Court that the defendants were trespassers.

Case referred to:

- (1) *Scarf v. Jardine*, (1882), 7 App. Cas. 345; 51 L.J.Q.B. 612; 47 L.T. 258; 4 Digest 450, 4069.

ACTION for possession of a dwelling-house on the ground of trespass.

The plaintiff was the owner of residential premises at 129, Parnell Road, Bow, and in 1940 he let them on separate tenancies to two tenants named Ball and Tracey who came to live in the premises with their families. In 1941 the first two defendants, Mr. and Mrs. Newman (senior), came to the premises and at first occupied one room on the ground floor with the Ball family. Later, the Newmans' daughter-in-law came to live with the Traceys upstairs. In 1942 the Ball family left the premises, but the Newmans continued to reside there. After the war, the Newmans' son, Albert Newman, came to join his wife. In 1946 the Traceys, except for the mother, who stayed till she died in January, 1951, left the premises. Rent continued to be paid in respect of the whole premises by the Newmans and was accepted till June, 1951. It was contended on behalf of the defendants that the rent collector had been informed that the Balls and the Traceys had left and that he had continued to collect the rent from the defendants.

S. W. Magnus for the plaintiff.

Buckee for the defendants.

PARKER, J., stated the facts and continued: This case is rendered difficult by reason of what happened in November, 1951, when proceedings in the Bow County Court were commenced by the plaintiff against the defendants. By his particulars of claim the plaintiff alleged that the defendants were trespassers, and that the annual value of the property did not exceed £100. If the latter allegation were true, the county court judge could deal with the matter. To that claim the defendants, in effect, pleaded that they had become tenants, and thereupon the plaintiff amended his particulars of claim and added para. 4 which originally read as follows:

"If, contrary to the plaintiff's contention, the defendants are protected by the Increase of Rent and Mortgage Interest (Restrictions) Acts, the plaintiff reasonably requires possession of the said dwelling-house as a residence for himself."

That was a hopeless ground on the facts, and it was amended by substituting:

"The plaintiff relies on sched. I to the [Rent and Mortgage Interest Restrictions (Amendment) Act] 1933. On a date unknown to the plaintiff one of the original tenants, without the consent of the plaintiff, sub-let or assigned the whole of the premises to the defendants or one of them."

It turned out that the annual value of the property was over £100, and, accordingly, when the matter came before the learned county court judge he had no jurisdiction to determine the claim so far as it was based in trespass. Thereupon (to quote the words set out in the notes of the county court judge):

"On the objection of counsel for the defendants that the rent exceeds £100 a year and that I have no jurisdiction, counsel for the plaintiff elects to proceed on the alternative ground set out in para. 4 of the amended particulars of claim."

The matter proceeded and evidence was called, and in the end judgment was given for the defendants with costs. In giving his reasons the learned county court judge said:

"Owing to lack of jurisdiction I am compelled to hold that the plaintiff's claim fails as there is no evidence that the defendants are contractual or statutory tenants."

I find it very difficult to ascertain what was passing through the learned county court judge's mind, but clearly there was some confusion, and before me both sides in effect rely on what took place before the learned county court judge as creating estoppels. Counsel for the plaintiff submits that it has already been determined between the parties that the defendants are not tenants, and are, therefore, trespassers. He also says that the defendants cannot before me adduce evidence that they are tenants because it is *res judicata* between the parties that they are trespassers, and, accordingly, that there is no defence to his claim. Counsel for the defendants, on the other hand, replies that it is the plaintiff who is estopped because, as appears from the learned county court judge's note, he, by his counsel, elected, and (it is said) finally elected, to abandon his claim in trespass and to proceed on the basis that the defendants were tenants, and that, having so finally elected, on the principle laid down in a number of cases (in particular, *Scarfe v. Jardine* (1) (7 App. Cas. 360)), the plaintiff cannot now come forward and seek to assert the remedy which he has elected to abandon.

So far as concerns the plaintiff's contention, the judgment was a judgment for the defendants which, on the issue raised in the amended para. 4 of the particulars of claim, might be based on a finding under the Rent Restrictions Acts that it was unreasonable to grant possession or on some other ground. If, however, one looks at the reasons (as counsel for the plaintiff says I am entitled to do) it does appear that the learned county court judge was holding

that the claim failed because he had no jurisdiction, the defendants being trespassers. It seems to me that, if and in so far as the learned county court judge did find that these defendants were trespassers, that could not amount to *res judicata* between the parties because it was the very thing which he had no jurisdiction to find and which was not the basis of the claim before him, and, indeed, was a ground that had been specifically abandoned.

I turn to the defendants' contention as regards estoppel. This is a simple one, namely, that the claim which is now raised was specifically abandoned before the county court judge. The learned county court judge records it as an "election", and counsel for the defendants (who was there) assures me that he understood it, and it was understood, as a final election, and, indeed, his submissions to the learned county court judge at the end of the case bear out entirely what he tells me because he there took his stand on the basis that the plaintiff was proceeding on the alternative claim, that is, on the assumption and admission that these defendants were tenants. It seems to me that that must be the basis on which the matter proceeded. It is suggested that really all that took place was that counsel for the plaintiff said, in effect: "I now find that the annual value is over £100. Therefore, I cannot proceed before this court in a claim for trespass, but, if I am right under the Rent Restrictions Acts, there is an end of the matter, and I ask you, the county court judge, to decide that issue without prejudice to my being able to pursue my claim in trespass should you be against me on the issue under the Rent Restrictions Acts". I do not think that such a course can be taken except by agreement between the parties and with the consent of the judge, and there is no sign of any agreement between counsel for the parties that the county court judge should proceed on that basis. So far from that, there is clearly expressed in the notes, and it was clearly understood by counsel for the defendants, as appears from his submission, that, so far from there being an agreement between the parties as to what the learned county court judge should do, the plaintiff abandoned his claim in trespass and finally elected to treat these defendants as tenants. I agree that on that basis it is difficult to see what was passing through the mind of the county court judge, but it seems to me perfectly clear here that there was a final election, and, that being so, though it may not have been intended and may produce difficulties for the landlord, I do not think in the circumstances that it is open to the plaintiff to call evidence before me that these defendants are trespassers. I should add that, if I am wrong, I should be forced to hold on the evidence that the defendants at no time have become tenants of the plaintiff, but in the view I take on the points with regard to the estoppel that issue does not arise. In these circumstances this claim must be dismissed.

Judgment for defendants.

Solicitors: *Bennett, Hobson & Co.* (for the plaintiff); *Breeze, Benton & Co.* (for the defendants).

[*Reported by* MICHAEL MALONEY, ESQ., *Barrister-at-Law.*]

DAVID TAYLOR & SON, LTD. v. BARNETT.

[COURT OF APPEAL (Singleton, Denning and Hodson, L.J.J.), March 3, 4, 1953.]

Arbitration—Setting aside award—Misconduct by arbitrator—Award enforcing illegal contract—Arbitration Act, 1950 (c. 27), s. 22 (1), s. 23 (2).

A By a contract in writing, dated Feb. 27, 1952, the seller agreed to sell and the buyers agreed to buy ten thousand cases of Irish stewed steak at 2s. 4d. per pound, delivery to be between April and July, 1952. On Feb. 27, 1952, there was in force an order prohibiting the purchase or sale of any such meat at a price exceeding a maximum of 2s. 0½d. per pound. On Mar. 16, 1952, by another order the maximum price was raised to 2s. 4d. per pound. The seller failed to make delivery, and the dispute which arose was submitted to arbitration under a clause in the contract. The illegality of the contract by reason of the price provided for therein being in excess of the maximum price then prevailing was brought to the notice of the umpire, but he made an award in favour of the buyers.

B
C
D HELD: the parties could not contract lawfully for future deliveries at a price exceeding the maximum existing at the date of the contract, even though at a date before the deliveries were due to begin the law was altered and the amount of the maximum price was raised to that of the contract price, and, therefore, the contract was illegal; it was the duty of the umpire to decide questions submitted to him according to the legal rights of the parties and so to decline to make an award enforcing an illegal contract, and not in accordance with what he considered fair and reasonable in the circumstances; the proper course was for the court to set aside the award under s. 23 (2) of the Arbitration Act, 1950, and not to remit it to the umpire for re-consideration under s. 22 (1) since there was only one possible conclusion to which he could come, namely, that the contract was illegal.

Re Boks & Co. & Peters, Rushton & Co. ([1919] 1 K.B. 491), distinguished.

E FOR THE ARBITRATION ACT, 1950, ss. 22 (1), 23 (2), see HALSBURY'S STATUTES, Second Edn., Vol. 29, pp. 107, 109.

Cases referred to:

- (1) *Hodgkinson v. Fernie*, (1857), 3 C.B.N.S. 189; 27 L.J.C.P. 66; 140 E.R. 712; 2 Digest 527, 1645.
- (2) *Champsey Bhara & Co. v. Jivraj Balloo Spinning & Weaving Co.*, [1923] A.C. 480; 92 L.J.P.C. 163; 129 L.T. 166; Digest Supp.
- (3) *Smith, Coney & Barrett v. Becker, Gray & Co.*, [1916] 2 Ch. 86; 84 L.J.Ch. 865; 112 L.T. 914; 2 Digest 379, 420.
- (4) *Wohlenberg v. Lageman*, (1815), 6 Taunt. 251; 128 E.R. 1031; 2 Digest 488, 1307.
- (5) *Delver v. Barnes*, (1807), 1 Taunt. 48; 127 E.R. 748; 2 Digest 526, 1628.
- (6) *Re Boks & Co. and Peters, Rushton & Co.*, [1919] 1 K.B. 491; 88 L.J.K.B. 351; 120 L.T. 516; Digest Supp.
- (7) *Hamlyn v. Betteley*, (1880), 6 Q.B.D. 63; 50 L.J.Q.B. 1; 2 Digest 326, 101.
- (8) *Langton v. Hughes*, (1813), 1 M. & S. 593; 105 E.R. 222; 12 Digest, Replacement, 302, 2327.

APPEAL from an order of LORD GODDARD, C.J., dated Oct. 29, 1952.

H By a contract in writing, dated Feb. 27, 1952, the seller, J. T. Barnett, trading as the Barnett Trading Co., agreed to sell, and the buyers, David Taylor & Son, Ltd., agreed to buy, ten thousand cases of Irish stewed steak at 2s. 4d. a pound, delivery to be between April and July, 1952. At that date there was an order in force (Meat Products and Canned Meat (Control and Maximum Prices) Order, 1948 (S.I., 1948, No. 1509)) which, as amended by the Meat Products and Canned Meat (Amendment No. 3) Order, 1951 (S.I., 1951, No. 1317), prohibited the sale or purchase of any such meat at a price exceeding the

maximum of 2s. 0½d. a pound. On Mar. 16, 1952, by the Meat Products Order, 1952 (S.I., 1952, No. 507), the maximum price was raised to 2s. 5d. a pound. The seller failed to make delivery and the dispute which arose was referred to arbitration under an arbitration clause in the contract. One arbitrator was appointed by each side, and, as they failed to reach an agreement, they appointed an umpire who, on Aug. 21, 1952, made an award that the seller should pay to the buyers the sum of £11,000 and directed that the costs of the arbitration should be paid by the seller. On Aug. 26, 1952, the buyers gave notice of an application to the master seeking leave to enforce the award. On Sept. 1, 1952, the application came before the master who adjourned it to give the seller an opportunity of moving to set aside the award. On Oct. 1, 1952, notice of motion was served by the seller, and on Oct. 29, 1952, the motion to set aside the award was heard by LORD GODDARD, C.J. The motion was on two grounds, namely, (i) that the award was bad on the face of it in that it incorporated by reference and purported to enforce the contract between the parties although it was illegal under the provisions of the order of 1948 (as amended); (ii) that the umpire misconducted himself in law in that he failed to take into account the illegality of the said contract. LORD GODDARD, C.J., refused the motion, and the seller appealed.

Beyfus, Q.C., and *S. Bolton* (with them *S. Shaw*) for the seller.
Levy, Q.C., and *Pearl* for the buyers.

SINGLETON, L.J., stated the facts and continued: The position relating to this matter was stated thus by WILLIAMS, J., in *Hodgkinson v. Fernie* (1) (3 C.B.N.S. 202):

"The law has for many years been settled, and remains so at this day, that, where a cause or matters in difference are referred to an arbitrator, whether a lawyer or a layman, he is constituted the sole and final judge of all questions both of law and of fact . . . The only exceptions to that rule, are, cases where the award is the result of corruption or fraud, and one other, which, though it is to be regretted, is now, I think, firmly established, viz., where the question of law necessarily arises on the face of the award, or upon some paper accompanying and forming part of the award. Though the propriety of this latter may very well be doubted, I think it may be considered as established."

In *Champsey Bhara & Co. v. Jivraj Balloo Spinning & Weaving Co.* (2) LORD DUNEDIN said ([1923] A.C. 487):

"An error in law on the face of the award means, in their Lordships' view, that you can find in the award or a document actually incorporated thereto, as for instance a note appended by the arbitrator stating the reasons for his judgment, some legal proposition which is the basis of the award and which you can then say is erroneous."

Applying those tests, I find it impossible to say that this short award is bad on the face of it.

The second point raised by the seller is that the umpire misconducted himself in law in that he failed to take into account the illegality of the contract into which the parties had entered. As DENNING, L.J., pointed out in the course of the argument, if an arbitrator assumes an excess of authority, he may be guilty of misconduct in the arbitration, and I think that counsel for the buyers agreed that, if an arbitrator recognises that a contract is illegal, and thereafter proceeds to make an award on a dispute arising under that contract, he is guilty of what in law is misconduct.

In *Smith, Coney & Barrett v. Becker, Gray & Co.* (3) the plaintiffs attempted to obtain an injunction to restrain the other party to a contract going to arbitration on a dispute which had arisen, one of the grounds being that the contract

between the parties was illegal. The attempt to obtain the injunction failed because the court did not find that the contract was illegal. WARRINGTON, J., said (112 L.T. 916):

A "I think that the plaintiffs in order to succeed must show that the contract for arbitration with the submission was invalid. For that purpose I think that I am bound to look at the date at which the contract was made, and to see whether at that date there is any reasonable ground for saying that the contract was invalid. Was that so? For that purpose it is necessary to turn to the contract and see what it really is."

The Court of Appeal upheld the decision. LORD COZENS-HARDY, M.R., in his judgment, said (*ibid.*, 917):

B "The plaintiffs in this action sought a declaration that the contract which I have just read was illegal by reason of the war. Of course, if it was illegal, then any question of arbitration under the contract would fall with it."

In *Wohlenberg v. Lageman* (4) SIR VICARY GIBBS, C.J., said (6 Taunt. 255):

C "If an arbitrator acts directly against law, the court will set aside the award; but if, in a matter mixed of law and fact, he mistakes some of the points, they will not therefore set aside an award . . ."

D It is submitted by counsel for the seller that the umpire, in basing his award on an illegal contract, acted directly against the law, and in that sense was guilty of misconduct. As an alternative it is contended that, if one party to an arbitration puts before the arbitrator a contract which is illegal and asks the arbitrator to act on it, and he does so and makes an award, then that award is improperly procured.

Mr. Jack Toby Barnett, the seller, swore an affidavit, and in para. 8 thereof he said:

E "The said agreement which . . . is by reference incorporated in the umpire's said award is illegal and void in that the price agreed for the goods bought and sold thereunder exceeds the maximum price permitted under the relevant provisions of S.I., No. 1317 of 1951. I was not at the date of the said agreement or the hereinbefore mentioned reference to arbitration aware of the said statutory instrument or any provisions thereof and did not realise that the [Barnett Trading Co.] had entered into an illegal contract."

F I am not sure that it is material, but I do not think the umpire accepted as a fact that this gentleman who claims to be the sole proprietor of a firm of general produce merchants, importers and exporters in the city of London did not know that there was any such order. The contract states the price of these goods at 2s. 4d. per pound. We have before us several statutory instruments.

G The first which is material is No. 1509 of 1948, and that provides in Part III, para. 13:

"A person shall not sell or buy any imported canned meat at a price exceeding the maximum price applicable in accordance with the provisions of sched. IV to this order."

H The definition part, i.e., Part I, para. 1, contains these words:

"'Buy' includes offer or agree to buy and 'sell' includes offer or agree to sell or expose for sale";

and Part IV, para. 24, provides that infringements of the order are offences against the Defence (General) Regulations, 1939. It is an offence, therefore, if a person sells or offers to sell, or buys or agrees to buy, imported canned meat at a price exceeding the maximum price which is stated in sched. IV. In 1948 the maximum price as between wholesalers was 1s. 5d. per pound, that

price was raised to 2s. 0 $\frac{3}{4}$ d. on a sale between wholesalers by the later statutory instrument, which applies in this case, No. 1317 of 1951, so that at the time this contract was entered into the maximum price was 2s. 0 $\frac{3}{4}$ d., whereas the price under the contract was 2s. 4d. per pound. In my judgment, that is contrary to the terms of the two orders read together, and, accordingly, the contract entered into between the parties was an illegal contract. I do not think that that has been seriously challenged. Delivery was to be between April and July, but I do not think that affects the question, for there was clearly an offer and agreement to buy, on the one hand, and an offer and agreement to sell, on the other hand, at 2s. 4d. per pound.

The arbitrator appointed by the seller was Mr. Reginald Francis Newman, and he deposes to the proceedings which took place before the umpire on Aug. 21, 1952. He says that the two arbitrators were engaged with the umpire for about an hour. Mr. Mischeff, the other arbitrator, put his case to the umpire, and at the conclusion Mr. Newman presented his case on behalf of the seller. The first point he raised was that the contract was illegal on the ground that the price for the steak stated in the contract exceeded the fixed price laid down by the statutory instrument controlling meat products. Not only did he describe the contract as illegal, but he also submitted that the contract was impossible to perform. The umpire heard him, but did not make any comment or observation on that aspect of his submission. The illegality of the contract was, therefore, brought to the notice of the umpire and it was not challenged by the other side. When the point was taken that this was an illegal contract it was the duty of the umpire to pay attention to that fact.

The duty of an arbitrator or umpire is to decide the questions submitted to him according to the legal rights of the parties, and not according to what he may consider fair and reasonable in the circumstances. It seems to me that the umpire in this case thought it fair and reasonable that the seller should pay the loss incurred by his breach of contract, and that he cannot have had any regard for the fact that the contract was an illegal contract. There cannot be any dispute as to that. If this be misconduct in law, the proper course is to move to set aside the award. The court is given certain powers under s. 22 and s. 23 of the Arbitration Act, 1950. Section 22 (1) is in these terms:

"In all cases of reference to arbitration the High Court or a judge thereof may from time to time remit the matters referred, or any of them, to the re-consideration of the arbitrator or umpire."

Counsel for the seller submits that we can and ought to do that if we do not consider it right to proceed under s. 23 (2), which reads:

"Where an arbitrator or umpire has misconducted himself or the proceedings, or an arbitration or award has been improperly procured, the High Court may set the award aside."

Counsel for the buyers, in his submission, said that the award could be treated as a piece of waste paper in that he would not get leave to enforce it in any event, and he might never bring an action on it. I do not think it is right that the award should be so treated. I thought at one time that the proper course for this court to adopt would be to remit the case under s. 22 (1) of the Act to ascertain whether or not the umpire had considered the question of the illegality of the contract. I feel, however, that a layman or a lawyer looking at this contract with the relevant statutory instrument must see that it is an illegal contract. If, notwithstanding that, the umpire thought it right to make an award because, in his view, the buyers ought to pay, the court ought to set aside the award for the following reasons. If we remitted the matter to the umpire to ascertain whether he considered the question of illegality or not it would not carry the matter any further. The point was raised before him,

and he had the opportunity to consider it. If we left the case to stand as it is, as counsel for the buyers asked, and dismissed this motion, it would mean that there would be another application to the master, and probably an action on the award. In the circumstances I think it is the duty of the court to set aside the award, not on the ground that it is bad on the face of it, but on the second ground.

- A **DENNING, L.J.:** Counsel for the seller has moved before us to set aside the award on the ground that the contract on which it was based was illegal because the price exceeded the maximum ruling at that time. Counsel for the buyers suggested that the contract was not illegal and he said that, if the parties had received advance information that the maximum price was to be increased, they might lawfully contract for future deliveries at a price higher than the existing maximum. I do not think so. The regulation definitely forbids any agreement to buy or sell at a price in excess of the maximum and that must invalidate agreements for future delivery as well as those for present delivery. No advance information of an impending change can alter the law; it is only when the law itself is altered that the parties can safely act on it. The contract, therefore, was plainly illegal. Counsel next suggested that, if an arbitrator or an umpire had knowledge of an illegality, he could if he pleased turn a blind eye to it, and, despite the fact that the contract was illegal, he could award damages for breach of it if he thought it was fair and reasonable so to do. It is clear that counsel carried his argument thus far, because when I put to him the case of a building contract which was illegal for want of a licence he said that the umpire could award payment to the builder if he considered it fair that he should be paid. Counsel sought to support his argument by reference to two cases, *Delver v. Barnes* (5) and *Wohlenberg v. Lageman* (4), but those cases do not support his proposition, and I do not think we should countenance it. There is not one law for arbitrators and another for the court, but one law for all. If a contract is illegal, arbitrators must decline to award on it just as the court would do. Counsel finally contended that the procedure was at fault, that the award should not be set aside, but that the question of illegality should be decided in an action on the award. That might well be a proper course if the illegality depended on evidence, but I cannot see how any evidence could cure this illegality.
- C
- D
- E

- In my opinion, the court has jurisdiction to set aside an award based on an illegal contract. It may be that the umpire, not being a lawyer, did not realise that it was illegal. It may be that the buyers who claim damages themselves did not know it, and in that sense there was no misconduct or improper procurement, but, nevertheless, the award cannot stand. *An arbitrator has no jurisdiction or authority to award damages on an illegal contract. It is obvious that the court would not itself enforce such an award and equally it should not allow it to stand. Counsel for the seller suggested that, if we were in doubt about misconduct or improper procurement under the Arbitration Act, 1950, s. 23 (2), we might remit the award under s. 22 (1) for re-consideration. I agree that we might do so, but I see no point in remitting the award to the umpire when there is only one conclusion to which he could come, namely, that the contract was illegal. In my judgment, the award should be set aside here and now, and there should be no further costs incurred.
- F
- G

- H **HODSON, L.J.:** I agree. The first point taken was that the award was bad on the face of it in that it incorporated by reference an illegal contract. On that point I agree with the learned Lord Chief Justice that there is no error in law on the face of the award which entitles the seller to have it set aside. In the first place, there is no incorporation by reference sufficient to identify the document said to be an illegal contract, and, even if there had been identification of that document, incorporation is not brought about by mere reference, as is shown by a decision of the Privy Council, *Champsey*

Bhara & Co. v. Jivraj Balloo Spinning & Weaving Co. (2). Further, even if it were incorporated, as counsel for the buyers pointed out, the contract is not illegal on the face of it, because the price quoted is not shown to be higher than the maximum price merely by reference to the contract itself, the permitted prices varying according to the functions of the contracting parties which do not appear on the face of the contract.

The second ground on which the seller has sought to set aside the award is that the umpire misconducted himself in failing to take into account the illegality of the contract. That is a matter which can be dealt with independently of the first point if it be established. Having regard to the functions performed by the parties to this contract, it is clear that the contract was illegal, and it matters not that the time for delivery was at a later date than the contract. By the definition contained in the regulation (S.I., 1948, No. 1509) "sale" includes agreement to sell, and it follows that not only an immediate sale at a price in excess of the permitted maximum, but also an agreement for sale at such a price at a future date, must be illegal. It is contended by counsel for the buyers that, if there be an illegal contract, the court should do nothing to assist either party. Counsel relied on the decision in *Re Boks & Co. and Peters, Rushton & Co.* (6). Although the matter came to the Court of Appeal, the passage relied on is contained in the statement of facts containing the decision of the Divisional Court ([1919] 1 K.B. 493) from which the appeal was brought. The view taken by that court was that it would not be right to set aside the award, the matter being treated as if it arose out of an illegal transaction so that the court would not interfere either to enforce the award or to set it aside, but would let the parties remain in the position in which they were. The present case is, in my judgment, distinguishable from that because, although before this court the seller is taking the initiative, yet these proceedings are, to my mind, closely bound up with the proceedings initiated by the buyers who took out a summons for leave to enforce the award summarily, this application being taken out as a counter move. Consequently, to my mind, the position is not the same as it would have been if an original application had been made, and had not been brought in answer to an application by the other side. Moreover, I think, it is clear from *Smith, Coney & Barrett v. Becker, Gray & Co.* (3), that the court will interfere by injunction in a proper case to prevent an arbitration being held on an illegal contract. The application failed in that case because it was held that there was not an illegal contract.

Counsel for the buyers argued further that illegality is not necessarily fatal even to an action on an award, and for that proposition he referred to *Delver v. Barnes* (5) and *Wohlenberg v. Lageman* (4), to which reference has already been made. To my mind, the judgments in those cases do not really support the proposition for which he contended. It seems to me that the headnote in the first case goes further than the judgment of MANSFIELD, C.J., warranted. I think it is clear that, once the illegality is made plain, the award can, and should be, set aside.

Lastly, it was submitted by counsel that, if the parties agreed to submit to arbitration an illegal contract, they cannot complain of the illegality and consequently the want of jurisdiction. I am bound to say that I cannot agree with that proposition as applicable to this case, because Mr. Newman, the arbitrator for the seller, took the point that the contract was illegal. In this connection I would refer to what LORD SELBORNE, L.C., said in *Hamlyn v. Betteley* (7) (6 Q.B.D. 65):

"Even in arbitrations, where a protest is made against jurisdiction, the party protesting is not bound to retire; he may go through the whole case, subject to the protest he has made."

I think the effect of Mr. Newman's drawing attention to the illegality was to protest against the jurisdiction, and the fact that he did not retire from the

arbitration at that moment does not prevent the point from being raised now.

In *Langton v. Hughes* (8), LORD ELLENBOROUGH, C.J., said (1 M. & S. 596):

" . . . what is done in contravention of the provisions of an Act of Parliament, cannot be made the subject-matter of an action."

In the circumstances of this case I think that principle is applicable and ought to be acted on by this court, and I agree that the appeal should be allowed.

A *Appeal allowed.*

Solicitors: *Carters* (for the seller); *Gale & Phelps* (for the buyers).

[*Reported by MISS PHILIPPA PRICE, Barrister-at-Law.*]

B BROOM v. MORGAN.

[COURT OF APPEAL (Singleton, Denning and Hodson, L.JJ.), March 5, 6, 1953.]

Master and Servant—Liability of master—Liability to third person for acts of servant—Act within course of employment—Injury to servant's wife due to servant's negligence.

C Where a servant, while acting in the scope of his employment, negligently harms another, the fact that his relationship to the injured person is such that suit cannot be brought against him does not relieve the master from liability.

D The plaintiff and her husband were employed by the defendant to manage and work in a beer and wine house. The plaintiff was injured through the negligence of her husband in the course of his employment. In an action by her against the defendant in respect of the injury,

HELD: an employer was liable to a person injured by the negligence of his servant notwithstanding the legal immunity of the servant from action at the suit of the injured party, and, therefore, the defendant was liable to the plaintiff despite the inability of the plaintiff to sue her husband in respect of the injury.

E Per DENNING, L.J.: The master's liability for the negligence of his servant is not a vicarious liability, but a liability of the master himself owing to his failure to see that his work is properly and carefully done . . . The master's liability is his own liability and remains on him notwithstanding the immunity of the servant . . . But, even if the master's liability is a vicarious liability, the husband's immunity is a mere rule of procedure and not a rule of substantive law. It is an immunity from suit and not an immunity from duty or liability, and so, on that view of the law also, the master would be liable for the negligence of the servant.

F Decision of LORD GODDARD, C.J. ([1952] 2 All E.R. 1007), affirmed.

G AS TO LIABILITY OF MASTER TO THIRD PERSONS FOR TORT COMMITTED BY SERVANT, see HALSBURY, Hailsham Edn., Vol. 22, pp. 221-229, paras. 397-408; and FOR CASES, see DIGEST, Vol. 34, pp. 125, 126, Nos. 964-972.

Cases referred to:

- H (1) *Bartonshill Coal Co. v. Reid*, (1858), 3 Macq. 266; 31 L.T.O.S. 255; 22 J.P. 560; 34 Digest 126, 971.
- (2) *Bartonshill Coal Co. v. McGuire*, (1858), 3 Macq. 300; 31 L.T.O.S. 258; 34 Digest 126, 972.
- (3) *Smith v. Moss*, [1940] 1 All E.R. 469; [1940] 1 K.B. 424; 109 L.J.K.B. 271; 162 L.T. 267; 2nd Digest Supp.
- (4) *Schubert v. August Schubert Wagon Co.*, (1928), 249 N.Y. 253; 164 N.E. 42.
- (5) *Waugh v. Waugh*, (1950), 50 S.R.N.S.W. 210; 67 W.N. 175; 27 Digest, Replacement, 263, 921.
- (6) *Pangburn v. Buick Motor Co.*, (1914), 211 N.Y. 228; 105 N.E. 423.
- (7) *White v. Proctor*, [1937] O.R. 647.

- (8) *Jones v. Manchester Corpn.*, [1952] 2 All E.R. 125; [1952] 2 Q.B. 870.
 (9) *Phillips v. Barnett*, (1876), 1 Q.B.D. 436; 45 L.J.Q.B. 277; 34 L.T. 177; 40 J.P. 564; 27 Digest, Replacement, 261, 2110.
 (10) *Gottliffe v. Edelston*, [1930] 2 K.B. 378; 99 L.J.K.B. 547; 143 L.T. 595; 27 Digest, Replacement, 262, 2114.

APPEAL by the defendant from an order of LORD GODDARD, C.J., dated Nov. 17, 1952, and reported [1952] 2 All E.R. 1007.

The plaintiff, Phyllis Muriel Broom, and her husband were employed by the defendant, Lilian Alice Morgan, the licensee of a wine and beer house known as the "Bird in Hand", West End Lane, London, N.W., as helper and manager respectively in the house. The plaintiff and her husband took up their employment on Jan. 20, 1950, and shortly afterwards the plaintiff met with an accident which arose in this way. As a means of access from any other part of the premises to the area behind the bar counter there was a low door in the counter with a flap over it. Immediately inside that door was a trap-door in the floor which covered a lift shaft, the lift being used for taking bottled beer from the cellar to the bar. On Feb. 4, 1950, the plaintiff had occasion to pass through the low door to the inside of the bar counter. The trap-door had been left open by her husband while he was taking bottles of beer from the cellar to the bar, and he failed to give her warning of the danger and took no step to protect the opening of the shaft. As a result the plaintiff fell down the shaft and suffered injuries. The plaintiff claimed damages against the defendant for personal injuries arising out of the negligence of her husband in the course of his employment, or, alternatively, out of the negligence of the defendant in failing to provide a safe entrance to the place in which the plaintiff was employed by the defendant. The defendant denied that she had been guilty of negligence and contended that, as the plaintiff could not have sued her husband for his negligent act, she could not bring an action against the defendant in respect of it.

LORD GODDARD, C.J., found there was negligence on the part of the husband in respect of which the defendant was liable, and held that an employer was liable to a person injured by the negligence of his servant notwithstanding any legal immunity of the servant vis-à-vis the injured party, and, therefore, the defendant was liable to the plaintiff although the plaintiff could not have sued her husband for the injury.

Marshall, Q.C., and *F. G. Paterson* for the plaintiff.

John Thompson for the defendant.

SINGLETON, L.J., stated the facts and continued: The question which we have to consider in this case arises from the fact that the person alleged to have been negligent was the husband of the plaintiff. The position of an employer was stated by the Lord Chief Justice in the course of his judgment where he cited a passage from the opinion of LORD CRANWORTH in *Bartonskill Coal Co. v. Reid* (1) (3 Macq. 283). I prefer to read a passage from the opinion of LORD CHELMSFORD, L.C., in the second case of *Bartonskill Coal Co. v. McGuire* (2) where he said (3 Macq. 306):

"It has long been the established law of this country that a master is liable to third persons for any injury or damage done through the negligence or unskilfulness of a servant acting in his master's employ. The reason of this is, that every act which is done by a servant in the course of his duty is regarded as done by his master's orders, and consequently is the same as if it were the master's own act, according to the maxim, Qui facit per alium facit per se."

It is clear that when the husband of the plaintiff was bringing up bottled beer from the cellar through the trap-door he was acting in the course of his duty, and in so doing he left the trap-door open without giving warning of the danger

which was thereby created. It is said that that constituted negligence on his part, and that he was negligent vis-à-vis the plaintiff. There is no liability for negligence unless there is in the particular case a legal duty to take care. Where there is such a duty reasonable care must be taken to avoid acts or omissions which can reasonably be foreseen as likely to injure persons who are reasonably likely to be affected. The persons reasonably likely to be affected by an act such as that complained of in this case are the persons who are employed on the premises, and might be likely to go into the place where the danger was created. There were two persons employed by the defendant, a man and the plaintiff herself. It seems to me that in those circumstances the plaintiff's husband, when he left the trap-door open, failed to use reasonable care to avoid an act which he could reasonably have foreseen as likely to injure a person working on those premises. The Lord Chief Justice, in giving judgment for the plaintiff, followed a decision of CHARLES, J., in *Smith v. Moss* (3), and he cited a judgment to the like effect of CARDOZO, C.J., in *Schubert v. August Schubert Wagon Co.* (4).

The defendant now appeals, and counsel has submitted on her behalf that a husband cannot be negligent vis-à-vis his wife, and that, in a case of vicarious responsibility, an action can only succeed against the employer if an action would have succeeded against the employee who was negligent. He further submitted that the liability of employers and negligent employees was a joint and several liability, and, unless an action against the employee would succeed, an action against the employer in respect of that employee's negligence must fail. The submission was supported by citations from a number of authorities, but the precise position which arose in this case does not appear to have been before the Court of Appeal before, the only reported case in this country being the decision of CHARLES, J., to which I have referred.

It seems to me that, in approaching this subject, one must look first to see what was the duty of the husband to his wife. The husband owed a duty to the other employees who used the premises, his wife being one of them. Counsel for the defendant submitted that he was under no legal duty of care to his wife. I find that difficult to follow. At common law a husband was under a duty to maintain his wife, and there must be a duty on the husband not to injure her by carelessness or neglect. By "neglect" I mean breach of some duty. I cannot think that the husband is under no legal duty to his wife. If she were an employee of his, his duty to her would be the same as his duty to any other employee. It is right to say that, if he failed in the duty which he owed to her as an employee, she could not succeed in an action against him in respect of that breach of duty or negligence, for a wife cannot sue her husband in tort, but that is not the same as saying that he cannot be guilty of a breach of duty towards her. Section 12 of the Married Women's Property Act, 1882, provides that:

"Every woman, whether married before or after this Act, shall have in her own name against all persons whomsoever, including her husband, the same civil remedies, and also (subject, as regards her husband, to the proviso hereinafter contained) the same remedies and redress by way of criminal proceedings, for the protection and security of her own separate property, as if [she were]* a feme sole, but, except as aforesaid, no husband or wife shall be entitled to sue the other for a tort."

The natural reading of that is that there can be a tort as between husband and wife, but neither husband nor wife is entitled to sue the other in tort.

Counsel for the plaintiff submitted that the law in this matter depends on duty, and he asked the court to hold that the husband was under a duty of care towards his wife, and that to hold otherwise would be contrary to history.

* Amended by Law Reform (Married Women and Tortfeasors) Act, 1935, s. 5 (1), sched. I.

He submitted that there was a duty at common law to take care, and he drew attention to the fact that it had been said that the position of a husband and wife, and, in particular, the fiction that husband and wife were one, was altered by the Married Women's Property Act, 1882. In WINFIELD ON THE LAW OF TORT, 5th ed., p. 100, there appears this passage:

"Actions in tort between husband and wife were not possible at common law owing to the fiction that they were one flesh; a better and more modern reason is that such litigation is 'unseemly, distressing and embittering'."

It is said that because an action in tort between husband and wife cannot succeed, therefore this action against the employer of the negligent husband by another employee, the wife, must fail. I do not think that follows, and the reasons why are set out very clearly in *Waugh v. Waugh* (5). In that case the plaintiff, a Mrs. Waugh, was a passenger in a car driven by her husband and owned by their son. She was injured in an accident due to the negligence of her husband in the driving of the car. A verdict was found in her favour and she recovered damages in the district court for personal injury. The defendant, the son, appealed and sought to have the verdict set aside and judgment entered for him. The sole question which arose was whether, in view of the relationship between the plaintiff and the driver (her husband), the action lay against the defendant. The Court of Appeal of New South Wales held that the plaintiff was entitled to succeed. STREET, C.J., after agreeing with the reasons given by MAXWELL, J., said (50 S.R.N.S.W. 211):

"The undoubted position in law is that, except for the protection of her own property, a wife cannot sue her husband in tort, and on the facts of the present case the plaintiff could not claim against her husband for the injuries which she sustained as the result of his negligent driving. But the action is brought by the plaintiff, not against her husband as the driver of the car, but against the owner for whom he was acting at the time as the servant or agent and who would be responsible for any negligence of the driver while acting within the scope of his authority, and I can find no reason for extending the special immunity of the driver from liability so as to cover that driver's principal."

MAXWELL, J., in the course of his judgment, referred to a number of decisions, and, in particular, to the judgment of CARDOZO, C.J., in *Schubert v. Schubert Wagon Co.* (4), which I have already mentioned. He said (*ibid.*, 214):

"An American decision is to the same effect: see *Schubert v. Schubert Wagon Co.* (4). The facts were that the plaintiff while in the highway was struck by the defendant's car and injured. The car causing the hurt was driven by the plaintiff's husband, who was then in the defendant's service. His negligence was not disputed. It was conceded that the employer would have been liable if the servant, the driver of the car, had been a stranger to the plaintiff. The question was whether the rule of liability is different where the servant is the husband. CARDOZO, C.J., delivering the judgment concurred in by six other justices of the court, said (249 N.Y. 256): 'An employer commits a trespass by the hand of his servant upon the person of another. The act, let it be assumed, is within the scope either of an express mandate or of an implied one. In either event, if the trespass is not justified, he is brought under a distinct and independent liability, a liability all his own. The statement sometimes made that it is derivative and secondary (*Pangburn v. Buick Motor Co.* (6)), means this and nothing more, that at times the fault of the actor will fix the quality of the act. Illegality established, liability ensues. The defendant, to make out a defence, is thus driven to maintain that the act, however negligent, was none the less lawful because committed by a husband upon the person of his wife.

This is to pervert the meaning and effect of the disability that has its origin in marital identity. A trespass, negligent or wilful, upon the person of a wife, does not cease to be an unlawful act though the law exempts the husband from liability for the damage. Others may not hide behind the skirts of his immunity. The trespass may be a crime for which even a husband may be punished, but whether criminal or not, unlawful it remains. As well might one argue that an employer commanding a husband to commit a battery on a wife, might justify the command by the victim's disability. The employer must answer for the damage whether there is a trespass by direct command or trespass incidental to the business committed to the servant's keeping. In each case the maxim governs that he who acts through another, acts by himself."

A

B The learned judge held and OWEN, J., concurred that the appeal failed. The judgments of the Chief Justice of New South Wales and those of MAXWELL and OWEN, JJ., if I may humbly say so, commend themselves to me, and I agree with them. Counsel for the plaintiff referred to a judgment of the Ontario Court of Appeal in *White v. Proctor* (7), which is to the like effect, though it is not so helpful because of the particular terms of the statute which

C applied in that case.

C

I base my judgment in this matter on this short consideration. The fact that a wife has no right of action against her husband in respect of his tortious act does not mean in law that she has no right of action against his employer if, when he performed the negligent act, or made the negligent omission, he was acting within the scope of his employment. The employer remains liable, and there is no reason, either in law or in common sense, why he should have an immunity which springs in the case of husband and wife from the fiction that they are one and from the desire that litigation between husband and wife shall not be encouraged. During the course of the argument I considered the effect of a decision to the contrary. If an omnibus belonging to the London Transport Executive were negligently driven on the footwalk and ten people including the wife of the driver were injured and actions were brought against the Transport Executive, is it to be said that the nine persons could recover, but that the tenth could not recover merely because she was the wife of the driver? That is not the law of this country, and I am satisfied that this appeal ought to be dismissed.

D

E

F

DENNING, L.J.: It was argued by counsel for the defendant that the liability of the employer is only a vicarious liability, that is to say, that it is a substituted liability whereby a person who is not morally answerable is made responsible for the liability of another, and it cannot exist if that other is not liable. I am aware that the employer's liability for the acts of his servants has often been said to be a vicarious liability, but I do not so regard it. The law has known cases of a true vicarious liability. For instance, in the old days when a wife uttered slanders at a tea party with her friends, the husband was answerable for her wrongdoing, although it was no concern of his. I do not regard the liability of master and servant as coming into this category. The master is not liable when a servant does something "on a frolic of his own"; he is only liable when the servant is acting in the course of his employment.

G

H

The reason for the master's liability is not the mere economic reason that the employer usually has money and the servant has not. It is the sound moral reason that the servant is doing the master's business, and it is the duty of the master to see that his business is properly and carefully done. A master who sends a lorry out on the road with his servant in charge is morally responsible for seeing that the lorry does not run down people on the pavement. The master cannot wash his hands of it by saying: "I put a competent driver in charge of the lorry", or: "It was only the driver's wife who was hurt."

It is his lorry, and it is engaged on his business. He takes the benefit of the work when it is carefully done, and he must take the liability when it is negligently done. He is himself under a duty to see that care is exercised in the driving of the lorry on his business. If the driver is negligent there is a breach of duty, not only by the driver himself, but also by the master. In support of this view I would observe that the master and the servant are held in law to be joint tortfeasors. Either or both of them can be made liable for the negligence with which the work was done. If I might quote a passage from my judgment in *Jones v. Manchester Corpn.* (8) ([1952] 2 All E.R. 132):

" . . . when a master employs a servant to do something for him, he is responsible for the servant's conduct as if it were his own. If the servant commits a tort in the course of his employment, then the master is a tortfeasor as well as the servant. The master is never treated as an innocent party."

And I gave my reasons.

It was argued by counsel for the defendant that the doctrine of common employment afforded a legal recognition of vicarious liability. The argument was put in this way: There are two spheres of liability on an employer, namely, liability for breach of duty in the employer's sphere (which is a primary liability) and liability for casual negligence by a servant (which is a vicarious liability). The employer was able to rely on common employment as a defence to his vicarious liability, but not to his primary liability. Hence the doctrine of common employment implicitly recognised that there was a sphere of vicarious liability on an employer. I do not think that argument is sound. The doctrine of common employment was an irrational exception to the liability of an employer. It was based, not on any theory of vicarious liability, but on a fictitious implied contract. It has now been abolished by statute, and should be disregarded in the same way as if it had never been enunciated. Statute law and common law should be integrated as one law. It would be a retrograde step to invoke the doctrine of common employment from the past so as to build on it a theory of vicarious liability, especially when it is remembered that in the *Bartonshill* cases (1) and (2), which established the doctrine, the House of Lords expressly held that the liability of a master is based on the principle that the servant's act is his act. You may describe it as a vicarious act, if you please, but not as a vicarious liability. My conclusion on this part of the case is, therefore, that the master's liability for the negligence of his servant is not a vicarious liability, but a liability of the master himself owing to his failure to see that his work is properly and carefully done. If the servant is immune from an action at the suit of the injured party owing to some positive rule of law, nevertheless the master is not thereby absolved. The master's liability is his own liability and remains on him notwithstanding the immunity of the servant.

If I am wrong on this point, however, and the liability of the master is, properly speaking, a vicarious liability only (so that he is only liable if his servant is also liable), then I am still of opinion that the employer is liable in this case. It is plain, to my mind, that the husband owed a duty to use reasonable care to everyone lawfully in the house and that he was negligent so far as all of them were concerned, including his wife. If the barman had fallen down the hole and had been injured, the husband would clearly have been guilty of a tort and liable for the damage. His position is the same when his wife falls down the hole. The only difference is that by statute she is not permitted to sue him. His immunity does not rest on the theory that husband and wife are one. That fiction has no longer any place in our law. His immunity nowadays rests simply on the wording of s. 12 of the Married Women's Property Act, 1882, which is preserved in this respect by s. 1 of the Law Reform (Married Women and Tortfeasors) Act, 1935. That section disables the wife from suing

her husband for a tort in much the same way as the Statute of Frauds prevents a party from suing on a contract which is not in writing, but it does not alter the fact that the husband has been guilty of a tort. His immunity is a mere rule of procedure and not a rule of substantive law. It is an immunity from suit and not an immunity from duty or liability. He is liable to his wife, although his liability is not enforceable by action, and, as he is liable, so also is his employer, but with the difference that the employer's liability is enforceable by action.

I ought to say a word about *Phillips v. Barnet* (9). That case was decided before the passing of the Married Women's Property Act, 1882. In so far as it was based on the fiction that husband and wife are one, the reasoning is no longer valid, but I would not like to suggest that the case would be decided any differently today. The immunity from suit conferred by s. 12, once it has attached, is not lost by divorce. A wife who has divorced her husband for cruelty by blows cannot afterwards sue him for damages for assault. I agree that the appeal should be dismissed.

HODSON, L.J.: The question is whether the plaintiff can maintain an action against her husband's employer in respect of an injury suffered owing to the act of her husband while acting in the course of his employment. It is conceded that, if the act of the husband had been such an act as to identify him with the master in the doing of the act so as to make applicable in its literal sense the maxim "*Qui facit per alium facit per se*", the action would have lain against the master once negligence had been proved. It is contended, however, that this is not such a case. The act of negligence is said to be outside the master's sphere and to be the servant's independent act even though done in the course of his employment. It is said to be an act of a kind to which the doctrine of common employment would previously have applied, and so the argument runs as follows: A wife cannot sue her husband in tort; therefore, a husband owes no duty to his wife not to injure her by his careless act; accordingly, since no duty exists, the employer cannot be responsible for breach of any duty. Much reliance was placed on *Phillips v. Barnet* (9), which was also referred to by the Lord Chief Justice in the judgment under appeal. The headnote reads:

"A wife after being divorced from her husband cannot sue him for an assault committed upon her during coverture. Declaration, that the defendant assaulted and beat the plaintiff. Plea, that at the time of the committing of the grievances, etc., the plaintiff was the wife of the defendant. Replication, that before suit the marriage of the plaintiff and the defendant was dissolved by the absolute decree of the Court for Divorce and Matrimonial Causes. On demurrer:—*Held*, that the replication was bad: for that the action did not lie, as the wife's inability to sue did not arise merely from the necessity of joining her husband in an action for an assault, but from the rule that husband and wife are one person in law."

Counsel for the defendant relied on that case as partly showing that the disability of the wife was not merely procedural, because, if it had been only procedural, there would have been no obstacle to the plaintiff in the events which had happened. It is true that the reason given for the decision in that case was that husband and wife were taken to be one, but, although no one would, I imagine, question the validity of the decision, it might be justified on broader grounds of public policy, such as those indicated in the judgment of McCARDIE, J., in *Gottliffe v. Edelston* (10) ([1930] 2 K.B. 392) referred to in the passage in WINFIELD ON THE LAW OF TORT, 5th ed., p. 100, to which my Lord has referred.

I think the reasoning behind the argument put forward by counsel for the defendant is fallacious. It is quite true that the wife cannot sue her husband

in tort and that this position is expressly preserved by the Married Women's Property Act, 1882, s. 12, but the language of the section pre-supposes the existence of the tort. Moreover, as was pointed out in *White v. Proctor* (7) ([1937] O.R. 651), the decision in *Phillips v. Barnet* (9) was prior to the Married Women's Property Act in England, which made great inroads on the principle of unity of husband and wife. In the opinion of HENDERSON, J.A., who delivered the judgment of the Court of Appeal for Ontario (*ibid.*):

"The Married Women's Property Acts in England and here have brought about a radical change in the status of married women, and modern thought has borne at least an equal part. I question if the old fiction of law that husband and wife are in law one person has much place in modern jurisprudence."

It might be said, having regard only to the language of s. 12 of the Married Women's Property Act, 1882, that the disability is merely procedural, but I think it goes further and that it is also a substantive disability based on public policy. The rule subsists, but that does not, in my opinion, involve the proposition that a husband is not in breach of duty to his wife if he injures her by his careless act. It is that stage in counsel's argument which I feel myself unable to accept. It is true that an action in tort is not available to her and that there is an exception to the general rule which gives a right to damages where a tort is proved. Immunity is given to the husband personally, but the immunity does not extend to the master, and the master who is vicariously responsible cannot shelter behind the servant. That is the conclusion in substance which has been reached in all the cases, so far as we have been informed by counsel, after their researches in the matter. These cases include decisions of Dominion courts and courts of the United States of America, and, in particular, I would respectfully notice the powerful authority of CARDOZO, C.J., sitting in the Court of Appeals in New York with six other judges, which was referred to by the Lord Chief Justice in his judgment. I think, therefore, that on principle and authority the defendant is liable to the plaintiff for the act of her servant. The expression "vicarious liability" or, perhaps, more accurately, vicarious act, is, in my opinion, apt to cover all cases whether the act is in the master's sphere or not—that is to say, whether he is liable directly or liable merely through the servant, he is liable vicariously for the negligent act of the servant done in the course of his employment. That this is a proper conclusion to be reached is supported by the language of both the Lords Chancellors in the two *Bartonshill* cases (1) and (2), put shortly and clearly in the passage from LORD CHELMSFORD's speech in *Bartonshill Coal Co. v. McGuire* (2) (3 Macq. 306) which my Lord has read. I agree that the appeal fails and should be dismissed.

Appeal dismissed.

Solicitors: *R. I. Lewis & Co.* (for the plaintiff); *Gascoïn & Co.* (for the defendant).

[Reported by MISS PHILIPPA PRICE, Barrister-at-Law.]

WORBOYS v. WORBOYS.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Davies, J.), March 4, 1953.]

Divorce—Practice—Service—Substituted service—Order for security of wife's costs—Matrimonial Causes Rules, 1950 (S.I., 1950, No. 1940), r. 62 (2)—R.S.C., Ord. 67, r. 6.

A On Oct. 22, 1952, the registrar made an order against the husband for security of the wife's costs in the sum of £50. On a summons by the wife for leave to serve the order by substituted service,

B HELD: rule 62 (2) of the Matrimonial Causes Rules, 1950, required personal service of any order which, like the order of Oct. 22, 1952, was enforceable by attachment, but by R.S.C., Ord. 67, r. 6 (which was made applicable by the Matrimonial Causes Rules, 1950, r. 80), the court was empowered, where personal service was required, to make an order for substituted service; r. 62 (2) and Ord. 67, r. 6, were not in conflict; and in the circumstances there would be an order that service of the order of Oct. 22, 1952, be effected by registered post.

C Observations of KEKEWICH, J., in *Mander v. Falcke* ([1891] 3 Ch. 493), applied.

AS TO SERVICE OF ORDERS TO SECURE THE WIFE'S COSTS IN MATRIMONIAL SUITS, see HALSBURY, Hailsham Edn., Vol. 10, p. 726, para. 1115; and FOR CASES, see DIGEST, Replacement Vol. 27, p. 497, No. 4391.

D FOR THE MATRIMONIAL CAUSES RULES, 1950, r. 62 (2), see HALSBURY'S STATUTORY INSTRUMENTS, Vol. 10, p. 225.

Cases referred to:

- (1) *Nuttall v. Nuttall*, (1862), 31 L.J.P.M. & A. 164; 27 Digest, Replacement, 497, 4391.
- (2) *Pritchard v. Pritchard & Bean*, (1870), L.R. 2 P. & D. 53; 39 L.J.P. & M. 46; 22 L.T. 629; 27 Digest, Replacement, 558, 5095.
- E (3) *Whyte-Melville v. Whyte-Melville*, (1888), 4 T.L.R. 491; 16 Digest 53, 572.
- (4) *Re A Solicitor*, [1892] W.N. 22; Digest Supp.
- (5) *Mander v. Falcke*, [1891] 3 Ch. 488; 61 L.J.Ch. 3; 64 L.T. 791; 16 Digest 66, 766.
- (6) *Kistler v. Tettnar*, [1905] 1 K.B. 39; 74 L.J.K.B. 1; 92 L.T. 36; 16 Digest 54, 590.
- F (7) *Re Tuck*, [1906] 1 Ch. 692; 75 L.J.Ch. 497; 94 L.T. 597; 16 Digest 50, 534.

SUMMONS ADJOURNED INTO COURT.

G The wife applied for an order for substituted service of an order made by Mr. Registrar COMPTON MILLER, dated Oct. 22, 1952, whereby he directed the husband to pay into court or to give security for the wife's costs in the sum of £50. The summons originally came before SIR HORACE PEREIRA, senior registrar, who, after argument, referred the matter to the judge, and the learned judge, after hearing argument in chambers, adjourned the matter into court.

Lloyd-Davies for the wife.

H The husband did not appear.

DAVIES, J.: This is a reference from the registry to me of a not uninteresting question which has arisen in connection with the service on a husband of an order to pay into court or give security for the costs of his wife. The question is whether there is power to direct substituted service of such an order. The matter was before me in chambers on Feb. 26, 1953, when the husband did not appear, and, after full argument by counsel for the wife, I adjourned the matter into court.

[HIS LORDSHIP stated the facts and continued:] The difficulty which the registrar felt was that under the Matrimonial Causes Rules, 1950, r. 62 (2):

"A decree or order requiring a person to do an act thereby ordered shall state the time within which the act is to be done, and the copy to be served upon the person required to obey the same shall be indorsed with a notice in accordance with Form 20 [the penal notice] and shall be served personally on that person (the original decree or order or a copy issued by the court being produced to him at the time of service) or shall be delivered to his solicitor."

The material words which troubled the registrar were "and shall be served personally on that person". He took the view that, as that sub-rule requires by its terms personal service, and as such an order, if not complied with, is enforceable by attachment, personal service is necessary, and there is no power in any circumstances to order substituted service of such an order. Rule 80 of the Matrimonial Causes Rules, 1950, provides that:

"Subject to the provisions of these rules and of any enactment, the Rules of the Supreme Court shall, notwithstanding the provisions of Ord. 68 thereof, apply with the necessary modifications to the practice and procedure in any cause or matter to which these rules apply",

but the registrar considered that it was impossible under r. 80 to import the provisions of R.S.C., Ord. 67, r. 6, relating to substituted service, for he thought that R.S.C., Ord. 67, r. 6, was in conflict with the express words of the Matrimonial Causes Rules, 1950, r. 62 (2).

I do not think it is. I think this case is a reasonably plain and simple one, but, as it has caused trouble in the registry and as the authorities were gone into before me, I think it is right that I should refer to the rules and the authorities cited. The reason why I think the case a simple one is that, in my judgment, it is precisely covered by the words of R.S.C., Ord. 67, r. 6. Rule 62 (2) of the Matrimonial Causes Rules, 1950, provides that there shall be personal service of the orders mentioned therein. R.S.C., Ord. 67, r. 6, provides as follows:

"Where personal service of any . . . order . . . is required by these rules or otherwise and it is made to appear to the court or a judge that prompt personal service cannot be effected, the court or a judge may make such order for substituted or other service, or for the substitution of notice for service by letter, public advertisement, or otherwise, as may be just."

I think that that rule covers this case and I so hold.

Without going in too great detail into the rules, it is pertinent to remark that the requirements of personal service under r. 62 (2) of the Matrimonial Causes Rules, 1950, was introduced for the first time by the Matrimonial Causes Rules, 1947. The Matrimonial Causes Rules, 1937, r. 8 (1), dealt with service of petitions, originating summonses, and notices of application for ancillary relief. Rule 11 (1) and (2) dealt with service of other documents. Rule 11 (1) provided:

"Service of any document on a party who has not entered an appearance shall be personal service, unless otherwise directed . . ."

Rule 11 (2) provided:

"Any notice or other document by these rules required to be served but of which personal service is not required, may be served by leaving the same at the address for service . . ."

Rule 62 (2), which was not in exactly the same words as the present r. 62 (2), was silent as to whether or not the service of such an order should be personal. Those rules were followed by the rules of 1944, which differ in form, though

the substance is precisely the same. It is right that I should point out that in at any rate one of the text-books which were current when those rules were in force, to wit, RAYDEN ON DIVORCE, 4th ed., p. 261, para. 10, it is stated under "Attachment":

- A "Application for a writ of attachment (which cannot issue without an order) must be made to a judge on summons, which is adjourned into open court. It is necessary that the order on which the application is founded should have been personally served on the party, indorsed with the penal notice as required by Divorce Rule 62 (2), unless leave to substitute some other form of service has been obtained."

- B The editors, therefore, regard substituted service as possible, though no authority is cited for the proposition. It is curious to note that in the next edition of RAYDEN (5th ed.) at p. 294, the word "necessary" becomes "advisable". I do not know the reason for that change. In the rules of 1947, r. 8 (1) deals with service of petition, originating summons, and notice of application for ancillary relief, but that rule first introduced service by registered post for such documents, personal service of which previously was necessary. Rule 11 (1) and (2) permit service by post of other documents. But when we come to C r. 62 (2), as amended by the Matrimonial Causes (Amendment) Rules, 1947, dealing with orders such as the one with which we are at present concerned, we find that service must be personal or on the party's solicitor. The present rules of 1950 are to the same effect.

- D That is how the rules stand. In addition to the rules my attention was called to the three leading text-books. I do not propose to quote them in extenso, but it is right to say that in the current editions of those text-books, without any specific reference in any of them, so far as I have been able to ascertain, to the change which was made in the wording of this rule in 1947, the view is expressed that substituted service may be ordered in such a case as the present. The references are: RAYDEN ON DIVORCE, 5th ed., pp. 233 and 294, PHILLIPS' DIVORCE PRACTICE, 4th ed., pp. 286, 287, and, the latest book in date of them all, E LATEY ON DIVORCE, 14th ed., p. 631, where the proposition appears in this form:

"It would seem that there is no pleading, order, decree or other document, which, where the circumstances justify such an order being made, may not be served by some form of substituted service."

- F So the text-book writers are in agreement.

- G But the matter does not stop there. On the authorities that were cited to me I am satisfied that for very many years it has been the practice of all Divisions of this court, in appropriate cases and where the facts justified it, to give leave for substituted service, not merely of orders such as these on which attachments may issue, but of the motion for attachment itself. The first case to which I was referred was *Nuttall v. Nuttall* (1), a case in this Division in 1862 where orders had been made that a husband should pay costs and alimony pendente lite to his wife. To avoid compliance with that order, the husband had assigned his property and could not be found. The court made an order for substituted service of the orders by leaving them at the last known residence of the husband, at his attorney's office, and at the address given H in the appearance book (that is, what we nowadays call the address for service). Those orders were enforceable by attachment, and, though not exactly the same as the order in the present case, were indistinguishable from it in all essentials for the purposes of the present discussion. In *Pritchard v. Pritchard & Bean* (2) in 1870 there had been an order for damages against the co-respondent, and it was directed that the damages should be paid to the petitioner. On it being made clear to the court that the co-respondent was moving his property away and that there was reason to believe that it was his intention

to remove his personal property from the jurisdiction of the court in order to defeat the claim of the petitioner, an order was made that the damages should be paid to the petitioner within two days and that, in the event of the damages not being so paid, a writ of fi. fa. should be issued forthwith. Three days later, counsel applied to the court to order a writ of fi. fa. to issue at once, without personal service of the previous order for the payment of the damages on the co-respondent. He read an affidavit to the effect that the co-respondent was keeping out of the way to avoid service and that notice of the order had been given to his wife, brother and solicitor. The judge granted the application. I need not pause to consider whether a precisely similar order to that would be made at the present time. In that case there was no service of the order on the co-respondent at all. But the case shows that the court is prepared to act drastically if there is evidence that the party to whom the order is issued is seeking to disobey or not to comply with an order of the court. So much for cases in this Division.

My attention was called also to *Whyte-Melville v. Whyte-Melville* (3), in 1888, in which an order had been made on a clergyman directing him within four days of the service of the order to deliver up to a receiver certain securities. It was impossible to serve the defendant with this order, and the plaintiff obtained an order directing that service on the defendant's solicitor should be deemed good service—in other words, an order for substituted service. The defendant not having complied with the order, an application for a writ of attachment against him was made to and granted by STIRLING, J., who, in the course of his judgment, after referring to R.S.C., Ord. 67, r. 6, said that (4 T.L.R. 492):

"The theory upon which that power was given to the court was that if the court found that the person to be served was in communication with a person within the jurisdiction of the court, and there was a reasonable probability that substituted service of the order would have the result of its reaching the person upon whom it was made, the court would act upon that presumption."

Also, in the Chancery Division, in 1892, in *Re A Solicitor* (4), NORTH, J., gave leave for substituted service of a notice of motion to commit.

There are only three other authorities to which I need refer to illustrate the principle. The principle, of course, is that it would be absurd to suppose that a party to litigation in whatever Division of this court could stultify the court's order and permanently disobey it by keeping out of the way and evading personal service. That principle was well stated by KEKEWICH, J., in *Mander v. Falcke* (5), where he said ([1891] 3 Ch. 493):

"In another case before me, an order for committal was made and was upheld by the Court of Appeal, notwithstanding the absence of personal service of the notice of motion. When the application comes before me in this case to dispense with personal service, I will consider it. Such an application must necessarily be ex parte, and I shall not have the advantage of [counsel for the defendant's] assistance. I will not prejudge such an application one way or the other, except so far as to say that it would be impossible and inconceivable, and contrary to common sense and justice, that a man who has rendered himself liable to committal should ultimately be able to evade it by keeping out of the way."

The last part of that sentence is, I think, important and illustrates the common sense of the rule. Two other short quotations may be made from two cases in the Court of Appeal. The first is *Kistler v. Tettmar* (6). I need not go in any great detail through the facts of that case. Some observations in it, although made in the Court of Appeal, were rather doubted in the other case to which I shall refer, which was also in the Court of Appeal. In *Kistler v. Tettmar* (6) an order had been made for a judgment debtor to attend and to be examined

as to her means. It had been impossible to effect personal service of that order on her and it was sought to attach her for non-compliance with the order. STIRLING, L.J., said ([1905] 1 K.B. 44):

A “ . . . the general rule always has been that a writ of sequestration cannot be issued unless the party applying for it is in a position to obtain a writ of attachment. This being the law, the only remaining question to be considered is one of fact, namely, whether the judge was right in coming to the conclusion that the judgment debtor was evading service of the order. It seems to me that she was. It may be that, instead of leaving the copy order with the husband of the judgment debtor, as the process server did, the better course would have been to apply for an order for substituted service, which might in my opinion have been made under Ord. 67, r. 6.”

B That is a clear statement by STIRLING, L.J., as to the power of the court. The point that KEKEWICH, J., referred to in *Mander v. Falcke* (5) is reiterated by MATHEW, L.J., where he says (*ibid.*, 45):

C “ It was argued for the judgment debtor that the rule requiring personal service of an order, before a writ of attachment can be issued for disobedience of it, admitted of no exception; and consequently that in this case no writ of attachment could issue even although the judgment debtor was well aware of the existence of the order, and was evading the service of it. This is a somewhat startling proposition, for, after all, the only object of the rule requiring personal service is that the party should know what the order was and the consequences of disobeying it. I do not think D that there is any authority for this proposition, which would lead to a manifest absurdity, namely, that the court would be rendered powerless to enforce its order if the person against whom the order was made chose to lock himself up, and so prevent personal service upon him.”

E Finally, as showing the established practice, at any rate of the Chancery Division, I would refer to *Re Tuck* (7), where some doubt was thrown on one part of the decision in *Kistler v. Tettnar* (6). It was held that personal service was necessary even though the order was made by consent and even though the person against whom the order was made was present in court when the order was made, but, as appears from the judgment of the court, which consisted of SIR RICHARD HENN COLLINS, M.R., and COZENS-HARDY, L.J., they consulted F the senior registrar as to what the practice was in the Chancery Division. The reply they received was this ([1906] 1 Ch. 696):

G “ The practice in the registrar’s office where an order has been made for a person to do an act within a limited time is to require that the order be personally served for the purposes of founding a motion for an attachment, except in cases of orders for discovery or inspection (Ord. 31, r. 22), or where an order for substituted service has been made (Ord. 67, r. 6), or where, in the opinion of the court, the service has been evaded.”

It is plain, therefore, that at that time it was the practice of the court to make orders for substituted service in a case such as the present.

H I am convinced, therefore, that when the change in the wording of r. 62 (2) was made in the Matrimonial Causes Rules, 1947, it was never intended to depart from that long-established and most useful practice or to deprive the court of its power to make orders for substituted service in such cases. The question, however, is whether, even though I am right about my view of the intention of the rule, the words which have been adopted have deprived the court of its power. In my judgment, for the reasons which I have indicated, they have not. Rule 62 (2) provides, shortly, that service shall be personal service or on the solicitor. Rule 80 provides that, subject to the provisions of the Matrimonial Causes Rules, 1950, the Rules of the Supreme Court shall apply

with the necessary modifications to the practice and procedure in any matrimonial cause or matter. It seems to me, therefore, that R.S.C., Ord. 67, r. 6, is as plain as anything can be. It says that, notwithstanding the fact that the rule under consideration prescribes personal service, the court may, if it is made to appear that prompt personal service cannot be effected, make such an order for substituted or other service as may be just. I am satisfied that that rule is not rendered inapplicable by the wording of r. 62 (2), that it is imported and preserved as part of the practice of this Division by r. 80 of the Matrimonial Causes Rules, 1950, and, therefore, I have power to make such proper and necessary order as the facts require. On the facts I am satisfied that the husband was seeking to evade service of this order. I am further satisfied that he is living at this address, 122, St. George's Avenue, Tufnell Park, and that communications addressed to him at that address will reach him. In all the circumstances, therefore, I think the proper order to make here is that service of the order of Mr. Registrar COMPTON MILLER dated Oct. 22, 1952, shall be effected by registered post on the husband at 122, St. George's Avenue, Tufnell Park. As part of my order I think it right in all the circumstances that the husband should pay the costs of the application to the registry and of the application to me.

Order accordingly.

Solicitors: *Whitelock & Storr* (for the wife).

[*Reported by A. T. HOOLAHAN, ESQ., Barrister-at-Law.*]

R. v. COMPTROLLER-GENERAL OF PATENTS. *Ex parte* PARKE, DAVIS & CO.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Lloyd-J. *Affirmed*, C.A. [1953] 2 All E.R. 137 March 10, 11, 20, 1953.)]

Patent—Licence—Compulsory licence—Medicine—Application for compulsory licence within three years from grant—Effect of International Convention for Protection of Industrial Property, art. 5—Patents Act, 1949 (c. 87), s. 41 (1) (b), s. 45 (3).

Prohibition—Grant where right of appeal—Patents Act, 1949 (c. 87), s. 44 (1).

A company, registered in the United States of America, obtained the grant of three British letters patent concerning a process for the production of a non-toxic antibiotic. Within three years of the grant the respondents applied to the Comptroller-General of Patents for a compulsory licence under the Patents Act, 1949, s. 41 (1) (b). The company applied for an order prohibiting the Comptroller-General from entertaining the application on the ground that, having regard to the International Convention for the Protection of Industrial Property, art. 5 (A) (4), and s. 45 (3) of the Act of 1949, no compulsory licence could be given before the expiration of three years from the date of the grant of the patent.

HELD: article 5 expressed the restrictions which the parties to the convention agreed to accept on their right to take legislative measures to prevent abuses of the exclusive rights conferred by letters patent, and it did not extend to the matters dealt with by s. 41 (1), which created a right to grant compulsory licences solely on account of the character of the invention, and, therefore, in acceding to the application, the Comptroller-General would not be making an order "at variance with any . . . convention" within s. 45 (3) of the Act of 1949, and his jurisdiction under s. 41 was unfettered as to time.

Per LORD GODDARD, C.J.: It does not follow that, because there is a right of appeal [in this case under s. 44 (1) of the Act of 1949] from a tribunal before which an objection to jurisdiction is taken, the power of the Divisional Court to issue an order of prohibition is taken away.

There is no technical obstacle to the co-existence of a right of appeal and a right to an order of prohibition.

FOR THE PATENTS ACT, 1949, s. 41, see HALSBURY'S STATUTES, Second Edn., Vol. 17, p. 678.

Cases referred to:

- A (1) *Turner v. Kingsbury Collieries, Ltd.*, [1921] 3 K.B. 169; 90 L.J.K.B. 1132; 125 L.T. 625; 34 Digest 376, 3047.
- (2) *Sweetland v. Turkish Cigarette Co.*, (1899), 80 L.T. 472; 16 Digest 126, 244.
- (3) *Burder v. Veley*, (1840), 12 Ad. & El. 233; 9 L.J.Q.B. 267; 4 J.P. 379, 394; 113 E.R. 801; *affd.* Ex. Ch. *sub nom.* *Veley v. Burder*, (1841), 12 Ad. & El. 265; 113 E.R. 813; 16 Digest 372, 2109.
- B (4) *Gare v. Gapper*, (1803), 3 East, 472; 102 E.R. 678; *subsequent proceedings, sub nom.* *Gould v. Gapper*, (1804), 5 East, 345; 102 E.R. 1102; 16 Digest 394, 2378.
- (5) *London Corpn. v. Cox*, (1867), L.R. 2 H.L. 239; 36 L.J.Ex. 225; 16 Digest 373, 2112.
- (6) *Broad v. Perkins*, (1888), 21 Q.B.D. 533; 57 L.J.Q.B. 638; 60 L.T. 8; 53 J.P. 39; 16 Digest 373, 2113.
- C (7) *Farquharson v. Morgan*, [1894] 1 Q.B. 552; 63 L.J.Q.B. 474; 70 L.T. 152; 58 J.P. 495; 16 Digest 373, 2110.
- (8) *R. v. Wimbledon JJ. Ex p. Derwent*, [1953] 1 All E.R. 390.
- (9) *Barker v. Palmer*, (1881), 8 Q.B.D. 9; 51 L.J.Q.B. 110; 45 L.T. 480; 16 Digest 375, 2134.

D APPLICATION by patentees, Parke, Davis & Co. (a corporation organised under the law of the State of Michigan in the United States of America) for an order of prohibition prohibiting the Comptroller-General of Patents, Designs and Trade Marks from entertaining an application made under the Patents Act, 1949, s. 41, by the respondents, British Drug Houses, Ltd., for compulsory licences under the patents No. 652280, No. 660381 and No. 652273.

E By art. 5 (A) (4) of the International Convention for the Protection of Industrial Property, ratified by the United Kingdom on June 30, 1938, it was provided that an application for the grant of a compulsory licence might not be made before the expiration of three years from the date of the grant of a patent, and it was argued by the patentees that that provision applied to applications for compulsory licences made under s. 41 (1). It was contended F by the respondents that art. 5 applied only to compulsory licences to prevent an abuse of monopoly rights and not to compulsory licences to exercise patents relating to food or medicine (with which s. 41 (1) was concerned). On behalf of the Comptroller-General it was argued that no order of prohibition lay against him because there was a statutory right of appeal against his decision.

G *Pritt, Q.C., Shelley, Q.C., and Aldous* for the applicants, the patentees.
The Attorney-General (Sir Lionel Heald, Q.C.), and P. J. S. Bevan for the Comptroller-General.

Sir Hartley Shawcross, Q.C., and J. P. Graham for the respondents.

Cur. adv. vult.

H Mar. 20. LORD GODDARD, C.J.: I will ask LLOYD-JACOB, J., to read the first judgment.

The following judgments were read.

LLOYD-JACOB, J.: By this motion the applicants, Parke, Davis & Co., seek an order of prohibition directed to the Comptroller-General of Patents requiring him to refrain from considering an application made in respect of letters patent No. 652273, No. 652280, and No. 660381 by the respondents, British Drug Houses, Ltd., under the provisions of the Patents Act, 1949, s. 41. These

three letters patent are based on convention applications and are entered on the register of patents as the property of the applicants. The alleged inventions with which the specifications are concerned are steps in the synthesis of a non-toxic antibiotic, to which the brand name "Chloromycetin" has been applied, and it is not contested that the relation of these convention applications to the field of medicine brings them within the orbit of s. 41. It is common ground, too, that a period of three years has not yet elapsed since the date of grant of the earliest of these patents. On receipt of the application, the Comptroller-General appears to have followed the procedure set out in s. 43 (2) of the Act, whereby he directed the service by British Drug Houses, Ltd., of a copy application on Parke, Davis & Co. and advertised the application in the Official Journal. Such direction and advertisement are only permissible where the Comptroller-General is satisfied that a *prima facie* case has been made out in the application for the making of an order, so that the fact of such direction and advertisement imports to the Comptroller-General a determination that he has jurisdiction to make the order sought in the application.

Section 45 (3) contains a specific limitation on the jurisdiction of the Comptroller-General. It provides:

"No order shall be made in pursuance of any application under s. 37 to s. 42 of this Act which would be at variance with any treaty, convention, arrangement or engagement applying to the United Kingdom and any convention country."

The sections therein referred to are those under which the Comptroller-General, whether the patentee approves or not, is empowered to authorise other parties to exercise the patent monopoly under what are termed compulsory licences. With the exception of s. 41, such authorisation is expressed in language which is substantially identical with that contained in the Patents and Designs Acts, 1907 to 1946, s. 27, wherein the power was expressed as providing relief against abuse of the monopoly rights under the patent and the grounds on which the grant may be made were all related to the patentee's own exercise of his monopoly. By contrast, s. 41, which had its counterpart in the Patents and Designs Acts, 1907 to 1946, s. 38A (3), creates a right to grant a compulsory licence, not by reason of the patentee's exercise of his monopoly, but solely on account of the character of the invention.

The application submitted to the Comptroller-General, being made under the provisions of s. 41 of the Act, must be subject to s. 45 (3), and the contention of Parke, Davis & Co. in this court is that there is an arrangement, viz., the International Convention for the Protection of Industrial Property: see Cmd. No. 5833, Treaty Series No. 55 (1938), the terms of which, they say, are inconsistent with the making of any affirmative order by the Comptroller-General. The relevant portions of the convention are to be found in art. 5 (A) (1), (2), (3) and (4), which reads as follows:

"(A) (1). The importation by the patentee into the country where the patent has been granted of articles manufactured in any of the countries of the Union shall not entail revocation of the patent. (2) Nevertheless each of the countries of the Union shall have the right to take the necessary legislative measures to prevent the abuses which might result from the exercise of the exclusive rights conferred by the patent, for example, failure to work. (3) These measures shall not provide for the revocation of the patent unless the grant of compulsory licences is insufficient to prevent such abuses. (4) In any case, an application for the grant of a compulsory licence may not be made before the expiration of three years from the date of the issue of the patent, and this licence may only be granted if the patentee is unable to justify himself by legitimate reasons. No proceedings for the revocation of a patent may be instituted before the expiration of two years from the date of the granting of the first compulsory licence."

The general purport of the article is plain. By art. 5 (A) (1), the retention of patent rights is not to be imperilled by manufacture abroad. By art. 5 (A) (2), the granting country may prevent such abuses as may arise from a patentee's operation of his patent monopoly. By art. 5 (A) (3), such prevention shall only involve revocation if the grant of compulsory licences is insufficient. By art. 5 (A) (4), minimum periods of grace of three and five years respectively for compulsory licence and revocation are specified.

A As I read this article, it is concerned to express the restrictions which the contracting parties agree to accept on their right to take legislative measures to prevent abuses resulting from the exercise of the exclusive rights conferred by patents. Where it refers to compulsory licences, the reference is to such as are concerned with the prevention of such abuses. The Patents Act, 1949, s. 37 to s. 40, set out the grounds on which such compulsory licences may be granted, and it is to be noted that these sections conform to the provisions of the article. Section 41, on the other hand, is concerned neither with the exercise by the patentee of the rights conferred by the patent nor with any abuse that may result therefrom. The sufficiency or otherwise of compulsory licences to prevent abuses cannot, therefore, arise, and the possibility of revocation on the ground of abuse does not exist. The section specifies that certain patents, viz., those relating to food, or medicine or surgical or curative devices, shall be susceptible of exercise by persons licensed by the Comptroller-General, and this irrespective of the exercise or non-exercise by the patentee. There is, therefore, no default for which the patentee could be required to justify himself by legitimate, or, indeed, any, reasons, and this provides an additional differentiation from art. 5 (A) (4).

D Scrutiny of the relevant enactments discloses that, from the first introduction of licence provisions in respect of food and drugs in 1919, the Comptroller-General's jurisdiction has been unfettered in point of time—a freedom which is in striking contrast to the restrictions concerning the grant of compulsory licences under the abuse of monopoly rights sections. By s. 45 (3) of the Act of 1949 the legislature has provided that the exercise by the Comptroller-General of his powers to grant licences must accord with international treaty obligations. It is, therefore, necessary to examine such treaty obligations to ascertain whether the provisions thereof are inconsistent with any particular grant, but this does not mean that the ambit of these treaty obligations is thereby widened. Only to the extent to which they relate to the case under consideration do they require to be applied. In the present case the provisions of art. 5 of the international convention do not extend to applications under s. 41 of the Act, and they cannot, therefore, operate to fetter the jurisdiction conferred by s. 41 on the Comptroller-General. The motion, accordingly, fails.

LORD GODDARD, C.J.: I entirely agree with the judgment of LLOYD-JACOB, J., from which it follows that the matter is one which the Comptroller-General has jurisdiction to decide. Had the court felt obliged to place a different construction on art. 5 (A) (4) of the convention and to hold that the application could not have been made before the expiration of three years from the date of the issue of the patent, the Comptroller-General would have had no jurisdiction to entertain the application. In that event I should have been unable to agree with the argument of the Attorney-General that, because the statute gives a right of appeal, prohibition would not lie. Objection to jurisdiction can always be taken by plea, and, if an appeal lies from the court or tribunal in which such a plea is raised, the appellate court could, no doubt, decide the question of jurisdiction, but it by no means follows that, because there is an appeal, the power of this court to issue a prohibition is taken away. There is no technical obstacle to the co-existence of a right to appeal and to a prohibition: *Turner v. Kingsbury Collieries, Ltd.* (1); *Sweetland v. Turkish*

Cigarette Co. (2). In *Burder v. Veley* (3), LORD DENMAN, C.J., said (12 Ad. & El. 263):

"The cases in *East*, [*Gare v. Gapper* (4) and *Gould v. Gapper* (4)] then, seem to establish, and consistency of reasoning requires, that the power of prohibition is in no case taken away by the privilege of appeal. If called upon, we are bound to issue our writ of prohibition, as soon as we are duly informed that any court of inferior jurisdiction has committed such a fault as to found our authority to prohibit, although there may be a possibility of correcting it by appeal. For there is no reason for driving the subject to that expensive process, to abide the chance of a repetition of the error . . ."

If the defect of jurisdiction is apparent on the face of the proceedings, the order of prohibition must go as of right and is not a matter of discretion: see the elaborate judgment of WILLES, J., in *London Corpn. v. Cox* (5), followed and adopted in *Broad v. Perkins* (6) and *Farquharson v. Morgan* (7). We considered this very point in *R. v. Wimbledon JJ. Ex p. Derwent* (8), heard in this court on Jan. 23, 1953. Where, however, the defect is not apparent, but depends on some fact in the knowledge of the applicant which he had the opportunity of bringing forward in the court below and has allowed that court to proceed without setting up the objection, the same cases show that the court has a discretion to refuse the writ and will leave the objector to his remedy by appeal. *Barker v. Palmer* (9) is no authority to the contrary. The decision in that case was that the defeated party in the court below could appeal and was not obliged to ask for prohibition, but the court also thought that prohibition was not appropriate in that case. The reason was that the subject-matter of the action was within the jurisdiction of the county court, subject to certain rules with respect to time, which were incidental to that jurisdiction. It was not the rules which conferred the jurisdiction. They related only to procedure. The decision of the judge in the county court was thus an incorrect ruling in law on a matter which was within his jurisdiction and could, therefore, only be corrected by appeal. Prohibition does not lie to correct wrong decisions in cases in which a tribunal has jurisdiction, but does lie to restrain the wrongful assumption of jurisdiction. I agree that this motion fails.

PARKER, J.: I agree entirely with both judgments.

Motion dismissed.

Solicitors: *Tackley, Fall & Read* (for the applicants); *Solicitor, Board of Trade* (for the Comptroller-General); *Bristows, Cooke & Carpmæl* (for the respondents).

[Reported by F. GUTTMAN, ESQ., Barrister-at-Law.]

ANSON v. ANSON.

[QUEEN'S BENCH DIVISION (Pearson, J.), March 10, 11, 12, 1953.]

Guarantee—Husband and wife—Presumption of advancement—Husband surety for wife's banking account—Payment by husband of overdraft—Recovery from wife.

A In September, 1946, the wife, the defendant in the action, with the concurrence of her husband, the plaintiff, opened a bank account at C. for the payment thereof of housekeeping and personal expenses. On Aug. 21, 1947, this account was overdrawn to the amount of £329 9s. 11d. On Sept. 5, 1947, at the request of the wife, the husband entered into an agreement with the C. bank guaranteeing his wife's overdraft to the amount of £500. In 1949 the parties were divorced. In 1951 the bank demanded payment from the husband of the amount of the overdraft under the guarantee, and in due course he paid the bank £500. In an action by the husband as guarantor for reimbursement against the wife as principal debtor,

C HELD: the right of a guarantor to reimbursement by the principal debtor if he was called on to pay the debt was based on an implied contract between him and the debtor or on a right to claim the amount of the debt as money paid to the debtor's use; there was no presumption as between husband and wife that the guarantee was in the nature of an advancement to the wife of the sum guaranteed and paid; and, in the absence of a special arrangement between the parties, the husband was entitled to reimbursement.

D *Re Salisbury-Jones* ([1938] 3 All E.R. 459), applied.

AS TO PRESUMPTION OF ADVANCEMENT, see HALSBURY, Hailsham Edn., Vol. 15, p. 716, para. 1247; and FOR CASES, see DIGEST, Replacement Vol. 27, pp. 147-156, Nos. 1072-1133.

Cases referred to:

- E (1) *Re A Debtor* (No. 627 of 1936), [1937] 1 All E.R. 1; [1937] Ch. 156; 106 L.J.Ch. 172; 156 L.T. 95; Digest Supp.
- (2) *Crompton v. Walker*, (1860), 3 E. & E. 321; 30 L.J.Q.B. 19; 121 E.R. 463; 26 Digest 138, 1021.
- (3) *Hamilton v. Goold*, (1839), 1 Jebb & S. 452; 1 I.L.R. 171; 6 Digest 40, c.
- F (4) *Brook's Wharf & Bull Wharf, Ltd. v. Goodman Bros.*, [1936] 3 All E.R. 696; [1937] 1 K.B. 534; 106 L.J.K.B. 437; 156 L.T. 4; Digest Supp.
- (5) *Moule v. Garrett*, (1872), L.R. 7 Exch. 101; 41 L.J.Ex. 62; 26 L.T. 367; 31 Digest, Replacement, 458, 5846.
- (6) *Re Salisbury-Jones*, [1938] 3 All E.R. 459; 159 L.T. 469; Digest Supp.

ACTION for money paid under a guarantee.

G The plaintiff (the husband) married the defendant (the wife) in 1944 and at all material times the relationship of husband and wife existed between them. In September, 1946, on the wife complaining that she was not managing the household accounts, the husband took her to the Camberley branch of Lloyds bank, where he had an account. There the normal formalities for opening a bank account were gone through and an account was opened for the wife, the husband providing an initial sum of £100. Between Jan. 1 and Sept. 5, 1947, H the husband paid by cheques to the wife the sum of £4,245. Of this sum the wife paid into her account at Camberley £250, the remainder being paid into an account which she had at a bank in London, and which was at all times substantially in credit, the husband not knowing the state of the London account though he knew of its existence. On Aug. 21, 1947, the wife's account at the Camberley bank was overdrawn to the extent of £329 9s. 11d. Towards the end of August, on the husband hearing that the account was overdrawn, he and the wife had a heated interview. The wife asked for a

guarantee of her account which, in view of the large sums he had already paid to her, the husband was unwilling to give. On Aug. 29 the husband drew a cheque for £380 in favour of the wife with the expressed intention of wiping out the overdraft at Camberley and providing her with a working balance. The wife paid the cheque into her account in London. Before the cheque was debited to the husband's account he discovered that it had not been paid into the wife's Camberley account and was told by the wife that she had paid it into her London account as that account needed money. On Sept. 5, 1947, the husband entered into a guarantee with Lloyds bank to guarantee his wife's account at Camberley to the extent of £500. His LORDSHIP found as a fact that, the wife having misused the cheque for £380 by not clearing her overdraft at Camberley, the husband did not intend to pay the money for clearing the overdraft twice over, but that he entered into the guarantee to meet a banking emergency or requirement and there was no intention to relieve his wife of the primary responsibility under the guarantee. On Sept. 7 or 8, 1947, having ascertained that his wife's account in London would not be embarrassed if the cheque for £380 were not paid in, the husband stopped payment of it. In 1949 the parties were divorced. On Nov. 21, 1950, the Camberley bank demanded payment from the wife of the sums she owed to the bank. On Jan. 10, 1951, the bank demanded payment from the husband, and on Dec. 14, 1951, he paid the bank £500. The husband now claimed as guarantor to be reimbursed from the wife as the principal debtor.

J. G. S. Hobson for the husband.

Fairweather and *Ronald Davies* for the wife.

PEARSON, J., stated the facts and continued: Prima facie, if this is to be treated as an ordinary case of a person guaranteeing somebody else's account, the ordinary rule is that the guarantor, having been called on to pay the debt, is entitled to reimbursement. The question is whether any special defence can be established on the facts of this case, including, of course, the important fact that at the material time, when the guarantee was given, the parties were husband and wife. By para. 2 of the defence it is pleaded:

"The said guarantee was not entered into at the request of the defendant, but was entered into without her knowledge or approval."

On the facts I do not accept that defence. I find that the guarantee was entered into at the wife's request in the sense that she told her husband: "You must guarantee my account", or: "You have either got to pay the money or guarantee my account". In any event, it was a request by her to him for a guarantee. Then she says it was entered into without her knowledge and approval. That also breaks down on the facts as I find them. Then para. 3:

"Sums of money drawn by the defendant on the said account were in fact expended during coverture in settling accounts at the request of the plaintiff and for which the plaintiff was liable."

I do not find that the account was used in settling accounts at the request of the plaintiff, but it was to some considerable extent used in settling accounts in respect of household bills, so to that extent that paragraph is true. I think it is a factor of some importance, but not decisive of the issue, in considering what the intentions of the parties were. It is perfectly possible for a wife and a husband to agree that household bills shall be paid from her account and the liability shall be hers—in fact, that is probably the normal position. Then in para. 4 it is said:

"Alternatively, the whole transaction was in the nature of an advancement by the plaintiff to the defendant (his wife) and the defendant is not liable to repay the same to the plaintiff."

The theory of advancement is not very easy to apply to the case of a bank guarantee, because the presumption of advancement normally arises when the husband buys property in his wife's name, and, whereas in a normal case with no special relationship between the parties there would be a resulting trust in favour of the person who provided the money, in a case as between husband and wife the presumption is the other way and is that the husband intended the property bought to become the wife's property by way of a free gift from him. That is the normal use of the word "advancement" in this context, and in relation to the case of a bank guarantee I think it has to be understood as meaning that there was an intention that the husband should not have the right of reimbursement. The meaning is that the transaction is to be interpreted as a transaction of a very special character—that, although the husband guarantees his wife's account, there is a special arrangement, expressly or impliedly made between them, that he is expected to bear the liability and is not expected, if he is called on to pay and does pay, afterwards to claim reimbursement.

With regard to the legal question which arises in this case, one starts with the question: What is the legal basis of the right of reimbursement by a surety against the principal debtor? I think there are two possible bases provided by the authorities, but the main, or orthodox, or more usual, basis on which it can be placed appears from *Re A Debtor* (No. 627 of 1936) (1), where the Court of Appeal had to consider carefully what was the origin or essential nature of this right of reimbursement, because the position in that case depended on whether the obligation should be treated as having arisen before or after a given date. The guarantee there had been given in 1933 before the Law Reform (Married Women and Tortfeasors) Act, 1935, had come into operation. The guarantor was called on to pay in 1936, after the Act had come into operation, and it had to be decided whether the obligation arose in 1933 or 1936. The Court of Appeal, therefore, had to consider what was the nature of the obligation, and the answer in the main was that in the normal case where a guarantee is given by a surety at the request of the principal debtor the right to reimbursement is of a contractual character and arises from an implied contract. It is referred to by SLESSER, L.J. ([1937] 1 All E.R. 6) as "... the implied undertaking of the principal debtor to repay the money paid on his behalf ...". So it is placed on that basis of implied contract, or, one is tempted to say, actual contract, because in the normal case what happens is that A who wishes to overdraw, or has an existing overdraft, says to B: "Will you please guarantee my overdraft?", and B says: "Yes, I will", and proceeds to give the bank a guarantee. That is an agreement between the two of them, and the terms of that agreement can be worked out on ordinary contractual lines, applying the principles with regard to implied terms. The intention normally is that the principal debtor shall remain the principal debtor; it is his debt and his obligation and he is expected to pay it. If the surety is called on to pay and does pay, that for the time being defeats the intention of the parties that the debt shall be and remain that of the principal debtor. To restore the position intended between the two of them by their original contractual intention it is necessary that the right of reimbursement should be read into the contract or inferred to be one of the terms of the contract. I think the essence of it is that the principal debt is primarily the obligation of the principal debtor, that the liability of the surety is only a secondary liability, and that it is the intention as between the two of them as well as against the third party that that position should be preserved. That is the explanation on contractual lines of this implied term which confers the right of reimbursement.

I think it is also of some interest to observe that in the judgment of GREENE, L.J., in that case there is an indication of a second possible foundation

for the right of reimbursement, which throws some light on the present case. He says (*ibid.*, 9, 10):

"Now where, as in the present case, the implied request for payment is referable to a request to give a guarantee, the contractual basis of the action is apparent, and the difference between the old form of action of *indebitatus assumpsit* and an action on a special contract to indemnify disappears for all practical purposes. The question whether or not the sub-section applies cannot, in my opinion, be affected by the fact that it would have been open to the plaintiff to bring his action on an *indebitatus assumpsit* instead of declaring on the implied undertaking to indemnify (compare *Crampton v. Walker* (2) and *Hamilton v. Gould* (3)). A question may arise as to the application of the sub-section in a case where a guarantee is given without any antecedent request on the part of the debtor. That case is merely one example of a number of cases where the law raises an obligation to indemnify irrespective of any actual antecedent contractual relationship between the parties. A quite recent example of a case where the law raises such an obligation irrespective of antecedent contract is to be found in a case decided in this court of *Brook's Wharf & Bull Wharf, Ltd. v. Goodman Bros.* (4)."

Brook's Wharf & Bull Wharf, Ltd. v. Goodman Bros. (4) was a decision of the Court of Appeal in which LORD WRIGHT, M.R., delivered the judgment of the court. It was a case in which importers had put some imported goods into a bonded warehouse and the bonded warehousemen were compelled out of their own moneys to pay the appropriate Customs duties. There had been no prior request from the importers that the bonded warehousemen should do so, but they had to do so because it was an obligation imposed on them by law. The bonded warehousemen claimed that sum from the importers, and it was held the claim was entitled to succeed. LORD WRIGHT, M.R., said this ([1936] 3 All E.R. 706):

"Under these circumstances, the plaintiffs claim that they are entitled to recover from the defendants the amount which they have paid to the Customs in respect of duties due on the defendants' goods. They make their claim as for money paid to the defendants' use on the principle stated in *LEAKE ON CONTRACTS*. The passage in question is quoted in the Exchequer Chamber by COCKBURN, C.J., in *Moule v. Garrett* (5), at p. 104, and is in these terms: 'Where the plaintiff has been compelled by law to pay, or, being compellable by law, has paid money which the defendant was ultimately liable to pay, so that the latter obtains the benefit of the payment by the discharge of his liability; under such circumstances the defendant is held indebted to the plaintiff in the amount' . . . The principle has been applied in a great variety of circumstances."

That is a possible alternative basis, and I think it is of interest as tending to confirm the explanation which I have sought to give of the way the relations of the parties are worked out on the contractual basis. The essence of the matter, as I have said, is that the debt is the debt of the principal debtor and it so remains, and, therefore, when the surety is called on to pay, that position has to be put right between the parties so that the liability becomes once more the liability of the principal debtor.

I ought to refer also to a case which is of considerable importance. It is the decision of SIMONDS, J., in *Re Salisbury-Jones* (6). In that case, on a mortgage by the wife, the husband joined as surety, the two covenanting jointly and severally to pay the mortgage debt. The wife received the mortgage money from the mortgagees. Later, the mortgagees during the lifetime of the wife called on the husband as surety to repay the mortgage moneys, which he did. After the death of the wife the husband sought to prove in her estate

A as a creditor for the sum so paid, when it was contended that he had no right to prove as a creditor since the payment was an advancement of the wife. It was held that the husband, in paying the mortgagee, was discharging a legal obligation under his guarantee, and, in such circumstances there could be no question of making a gift and no presumption of an advancement. Upon payment he became entitled to all the remedies of a surety who has paid the debt of the principal debtor, and, in the absence of any evidence of a release by him, he was entitled to prove in the estate as a creditor. SIMONDS, J., said ([1938] 3 All E.R. 461):

B "It is clear that he has paid those sums, and that he has paid them in consequence of the demand made upon him as surety to repay the principal sum and interest due by the principal debtor to the mortgagees. If that were all, the claim which he makes would be unanswerable, but it is urged on behalf of the estate of the intestate that that claim cannot be sustained, and cannot be sustained for two reasons. In the first place, it is said that, the relation between the parties being that of husband and wife, the sums paid by the husband to the mortgagee society are to be deemed to be gifts made by the husband to the wife, and that claim is based upon this. It is said that, where a husband purchases property in the name of a wife, and there is no evidence to show that it was not a gift, the presumption that it is a gift prevails. It is urged that a similar equity is applicable in a case of this kind, where the husband has joined as surety to guarantee a debt due by the wife to the husband. No authority of any kind has been adduced in support of that view. I decline to extend the doctrine of advancement in that way. The case has been put, really, in two ways. First of all, it is said that at the inception of the transaction, when the husband entered into a contract of guarantee, he did so by way of advancement. That is to say, from the moment the transaction began, he is to be deemed, in the absence of evidence to the contrary, to be in some way advancing his wife and making a gift to her. That view, I think, was not persisted in, but at a later stage it was urged that at any rate at the moment of every payment so made in pursuance of his obligation the husband is to be deemed to be advancing his wife. That seems to me to be a quite untenable proposition. The husband made the payments, at the moment when he made them, in pursuance of a legal obligation which he was under to the mortgagee society. A demand being made, he fulfilled his obligation, and, from the moment of fulfilling his obligation, he became entitled to claim against the principal debtor for the sums which he so paid. He had all the rights at law and in equity of a surety who pays off the principal debtor's debt, and, as it appears to me, the wife, or those claiming through her, must show that in some way he released that right."

G He went on to say that there was no evidence of the right having been released. I think that prima facie that is the position here, but I want to say also that I think it is possible to conceive a case as between husband and wife in which the right of reimbursement might be excluded by express or implied agreement between the parties at the moment when the guarantee is given. Suppose a case where the wife has no substantial resources of her own. She has an account at a bank in her own name, and out of that she pays the household bills and her own personal expenses, the account being fed by her husband by regular monthly payments, and suppose in some particular month the husband is unable to provide the money, but he arranges with the bank that by giving a guarantee he can provide an overdraft for the wife on that bank account, and suppose he says to his wife expressly or by implication: "This new guarantee arrangement that I have made will involve your being in debt to the bank, but you need not worry about that debt, because this arrangement is entirely for my convenience. It will not be your debt, it will be my debt."

I will pay it, and you will not be concerned in it". If something of that sort has been said, or if that is the right view of the common intention of the parties in any case, I think it would be very arguable that, working out the position on a contractual basis, one ought to read into the implied contract a term that there shall be no right of reimbursement.

The question which, I think, is the main question here is whether anything of that sort can be implied. I decide that, on the special facts of this case, there is no such implication, but that the effect of the facts is the other way. The husband must have made it plain to his wife that he was not going to relieve her of the debt. The intention was that, it being already her debt, it should remain her debt, and he was giving this instrument of guarantee to the bank, not to relieve her of the obligation, but to solve the immediate banking emergency or requirement in that way without relieving her of her obligation. If he had meant to relieve her of her obligation, he would have done so directly by a payment to her account. Instead of that he did something different, which was intended to be different, namely, to give the bank a guarantee of the account, leaving the wife with her obligation as the principal debtor. In those circumstances, the ordinary position as between surety and principal debtor prevails as in the *Salisbury-Jones* case (6), and the proper view of the matter is that the wife is liable to reimburse to the husband the sum which he has paid. I hold, therefore, that the sum of £500 is due from the wife to the husband, and I give judgment for that sum with costs and interest at four per cent.

Judgment for plaintiff.

Solicitors: *Glover & Co.* (for the husband); *A. E. Hamlin, Brown, Veale & Twyford* (for the wife).

[*Reported by* MICHAEL MALONEY, ESQ., *Barrister-at-Law.*]

R. v. JACKSON.

[COURT OF CRIMINAL APPEAL (Lord Goddard, C.J., Byrne and Parker, JJ.), March 23, 1953.]

Criminal Law—Evidence—Corroboration—Failure of accused to give evidence.

The appellant was convicted of receiving and of being an accessory before the fact to larceny of some tyres. During the trial evidence was given by accomplices, the persons who had been convicted of the larceny of the tyres, that they had arranged the whole transaction with the appellant. He himself did not go into the witness box and give evidence, and the judge directed the jury that they could take that fact as amounting to corroboration of the accomplices' evidence.

HELD: the direction was wrong.

AS TO CORROBORATION OF EVIDENCE OF ACCOMPLICES, see HALSBURY, *Hailsham Edn.*, Vol. 9, p. 223, para. 311; and FOR CASES, see DIGEST, Vol. 14, pp. 460-462, Nos. 4891-4919.

APPEAL against conviction.

The appellant was convicted before STABLE, J., at Stafford Assizes on Dec. 11, 1952, of being an accessory before the fact to the theft of a quantity of tyres and of receiving the tyres knowing them to be stolen, and he was sentenced to four years' imprisonment. He appealed against his conviction on the ground, *inter alia*, that the judge in his summing-up had misdirected the jury by directing them that they might think that the failure of the appellant to give evidence amounted to corroboration of evidence given against him by accomplices, the thieves of the tyres, to the effect that they had arranged the whole transaction with him. This report deals only with this point.

Bussé, Q.C., and *John Ellison* for the appellant.

Baker, Q.C., and *H. J. Davies* for the Crown.

LORD GODDARD, C.J., delivered the following judgment of the court. It often happens in relation to charges of receiving stolen goods or of being an accessory to the commission of larceny—cases which are often closely akin to conspiracies—that the evidence which has to be led is that of the persons who themselves were the thieves. That evidence, of course, is open to the comment that it is the evidence of accomplices. The court always directs the jury that they must regard such evidence with great caution and that it may be unsafe to act on it unless they can find some corroboration, but that, even though there is no corroboration, they may convict if they are satisfied that the accomplices are telling the truth. Juries are always warned that they ought, if they can, to have corroboration because that is the only satisfactory way of coming to a decision where the evidence consists of the evidence of accomplices, but the day has long gone by when this court will quash a conviction merely because it has been obtained on the evidence of accomplices, because it is perfectly open to the jury, if they choose, to accept their evidence.

The difficulty that arises here is on the direction that the learned judge gave, because, having pointed out who might be regarded as accomplices and emphasised the danger of acting on their evidence, in commenting on the fact that the appellant had not gone into the witness box to give evidence he said:

“You, members of the jury, will attach just what weight you think right to that, and if you say: ‘Well, that, in our view, forms ample corroboration that those thieves were telling the truth. We think he has refrained from going into the witness box because he does not dare, he thinks he will only make matters worse if he does’—if you come to that conclusion—the weight you attach to his silence is entirely a matter for you.”

That came just at the end of the learned judge’s summing-up and could only have been understood by the jury as meaning that the fact that the appellant had not gone into the witness box might amount to corroboration if they thought fit to treat it as such.

That is not correct. One cannot say, because a man has not gone into the witness box to give evidence, that that of itself is corroboration of the evidence of accomplices. It is a matter which the jury could very properly take into account and very probably would, but it is not a right direction to give to a jury, and it should be clearly understood that it is wrong in law. However, the jury evidently thought this was an overwhelming case because, after a trial of a day and a half, they were out for exactly five minutes and came back and found the appellant Guilty. In view of the circumstances the court thinks that this is a case in which it is bound to apply the proviso to s. 4 (1) of the Criminal Appeal Act, 1907, which says that if, in the opinion of the court, no miscarriage of justice has occurred, the court may dismiss the appeal although it decides the point of law in the appellant’s favour. That the appellant here received the tyres and that they were stolen, there was no doubt. The only question was whether he knew they were stolen, and the very defence he was setting up, as indicated by the cross-examination which he instructed his counsel to administer to the witnesses for the prosecution, seems to this court to show in the strongest possible way that he must have known that these goods were stolen. Therefore, although we cannot approve the learned judge’s direction to the jury, that they could take the fact that the appellant did not go into the witness box as amounting to corroboration, the case was so clear that the jury, after a proper warning, must have accepted the evidence of the accomplices, and so the court thinks it right to apply the proviso.

Appeal dismissed.

Solicitors: *Registrar, Court of Criminal Appeal* (for the appellant); *Gibson & Weldon*, agents for *H. Taylor*, town clerk, Stoke-on-Trent (for the Crown).

[*Reported by G. A. KIDNER, Esq., Barrister-at-Law.*]

SHIELS v. CRUIKSHANK.

[HOUSE OF LORDS (Lord Normand, Lord Oaksey, Lord Reid, Lord Asquith of Bishopstone, Lord Cohen), January 28, March 9, 1953.]

Negligence—Damages—Fatal accident—Relevancy of widow's private means.

The respondent, a widow, claimed damages against the appellant in respect of her husband's death which, she alleged, was caused by the appellant's negligence, and averred that she was dependent on her deceased husband for support. On the question whether, in assessing the damages to which she was entitled in respect of the loss of her right to support by her husband, an averment by the appellant that she possessed a substantial private fortune was relevant,

HELD: while it was permissible to lead evidence or to cross-examine the respondent to establish the limit of the extent to which she had been supported by her husband during his life, it was not permissible to inquire what was the amount of her estate, nor whether her private income, which she enjoyed before her husband's death and would continue to enjoy after it, would enable her to maintain herself in future or to make out of it a larger contribution to her maintenance than she had done in the past, and, therefore, the appellant's averment was irrelevant.

APPEAL from a decision of the Second Division of the Court of Session dated June 28, 1951.

On Oct. 8, 1949, the respondent's husband received injuries in a street accident in Edinburgh from which he died. The respondent concluded for damages against the appellant, Henry John Shiels, alleging that the accident was caused by the negligent driving by the appellant of a motor bicycle which collided with her husband. The respondent averred that she was dependent on her deceased husband for support. The appellant stated that she had been left with ample means of support for the rest of her life, and further averred that she had "a substantial private fortune available for her support." The respondent challenged the relevancy of this last averment, and on May 3, 1951, the Lord Ordinary (LORD BLADES) sustained her challenge. The appellant lodged a reclaiming motion against the Lord Ordinary's interlocutor, which, on June 28, 1951, was refused by the Second Division of the Court of Session.

Morison, Q.C., and *M'Larty* (both of the Scottish Bar) for the appellant.

Cameron, Q.C. (Dean of Faculty), and *W. R. Grieve* (both of the Scottish Bar) for the respondent.

The House took time for consideration.

Mar. 9. The following opinion was read.

LORD NORMAND: My Lords, the appellant's counsel made it clear that the real issue in the appeal is whether the interlocutor of the Second Division appealed against unduly restricts the scope of the trial before a jury, which has been allowed.

The respondent, the pursuer, sued the appellant for a sum of £40,000 in name of damages suffered by her in respect of the death of her husband from injuries received in a street accident in Edinburgh on Oct. 8, 1949. She averred that the accident was caused by the fault of the appellant, who was riding a motor bicycle which collided with her husband. There is no question that these averments are relevant. On damages, she averred that she was

"dependent on the deceased for support and lived with him until his death . . . At the time of the said accident the income of the deceased amounted to approximately £22,000 per annum, of which at least £17,000 was represented by salaries and fees, which ceased with his death."

In his answers the appellant, after a general denial, averred that the respondent

"has been left with ample means for support for the rest of her life.

She is liferented in the residue of the estate of the deceased. The deceased left movable estate of over £60,000 and . . . substantial heritable estate. The deceased also bequeathed to the pursuer movable property of considerable value. The defender also believes and avers that the pursuer has a substantial private fortune available for her support."

A In reply, the respondent admitted that she has a liferent in the residue of the deceased's estate, which she estimated at about £24,000 and that she has certain private means. She denied that the deceased left any heritable estate. She also added this plea in law:

"The defender's averments relating to the private means of the . . . pursuer being irrelevant, should not be admitted to probation."

B The Lord Ordinary, on the motion of the respondent, appointed the cause to be heard in the procedure roll for the discussion of the plea of relevancy. In the debate the respondent's counsel admitted, as the Lord Ordinary's opinion shows, that the averments that she had obtained pecuniary benefits under her husband's will were relevant. I have no doubt that this admission was correct, but this point has never been an issue between the parties. The respondent, however, maintained that the averment that she was possessed of a substantial
C private fortune was irrelevant. The Lord Ordinary sustained the respondent's plea to the relevancy and appointed issues to be lodged. The appellant thereupon lodged a reclaiming motion. The argument presented on his behalf to the Second Division is set out by LORD PATRICK, who delivered the leading opinion. He said (1951 S.C. 746):

D "The argument runs that, the true foundation of the claim for damages for loss of support being partly the existence during life, as between claimant and deceased, of a mutual obligation of support in case of necessity, the award must be conditioned by the same considerations as would affect the right to aliment and the amount of aliment awarded in an action where such a claim for support was attempted to be enforced. In an action for
E aliment by a wife against a husband the private means of the wife are always a relevant consideration. The reason is obvious. Aliment is only awarded ex necessitate. To the extent to which the wife has private means she cannot prove her necessity."

This novel argument, which might result in leaving the widow without any claim for damages, beyond solatium, in a case where she had even a mediocre fortune
F of her own, though she had been maintained by her husband in affluent circumstances out of income which terminated on his death, was without difficulty rejected by LORD PATRICK and the Lord Justice-Clerk (LORD THOMSON). LORD MACKAY dissented. The court, therefore, by a majority, refused the reclaiming motion and sustained the Lord Ordinary's interlocutor.

In the present appeal, counsel for the appellant did not repeat the argument
G which had been submitted in the Court of Session. He did not contend that the means of the widow must always be a relevant consideration or that the considerations which apply to the claim for aliment and the amount of aliment have any relevance to a claim in an *actio injuriarum* for loss of support. He did, indeed, submit that there might be special cases in which the widow's possession of a private fortune and its amount should not be left entirely out
H of account. We are not, however, concerned to consider this submission, for, if a case of special circumstances was to be made, it should have been specifically averred. But here, there is nothing but the bare averment that the respondent had a substantial private fortune available for her support. The point which counsel for the appellant endeavoured to make was that the terms of the interlocutor combined with the terms of the plea in law, which it sustained, would prevent him from leading evidence or cross-examining to show that the respondent had not in fact been wholly supported by her deceased husband during

his life. He said, and I agree with him, that in this kind of claim the defender was always entitled to ask the pursuer whether the cost of the wife's support had been met partly by the husband and partly from some other source, and how much from each. It is clear that neither LORD PATRICK nor the Lord Justice-Clerk thought that the result of their judgment would be to exclude inquiry of this sort. LORD PATRICK said (*ibid.*, 747):

"The amounts of support in fact afforded [*sc.*, by the deceased] in the past and likely to be afforded in the future have in my experience been the factors taken into account in making such awards."

That is, in my opinion, an accurate statement, and obviously warrants inquiry into the actual amount of the husband's contribution. But it does not make it permissible to inquire what the amount of the wife's estate was, and whether her own private income which she enjoyed before her husband's death and continued to enjoy after it would enable her to maintain herself in future, or to make out of it a larger contribution to her maintenance than she had done in the past. The Lord Justice-Clerk said (*ibid.*, 753):

"In the present case the pursuer avers that she was dependent upon her deceased husband for support. She does not say that she was totally dependent. There must therefore be inquiry as to the degree to which she was dependent in fact prior to his death. Just what that inquiry will involve before the jury which is to try the case we are not asked to decide, and I do not want to say anything which might be construed as circumscribing the ambit of the trial."

I have two observations to make in order to clear away a possible misunderstanding of what the Lord Justice-Clerk said. The first is that the inquiry into the degree to which the wife was dependent in fact would be perfectly open if the widow had averred that she had been wholly dependent on her husband and the defender had denied this averment. Secondly, the Lord Justice-Clerk certainly intended to limit the ambit of the inquiry in this case by excluding questions about the amount of the wife's fortune. Though the learned judges did not intend by their interlocutor to exclude legitimate inquiry, I have still to consider whether they may have done so inadvertently. The effect of the interlocutor is to exclude from probatation the single averment: "The pursuer has a substantial private fortune available for her support", and its effect on the conduct of the trial may be judged by supposing that the record had never included this averment. What, then, would be the position? The pursuer avers her dependency and the defender denies it. The former lies under the onus of proving her dependency and its extent, and the defender is entitled to cross-examine and to lead evidence to show that the husband's contribution was less than the pursuer represented. All this was conceded by counsel for the respondent.

The appellant's apprehensions that the inquiry will be unduly restricted by the interlocutor are, therefore, in my opinion, groundless. I would dismiss the appeal with costs.

LORD OAKSEY: My Lords, I concur.

LORD REID: My Lords, I concur. I am asked by my noble and learned friend, **LORD ASQUITH OF BISHOPSTONE**, who is unable to be present this morning, to say that he also concurs.

LORD COHEN: My Lords, I also concur.

Appeal dismissed.

Solicitors: *Dennes & Co.*, agents for *Simpson & Marwick*, Edinburgh (for the appellant); *Stilgoes*, agents for *Norman Macpherson & Son*, Edinburgh (for the respondent).

[Reported by G. A. KIDNER, Esq., Barrister-at-Law.]

NESTLÉ CO., LTD. v. INLAND REVENUE COMMISSIONERS.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Jenkins and Hodson, L.J.J.),
March 9, 10, 1953.]

Company—Stamp duty—Exemption—Capital duty—Increase of capital to acquire shares in Northern Ireland companies—“Existing company”—Finance Act, 1927 (c. 10), s. 55 (1).

A An English company incorporated under the Companies Act, 1948, increased its share capital in order to acquire the whole of the share capital of two companies incorporated under the Northern Ireland Companies Act, 1932. It claimed that the increase of capital was exempt from stamp duty.

B HELD: the exemption from stamp duty in respect of an increase of share capital for the acquisition of the issued share capital of “any particular existing company” conferred by s. 55 (1) of the Finance Act, 1927, applied only to the acquisition of the capital of companies incorporated according to the laws of Great Britain (England and Scotland) and not to companies incorporated in Northern Ireland, and there was, therefore, no right to exemption.

C Decision of DANCKWERTS, J. ([1952] 1 All E.R. 1388), affirmed.

FOR THE FINANCE ACT, 1927, s. 55, see HALSBURY'S STATUTES, Second Edn., Vol. 21, p. 935.

APPEAL from an order of DANCKWERTS, J., dated May 1, 1952, and reported [1952] 1 All E.R. 1388, on a Case Stated by the Commissioners of Inland Revenue under s. 13 of the Stamp Act, 1891.

D The appellant company presented to the commissioners a statement of increase of nominal capital for their opinion as to the stamp duty chargeable in respect thereof. The commissioners admitted that so much of the increase as was referable to the acquisition of the issued share capital of two companies incorporated under the Companies Act, 1948, was entitled to exemption by virtue of s. 55 (1) (A) of the Finance Act, 1927, but refused exemption in respect of the balance, which was referable to the acquisition of the issued share capital of two companies incorporated under the Northern Ireland Companies Act, 1932.

E DANCKWERTS, J., held that the exemption conferred by the Act of 1927 applied only to companies regulated by the laws of Great Britain and dismissed the appeal. The company appealed.

F *Grant, Q.C.*, and *R. A. Watson* for the appellant company.
Pennycuik, Q.C., and *J. H. Stamp* for the Crown.

G SIR RAYMOND EVERSLED, M.R.: This appeal raises a question, put in a Case Stated pursuant to the Stamp Act, 1891, s. 13, whether the appellant company is entitled to a remission of capital duty in respect of certain increases of capital which it has made. The claim for remission of duty arises under s. 55 (1) of the Finance Act, 1927, whereby on the increase or the issue of capital of a company for the purpose of acquiring an undertaking or the shares of another company, the transaction being what is called a “reconstruction” or an “amalgamation”, certain privileges in regard to the capital duty which would otherwise be exigible are allowed. In the same section there is also a remission of the ad valorem duty on any transfers which may be executed pursuant to such an arrangement. The appellant company claims the benefit of the remission under both branches of the section, but this Case Stated relates only to the capital duty. The problem arising in regard to ad valorem duty is relevant in argument, but not otherwise on this appeal. As I understand it, it is suggested that, if the appellant company fails in this appeal as regards capital duty, it may still be entitled to a remission of ad valorem duty, under s. 42 of the Finance Act, 1930, on the transfers.

The appellant company is a company incorporated in England under the Companies Act, 1948. Its share capital is held substantially by another corporation, registered in the republic of Panama. In March, 1951, it took steps to acquire the whole of the share capital of four other companies. Two of those companies, Nesmilk, Ltd., and Nesfood, Ltd., are English companies, being incorporated in England under the relevant English Companies Act. The other two, Nestlé's Food Products (Northern Ireland), Ltd., and Ulster Farm Products, Ltd., are limited companies formed pursuant to the Northern Ireland Companies Act, 1932. As a consequence of the Government of Ireland Act, 1920, and other steps taken pursuant thereto, the Parliament of Northern Ireland has exclusive jurisdiction as regards the regulation of joint stock companies within the confines of Northern Ireland, so that the English Companies Act, 1948, under which the appellant company was incorporated, does not apply to Northern Ireland. The increase of the share capital which was requisite for the acquisition of the shares of the four companies amounted to £3,410,000, of which the greater part is attributable to the two English companies. DANCKWERTS, J., decided against the claim of the appellant company, and this appeal is from his decision.

Capital duty—duty on the capital of companies—is provided for in s. 112 and s. 113 of the Stamp Act, 1891, and first came into existence under the Customs and Inland Revenue Act, 1888, s. 11. For the present purposes it is sufficient to look at those two sections of the Act of 1891. Section 112 reads:

“A statement of the amount which is to form the nominal share capital of any company to be registered with limited liability shall be delivered to the Registrar of Joint Stock Companies in England, Scotland, or Ireland, and a statement of the amount of any increase of registered capital of any company now registered or to be registered with limited liability shall be delivered to the said registrar, and every such statement shall be charged with an ad valorem stamp duty of 2s. for every £100 and any fraction of £100 over any multiple of £100 of the amount of such capital or increase of capital as the case may be.”

Section 113 deals with companies incorporated otherwise than in accordance with the general law. It reads:

“Where by virtue of any letters patent granted by Her Majesty, or any Act, the liability of the holders of shares in the capital of any corporation or company is limited otherwise than by registration . . .”

then provisions of an analogous character are made for the levying of this capital duty. It followed from those sections, therefore, that a company which increased its capital by £3 million in order to acquire all the shares in a number of other companies would have to pay duty on the whole of that increased share capital. For reasons which counsel for the Crown, no doubt, rightly attributes to what was then called “rationalisation”, Parliament granted some indulgence in cases of that kind in s. 55 (1) of the Finance Act, 1927. That Act dealt with other tax matters, and s. 55 is found in the Part beginning with s. 48, which is headed: “Miscellaneous and General”. Nothing before s. 55 is in any way related to the Stamp Act, 1891. Section 55 (1) begins:

“If in connection with a scheme for the reconstruction of any company or companies or the amalgamation of any companies it is shown to the satisfaction of the Commissioners of Inland Revenue that there exist the following conditions, that is to say . . .”

Before I look at the conditions it is plain that the first duty of the court is to decide what is meant by the word “company” which appears unheralded in any way in this Part of the Act. It is a common English word and means, among other things, “a collection of persons or individuals”. Obviously the word in this context cannot mean that. The appellant company, however,

argues that it means or covers any corporation or persona ficta, which, by analogy to an English joint stock company or otherwise, might fairly be described in an ordinary context as a company. I am unable to accept that argument. I think that, when the general purpose of this section is borne in mind, one is inevitably carried back to s. 112 and s. 113 of the Stamp Act, 1891, to see what sort of creature Parliament is referring to as a company in s. 55 (1) of the Finance Act, 1927. In other words, one must give a restricted and technical meaning to this word "company", and I think that its inevitable meaning, in this context, is a body corporate of the kind indicated in s. 112 and s. 113 of the Act of 1891, i.e., a body corporate incorporated under letters patent of Her Majesty or according to the laws general or special of Great Britain. By Great Britain I mean England, Wales and Scotland. When the Stamp Act, 1891, was passed, Parliament at Westminster had jurisdiction as regards both stamp duty and joint stock companies over Ireland as well, so that "company" in that Act would include an Irish company, but, following the Government of Ireland Act, 1920, the power to legislate as regards both stamp duty and joint stock companies for Northern Ireland was transferred to the Northern Ireland Parliament. "Company", therefore, in s. 55 (1) of the Finance Act, 1927, now covers, in my judgment, English or Scottish companies only.

Counsel for the appellant company says, rightly, that the conditions for qualification for benefit under s. 55 are those stated in (a), (b) and (c) immediately following the words just read. The first is:

"(a) that a company with limited liability is to be registered, or that since the commencement of this Act a company has been incorporated by letters patent or Act of Parliament, or the nominal share capital of a company has been increased . . ."

He says that no problem arises as to the satisfaction of that condition because the nominal share capital of the appellant company, which, admittedly, on any view is within this section, has been increased. Then

"(b) that the company (in this section referred to as 'the transferee company') is to be registered or has been incorporated or has increased its capital with a view to the acquisition either of the undertaking of, or of not less than ninety per cent. of the issued share capital of, any particular existing company . . ."

The transferee company is the company referred to in (a). Again, counsel for the appellant company says that this condition also is satisfied, because the £3 million worth of additional share capital of the appellant company has been created with a view to the acquisition of the whole of the issued share capital of four particular existing companies.

"(c) that the consideration for the acquisition (except such part thereof as consists in the transfer to or discharge by the transferee company of liabilities of the existing company) consists as to not less than ninety per cent. thereof . . . (ii) where shares are to be acquired, in the issue of shares in the transferee company to the holders of shares in the existing company in exchange for the shares held by them in the existing company . . ."

Those are the three conditions. The third follows from the second in this case, that is to say, if the four companies which are mentioned, Nesmilk, Ltd., Nesfood, Ltd., Nestlé's Food Products (Northern Ireland), Ltd., and Ulster Farm Products, Ltd., are all "particular existing companies", then (b) and (c) are both satisfied. The argument necessarily involves that a particular existing company need not be a company registered in Great Britain, i.e., England or Scotland, and counsel for the appellant company says that there is nothing in the language which I have read which indicates any such local requirement. He admits that the transferee company (the appellant company here) must be

an English or a Scottish company, and that, indeed, necessarily follows from the fact that a remission of English stamp duty is here involved. But, he says, whatever may be said as to the characteristics of the transferee company, there is nothing which requires, according to the ordinary sense of language, any limitation to be put on the "particular existing company."

I am unable to agree with that argument. For the Crown it was suggested that the real test lay in the consideration of the opening words,

"scheme for the reconstruction of any company . . . or the amalgamation of any companies . . ."

I confess that I have not been able to derive the assistance from that consideration that both counsel for the Crown urged, since I should have thought it remained plain that, whether these two Irish companies are "particular existing companies" or not, the purchase or acquisition of all their shares was indubitably part of a scheme of amalgamation. But it seems to me that the clue is to be found by considering to what "company" is intended to refer in this context. If, as I think, after reference to the Stamp Act, "company" means a company registered in accordance with the laws of Great Britain at least as regards the transferee company, then I can see no possible or sensible reason for suggesting that the meaning is different when applied to the "particular existing company."

What is meant by "registered" in the opening lines of para. (a) "a company with limited liability is to be registered"? I suggest that in its context and having regard to the earlier reference to the Stamp Act, it means registered by the Registrar-General of Joint Stock Companies. When this Act of 1927 was passed, the first benefit, the extent of the remission of capital duty, set forth in para. (A) following the statement of conditions, read:

"an amount equal to the amount of the share capital of the existing company in respect of which stamp duty has been paid . . ."

Three years later, in the Finance Act, 1930, s. 41, there was an amendment of that paragraph of a rather unusual nature. The difficulty to which the clause gave rise was twofold. Stamp duty was first imposed in 1888, and the whole of the share capital of an existing company might have been issued before 1888 and no duty ever have been paid in respect of it. The original form of words would exclude from benefit the acquisition of the shares of such a company. Furthermore, it was quite likely that one amalgamation or reconstruction would follow another, and, if a company had once issued capital and had been granted relief in respect of that issue under this section and was afterwards itself acquired, this form of words would again quoad that share capital deprive the transferee company of the benefit. This is because, ex concessis, no stamp duty would have been paid in respect of that capital, since it would have been remitted under this section. Parliament, therefore, provided in the first place that, to the words "in respect of which stamp duty has been paid", there should be deemed to have been added "or relief has been allowed under the provisions of this section", and, secondly, that from the date of the passing of the Finance Act, 1930, neither the original qualification nor the one deemed to have been added should persist—in other words, from 1930, that the paragraph should read simpliciter, "an amount equal to the share capital of the existing company", without any qualification whatever (s. 41 of the Act of 1930). I have explained, at a little length, the nature of that amendment in order to make clear the extent to which use can legitimately be made of the words which were originally in the paragraph. I think it is legitimate to have regard to the form the paragraph originally took, as showing that, not only the transferee company, but also the existing company, was thought of as a company in respect of which this capital duty might have been leviable, a circumstance which would only come about in the case of a company incorporated under the local law of this country.

Counsel for the appellant company says that, assuming all that against him, still it does not affect his claim for relief from conveyance or ad valorem duty. He says we have to take these sections and paragraphs as we now find them and construe them according to their natural language. The question is, therefore, whether any particular case does or does not fit itself within the exact conditions set out for relief. But I come back again to what I think is the main premise on which the whole of the argument on this section must rest: What is meant by the word "company" in the opening two lines of the section? So far from leading me to a contrary conclusion, the few references I have made—and I have not attempted an exhaustive analysis of the section—support the view which I have formed—that "company" means a company registered according to the local laws of England or Scotland. If that is so, it is, of course, the end of this case, but a subsidiary argument of counsel for the appellant company was that, assuming that "company" cannot mean anything which is a corporation or anything like an English limited liability company (a result which would involve very great difficulties where the "amount" of the share capital of such an entity had to be ascertained), at least, it must comprehend a company incorporated according to the laws of Northern Ireland, particularly the Companies (Northern Ireland) Act, 1932. The relevant legislative history from 1920 onwards is briefly this. By the Government of Ireland Act, 1920, powers were given to the Parliament of Northern Ireland to make laws for Northern Ireland in regard to certain matters, which were thereby excluded from the legislative powers of the Imperial Parliament at Westminster. The regulation of joint stock companies was one of those matters. Certain powers were granted of levying duties and taxes (e.g., stamp duty) locally in Northern Ireland, and the power of the Imperial Parliament to levy taxes which would be exigible in Northern Ireland remained in other instances, e.g., income tax. These legislative powers are set out in s. 4 and s. 21. Furthermore, in s. 69 power was granted to His Majesty in Council to make regulations for the setting in motion of the Parliament and Government of Northern Ireland. In pursuance of that section, orders were made in 1922 which included the Government of Ireland (Adaptation of Taxing Acts) Order, 1922 (S.R. & O., 1922, No. 80), making the Stamp Act, 1891, an Act applicable to and in Northern Ireland, that is to say, making it, with the necessary modifications, a Northern Ireland Act. The point which counsel for the appellant company makes, and of which I hope I have sufficiently laid the foundations, is that, in any case, since the Stamp Act, 1891, and, therefore, capital duty under it, was made applicable to and part of the law of Northern Ireland, the argument based on the reference to the duty in para. (A) as limiting the local characteristics of a "particular existing company" necessarily falls to the ground. I do not think that is a sound argument. I do not think that the mere fact that the English Stamp Act, 1891, became, *mutatis mutandis*, part of the local law of Northern Ireland has the consequence that any Northern Ireland company can be treated as an "existing company" because capital duty under the old Stamp Act, translated into Northern Ireland enacted law, is exigible in regard to such a company. I think there are indications that, when dealing with stamp duty in the Act of 1927, Parliament did not intend to relate it to Northern Ireland at all. Section 57 (5) of the Finance Act, 1927, says:

"Such of the provisions as relate to matters with respect to which the Parliament of Northern Ireland has power to make laws shall not extend to Northern Ireland."

Stamp duty is one of them. In any case, once the view is taken that the word "company" in s. 55 (1) means a company incorporated according to the local laws of England and Scotland, or, put another way, excludes any company or corporation which is incorporated according to the laws of a part of the world, whether a Dominion in the British Commonwealth or not, which has exclusive

legislative power to make laws regulating such matters—once that conclusion is reached, the question of the local application to Northern Ireland of the Stamp Act, 1891, ceases, in my judgment, to have any real significance. As a result of the view which I have reached as to the meaning of the word “company”, it inevitably follows that this appeal fails.

JENKINS, L.J.: I agree. The first argument presented to us on the part of the appellant company was to the effect that the words “particular existing company” in s. 55 (1) of the Finance Act, 1927, according to their ordinary construction, were apt to include a corporate body deriving its incorporation from the laws of any part of the world, and that there was no justification for confining the expression to companies incorporated under the laws of the United Kingdom or of any particular part of the United Kingdom as distinct from companies incorporated in foreign States. It was agreed that, so far as capital duty was concerned—capital duty being the sole duty in issue in this appeal—a particular existing foreign company would have to qualify for relief in other respects, that is to say, it would have to be a company the interest of whose corporators was measured by means of some form of capital capable of being equated to the share capital of a company incorporated in this country. But, it was said, difficulties of that kind afforded no sufficient reason for curtailing the natural meaning of the words “particular existing company”. It was pointed out further that, whatever might be said of the provisions of s. 55 (1) of the Act as pointing, in relation to capital duty, to companies incorporated here, no such complication arose so far as the relief from transfer duty was concerned, the relevant matter as regards transfer duty being merely the transfer of shares or other property from one person to another, the character of the incorporation and internal arrangements of any company involved in the transaction being immaterial.

I find myself unable to accept that argument. Section 55 (1) of the Finance Act, 1927, is an enactment passed by the Parliament of the United Kingdom for the purpose of giving relief to certain companies fulfilling the conditions stated from the duty on the capital of companies imposed by an enactment of a similar character, i.e., the Stamp Act, 1891. One would expect, therefore, that s. 55 (1), addressed as it is to that subject-matter, would be concerned, and concerned only, with companies of the same kind, that is to say, companies incorporated under the general law of the United Kingdom. One must rightly, I think, in those circumstances, approach s. 55 (1) with a strong bias towards the view that the companies referred to, whether they be transferee companies or particular existing companies, are companies within the meaning of the law of this country, and as such are companies which, save in so far as they may have been exempted from it by the date of their incorporation, or relieved from it by some previous application of the provisions of s. 55 (1), are amenable to the provisions of s. 112 and s. 113 of the Stamp Act, 1891, as regards stamp duty on their capital.

In my judgment, that *prima facie* view is clearly borne out when one comes to consider the details of the section itself. First of all, there is no doubt that a transferee company must be a company incorporated according to the laws of this country. That, to my mind, supports the view that, comparing like with like, the other party to the amalgamation or reconstruction contemplated by s. 55 must be a company of a similar kind. Then there is the reference to the share capital of the particular existing company. Share capital is a conception well understood and established in English company law, but, so far as the company law of foreign countries is concerned, the possible methods of measuring the interests of corporators are many and various. Indeed, I understand it to be the case that companies under the law of some countries may have capital consisting of or including shares “of no par value”. It would seem, therefore, that any attempt to extend s. 55 (1) to cases of companies other than companies

incorporated under the laws of this country would be fraught with difficulty. It should be remembered that under para. (A) of s. 55 (1):

"The nominal share capital of the transferee company, or the amount by which the capital of the transferee company has been increased, as the case may be, shall, for the purpose of computing the stamp duty chargeable in respect of that capital, be treated as being reduced by either—(i) an amount equal to the amount of the share capital of the existing company . . ."

Pausing there, it is plain that, if the benefits of the section were thrown open to particular existing companies incorporated in foreign parts, the calculation postulated by para. (A) might well be impossible of performance. No doubt it might be possible in some cases, for instance, in those companies incorporated in countries which have adopted the principles of the English Companies Acts, such as Australia and India, but the fact that no difficulty would arise in applying the provisions of the section to some foreign companies does not advance the appellant company's argument on construction to any degree, for one must accept the position that on this construction the "particular existing company" may be a company incorporated in any part of the world; and even if it were possible to apply the terms of the section to sociétés anonymes in France, and I know not what other forms of corporation or quasi-corporation in other European countries, or to American corporations with shares of no par value—even if the division of the capital of a given foreign company could be equated to the share capital of the transferee company—there would remain, I should have thought, almost insuperable difficulties of calculation in matters of exchange and so forth. I think these considerations afford strong reasons for limiting the meaning of the words "particular existing company" in the way contended for by the Crown.

But the matter does not rest there, for, under s. 55 (1) as originally framed, para. (A) (i) went on from the point down to which I have already read it with the words, "in respect of which stamp duty has been paid". Now that language, to my mind, said in so many words that the section was only concerned with cases in which the particular existing company was a company amenable to the provisions of s. 112 or s. 113 of the Stamp Act, 1891. Those words were repealed by the Finance Act, 1930, s. 41 of which, as from the commencement of that Act, caused the provision in question to have effect as if the words "in respect of which stamp duty has been paid" were not contained therein, and provided further that the provision should be deemed to have had effect up to the commencement of the Act of 1930 as if, after the said words, there had been inserted the words "or relief has been allowed under the provisions of this section". Legitimate use has been made of that amendment in support of the appellant company's argument to suggest that, as from the date when the amendment took effect, s. 55 (1), whatever its previous scope may have been, was enlarged in its application so as to include all the heterogeneous tribe of foreign corporations. I cannot, for my part, accept the view that this amendment caused, as it were by a side-wind, so fundamental an alteration in the scope of s. 55 (1). To my mind, it is amply satisfied by the consideration that companies incorporated before the date when the Customs and Inland Revenue Act, 1888, introduced duty on the capital of companies were not liable for that duty on their share capital created prior to that date, and that it may have been thought unfair that those companies should not participate in the benefit of the exemption for which they would otherwise have qualified. It is satisfied also by the further consideration that it was obviously unreasonable that a company should not be entitled to the benefit of the exemption with respect to the capital of a particular existing company which had secured relief from capital duty by some previous application of the benefits of s. 55 (1). Accordingly, in the view I take, the learned judge

came to a right conclusion in holding, as he did, that s. 55 (1) did not extend to foreign companies, that is to say, did not extend to companies other than companies incorporated under the laws of the United Kingdom—if I might use that expression without prejudice to the special considerations raised as regards Northern Ireland by the provisions of the Government of Ireland Act, 1920.

But, says counsel for the appellant company, let s. 55 (1) be construed in the narrow sense put on it by the learned judge: nevertheless, the appellant company is entitled to succeed as regards its acquisition of the shares of the two companies incorporated in Northern Ireland, because the Government of Ireland Act, 1920, and the Order in Council made thereunder (S.R. & O., 1922, No. 80) in regard to stamp duty had the effect of qualifying those two companies, even under s. 55 (1) as originally framed, as particular existing companies in respect of whose share capital stamp duty had been paid. I cannot accept that proposition. It seems to me that the effect of the Government of Ireland Act, so far as material for the purposes of the argument which I am now stating, was this. Stamp duty was one of the matters on which the government of Northern Ireland was given power to legislate, and in the meantime the Order in Council to which we have been referred adapted the provisions of the Stamp Act, 1891, to Northern Ireland as part of the local law of that country. It is further to be observed, as my Lord has already pointed out, that s. 57 (5) of the Finance Act, 1927, the Act which contains the exempting s. 55 (1), provides that:

“Such of the provisions [of the Act] as relate to matters with respect to which the Parliament of Northern Ireland has power to make laws shall not extend to Northern Ireland.”

The precise effect of that provision is, perhaps, open to debate, but at all events, to my mind, it means that, inasmuch as s. 55 (1) deals with a matter, namely, stamp duty, with respect to which the Parliament of Northern Ireland has power to make laws, references in s. 55 (1) to stamp duty do not include stamp duty exigible under the local law of Northern Ireland. Therefore, construing s. 55 (1) as it originally stood, that is to say, including the words “in respect of which stamp duty has been paid”, it seems to me difficult to hold that a Northern Ireland company could qualify for the exemption. But the case does not rest there, for another of the matters on which the Parliament of Northern Ireland was given legislative power under the Act of 1920 was the matter of companies, and pursuant to that power the Parliament of Northern Ireland passed the Northern Ireland Companies Act, 1932, under which the two allegedly particular existing companies were incorporated. I agree with the learned judge that, as these two companies are companies owing their corporate existence to the local law of Northern Ireland, they are not companies within the meaning of s. 55 (1), for that sub-section, in the view I take, applies only to companies incorporated under the general law of Great Britain, and companies incorporated in Northern Ireland under laws enacted pursuant to the separate powers of legislation conferred on the Parliament of that country do not answer that description.

I would, therefore, reach the conclusion on the whole case that the particular existing company in s. 55 (1), having regard to the Government of Ireland Act and its effect on the legislative position of Northern Ireland, means a company incorporated under the laws of Great Britain, that is to say, the laws applicable to England, Wales and Scotland. I should, perhaps, add in conclusion, that, as my Lord has said, the question of transfer duty arises in this appeal only as a matter of argument. In my judgment, the argument founded on that aspect of s. 55 (1) carries the case no further. The problem is to discover, on a true

to say that "particular existing company" ought to be given some other meaning, because, if given that meaning, it will cause no difficulty in the application of one particular provision of the section. For these reasons I agree with my Lord that the learned judge came to a right conclusion and that this appeal fails and should be dismissed.

A **HODSON, L.J.:** I also agree. The appellant company claims relief from capital duty imposed by s. 112 of the Stamp Act, 1891, on companies, the relief being granted under s. 55 (1) of the Act of 1927, which has modified the rigours of the earlier Act. The appellant company has increased its capital with a view to the acquisition of the share capital of four companies, in respect of two of which no question arises. The two remaining companies whose share capital has been acquired were incorporated under the laws of Northern Ireland.

B The relief has been refused because the words "particular existing company" in s. 55 (1) (b) of the Act of 1927 have been held not to cover such companies. The appellant company's main argument is a simple one, namely, that there is no definition of "company" in the Act of 1927, and, therefore, there is no reason why the word should not include any corporation in the world which can be said to answer the description of a company in the sense in which it is

C used in the Companies Acts. It is said that, if it had been intended to limit the relief to English and Scottish companies, the statute could, and would, have so stated in clear terms.

The answer to this argument is, I think, contained in the Finance Act, 1927, itself, and in the Stamp Act, 1891, which imposed the duty or rather re-imposed it, since the duty was first imposed by the Customs and Inland Revenue Act, 1888. I think one expects to find in legislation of a fiscal character that the word "company" is intended to include companies subject to the laws of this country and not foreign countries. Section 112 and s. 113 of the Stamp Act, 1891, which impose the duty, clearly do not apply to companies outside the United Kingdom. In s. 55 (1) of the Act of 1927, where the word "company" is applied to a transferee company, that is to say, a company which is entitled

E to relief from duty, it clearly refers only to companies within the United Kingdom, and the context would at least suggest, therefore, that the "particular existing company" in the section should be the same kind of company. This is more apparent when one regards the scheme propounded by the initial words of the section, which begins :

F "If in connection with a scheme for the reconstruction of any company or companies or the amalgamation of any companies it is shown to the satisfaction of the Commissioners of Inland Revenue that there exist the following conditions . . .";

then the section indicates the subject-matter of the scheme as consisting of companies subject to United Kingdom taxation. If that were otherwise, there would, apparently, be the consequence that, *prima facie* at any rate, the

G benefits of relief would be given in respect of the reconstruction or amalgamation of world companies, whereas the legislature of this country would be expected to facilitate the reconstruction or the amalgamation of particular British companies. The difficulties of working the section on the construction contended for are illustrated by reference to that part of the section beginning (A):

H "The nominal share capital of the transferee company, or the amount by which the capital of the transferee company has been increased, as the case may be, shall, for the purpose of computing the stamp duty chargeable in respect of that capital, be treated as being reduced by either—(i) an amount equal to the amount of the share capital of the existing company in respect of which stamp duty has been paid, or, in the case of the acquisition of a part of an undertaking, equal to such proportion of the said share capital as the value of that part of the undertaking bears to the whole

*These difficulties would, indeed, be great, if not insuperable, in cases where shares of foreign companies were being acquired and an attempt would have to be made to deduct the capital of the foreign company from the nominal capital of the transferee company, without any guidance as to rates of exchange in some cases, and in other cases, where the shares of the foreign company had no par value, without any accurate standard of comparison at all.

The learned judge laid stress on the language of that part of s. 55 (1) (A) which I have just read and is followed by the words "in respect of which stamp duty has been paid". He read that part of the section and added these words ([1952] 1 All E.R. 1393):

"There is an indication that some stamp duty which has been imposed is to be reduced by something which is covered by these words: 'an amount equal to the amount of the share capital of the existing company in respect of which stamp duty has been paid.' . . . It seems to me that, as originally drafted, it is plain the legislature had in mind a company the shares of which were being taken over in respect of which stamp duty had already been paid, and the object of the exemption was to prevent stamp duty being levied anew when there was merely an increase of capital for the purpose of the acquisition of existing shares . . ."

The words, "in respect of which stamp duty has been paid" were removed from the section by a later Act of 1930, but this does not affect the argument based on the language of the section as it originally stood.

Counsel for the appellant company contends that this reasoning is fallacious, since, if I understand him correctly, this part of the section only deals with the circumstances in which the company claiming relief was qualified for relief, and the fact that the company could not satisfy the definition entitling it to claim does not affect the construction of the words first used, namely, the words, "particular existing company". I do not agree with this contention. I agree with the learned judge that the language supports a limited construction of the words, "particular existing companies". It shows that what is contemplated is an existing company which has paid stamp duty, and is, accordingly, a United Kingdom company. The section as a whole is not, I think, naturally to be read as, in the first place, including all companies by the words "particular existing companies", and, in the second place, providing a scheme for, so to speak, analysing the position to see whether or not a particular company is inside or outside. I would, therefore, reject the wide construction of the words "particular existing company" contended for by the appellant company and adopt the narrower construction, which would exclude the two companies incorporated in Northern Ireland, since at the time the Finance Act, 1927, was passed the Government of Ireland Act, 1920, had come into operation and Northern Ireland had for this purpose been constituted as a separate country.

The second argument put forward by the appellant company is that, if it is wrong in its first contention, then "particular existing company" means a "particular existing company liable to stamp duty". The two companies are liable to stamp duty since the Stamp Act, 1891, is still in operation in Northern Ireland, and, accordingly, it is said, they are within the section. I think that the short answer to this argument is that the words "particular existing company" are not to be construed as equivalent to a "particular existing company which is liable to stamp duty". The Stamp Act, 1891, continues in force in Northern Ireland, but it continues as part of its own legislation, and the word "company" in the Act of 1927 is confined, therefore, to United Kingdom companies, excluding Northern Ireland. These are the only companies contemplated by the opening language which governs s. 55 (1) of the Finance Act, 1927.

Appeal dismissed.

Solicitors: *McKenna & Co.* (for the appellant company); *Solicitor of Inland Revenue* (for the Crown). [Reported by F. A. AMES, Esq., Barrister-at-Law.]

JACKSON AND OTHERS v. HAMLYN AND OTHERS.

[CHANCERY DIVISION (Upjohn, J.), January 27, 28, 1953.]

Company—Meeting—Adjournment—Poll—Poll to be taken immediately at meeting—Impossibility of continuing meeting to ascertain result of poll.

A The articles of association of a company provided that a poll on any question of adjournment should be taken immediately at the meeting and without adjournment and that proxies should be lodged at least forty-eight hours before the time appointed for holding a meeting or adjourned meeting. At an extraordinary general meeting of the company, held on Jan. 20, 1953, to consider inter alia certain resolutions proposed by some of the shareholders, a poll was demanded on a motion for adjournment. B The meeting, which had started at noon and had already lasted for over three hours, could not be continued in the room where it was being held as that was then required for another purpose, and no other room was available. As the scrutineers would require over two hours to count the voting on the poll, the chairman said that the poll would be taken immediately and the result announced later. He went on to say that, C if the poll was in favour of adjournment, the meeting would stand adjourned for thirty days, and, if against, another meeting would be called as soon as practicable. The poll was then taken and the result was made public on Jan. 22, 1953, the motion for adjournment being lost by a substantial majority.

D HELD: the requirement in the company's articles that a poll on any question of adjournment should be taken immediately meant that the poll was to be taken as soon as practicable in all the circumstances; as it was impossible, for physical reasons, to go on with the meeting on Jan. 20, any meeting convened to hear the result of the poll and to continue with the business of the meeting of Jan. 20 (the motion for adjournment having been lost) would be a continuation of the meeting of Jan. 20; E and, therefore, any proxies deposited after mid-day on Jan. 18 would not be valid.

Shaw v. Tati Concessions, Ltd. ([1913] 1 Ch. 292), applied.

AS TO ADJOURNMENT OF MEETING, see HALSBURY, 1949 Edn., Vol. 5, p. 382, para. 618; and FOR CASES, see DIGEST, Vol. 9, pp. 580, 581, Nos. F 3878-3882.

Case referred to:

(1) *Shaw v. Tati Concessions, Ltd.*, [1913] 1 Ch. 292; 82 L.J.Ch. 159; 108 L.T. 487; 9 Digest 581, 3881.

MOTION.

G By their notice of motion the plaintiffs, three shareholders of Gordon Hotels, Ltd., sought (i) an injunction restraining the defendants (the directors of the company and the company) from sending, or procuring the company to send, to the members of the company until after the conclusion of an extraordinary general meeting convened for Jan. 20, 1953, and any continuation or adjournment of such meeting (save as required by law) any H document or communication other than a notification of the date, time and place of any continuation or adjournment of such meeting; and (ii) an injunction restraining the defendants from treating any instrument of proxy received by or on behalf of the company after Jan. 18, 1953, as valid for the purpose of the continuation or adjournment of the meeting proposed to be held at a later date.

The issued capital of the defendant company was £1,640,500, divided into 984,300 5½ per cent. cumulative preference shares of £1 each and 656,200

ordinary shares of £1 each, all of which were fully paid. There were about six thousand members of the company. Each of the plaintiffs held comparatively few shares in his own name, but was said to control a large number through nominees. By a notice dated Nov. 28, 1952, and served on the defendant company, the plaintiffs, who were dissatisfied with the policy of the company, requisitioned an extraordinary general meeting to consider certain resolutions which they proposed and which were to the following effect: (i) that, in view of the unsatisfactory record of the company as regards capital values and earnings, the meeting had no confidence in the existing management; (ii) that two of the defendant directors should resign from the board of the company; (iii) that another director be asked to resign from the board; (iv) that the three plaintiffs be appointed directors; and (v) that there should be set up a committee of ordinary and preference shareholders. By a notice, dated Dec. 31, 1952, the defendants convened a meeting to be held at Winchester House, in London, on Jan. 20, 1953, to consider inter alia the resolutions proposed by the plaintiffs. The meeting started at noon, being presided over by the first defendant, the chairman of the company. At the beginning nearly five hundred shareholders were present, but by 3 p.m. the number was considerably less. It was a stormy meeting, and at about 3 p.m. a member moved the adjournment of the meeting for one month. The motion was seconded, and, on the chairman putting it to the vote, on a show of hands there were 101 in favour of the adjournment and forty-seven against. The first plaintiff, Mr. Jackson, then demanded a poll. The hall in which the meeting was being held was let for another purpose as from 3.45 p.m., so that it was impossible for the meeting to continue there. No other room was available at Winchester House, and it was not considered practical to move the meeting elsewhere. As the scrutineers would take over two hours to count the voting on the poll, the chairman said that the poll would be taken immediately and that the result would be announced later. He added: "If the poll is in favour of adjournment, the meeting will stand adjourned for thirty days. If against, another meeting will be called as soon as practicable, and that will be, I propose, in a week's time." The poll was then taken and its result was made public on Jan. 22, 1953. The motion for adjournment for thirty days was lost by a substantial majority, the voting being 670,261 votes against the adjournment and 423,428 in favour of it.

UPJOHN, J., held that the plaintiffs were not entitled to any relief on para. (i) of their notice of motion. It was agreed by the parties that, in regard to para. (ii), the motion should be treated as the trial of the action. The report deals only with this point.

Sir Andrew Clark, Q.C., and Instone for the plaintiffs.

Lindon, Q.C., and K. W. Mackinnon for the defendants.

UPJOHN, J., stated the facts, held that the plaintiffs were not entitled to any relief on para. (i) of their notice of motion, and continued: Before dealing with para. (ii) of the notice of motion in any detail, I must refer to some of the articles of association of the defendant company. Article 63 reads:

"The chairman, with the consent of any meeting at which a quorum is present, may adjourn the meeting from time to time and from place to place, as the meeting shall determine."

Then there are provisions that, where the meeting is adjourned for ten days or more, notice of the adjourned meeting is to be given. Article 65 reads:

"At any general meeting of the company a resolution put to the vote of the meeting shall be decided on a show of hands unless before or upon the declaration of the result of the show of hands a poll be demanded in writing by the chairman or by at least five members present in person or by proxy and entitled to vote at the meeting . . ."

Article 67 is in these terms:

“A poll duly demanded on the election of a chairman of a meeting or on any question of adjournment shall be taken immediately at the meeting and without adjournment.”

That, perhaps, is the most vital article. Article 77 reads:

A “The instrument appointing a proxy and the power of attorney or other authority, if any, under which it is signed, or a notarially certified copy of such power or authority, shall be deposited at the office at least forty-eight hours before the time appointed for holding the meeting or adjourned meeting at which the person named in such instrument proposes to vote; otherwise the person so named shall not be entitled to vote in respect thereof.”

B The question which I have to decide is, in substance, this. Will the meeting which will be resumed (to use a neutral expression) one day, as soon as practicable, be an adjournment of the meeting of Jan. 20, in which case, having regard to art. 77, new proxies can be deposited for use at the adjourned meeting provided C that they are deposited forty-eight hours before the adjourned meeting, or is it a wholly new meeting, the meeting of Jan. 20 having been dissolved? If it is a new meeting, fourteen days' notice must be given under art. 59 and under the Companies Act, 1948, s. 133 (2) (b), and, technically, the directors could, of course, include completely new business, although I am not suggesting that they would, in fact, do any such thing. The defendants contend that the D meeting of Jan. 20 has either ceased or been adjourned. The plaintiffs contend that the meeting which is to take place is merely a continuation of the meeting of Jan. 20 which was interrupted, and that, therefore, no proxies deposited with the company after mid-day on Jan. 18, 1953, are valid for the continuation of the meeting. The only resolution for an adjournment that was before the meeting of Jan. 20 was for an adjournment for thirty days, and on that a poll E was demanded. Under art. 67 the poll had to be taken immediately at the meeting. No one suggested any adjournment while the poll was being taken, and it seems to me clear, therefore, that, for the purposes of art. 63, there was no adjournment of the meeting, because the chairman did not adjourn the meeting and he did not receive the consent of the meeting to any adjournment. With all respect to the contrary argument, I do not see how in this case it can F be suggested that there was an adjournment. The only motion for an adjournment was lost.

Then it is said—the argument is subtle and attractive—that, looking at the true meaning of the word “meeting”, one finds here that a meeting has ceased, it having ceased when the parties, by common consent, left Winchester House and went about their separate ways. Without importing some fiction into the G matter which would not be justified, one cannot, it is said, assume that the meeting is continuing the whole time, and that, when it re-convenes (again to use a neutral expression), the same meeting is in existence. It is pointed out that the meeting may be in a different place. Certainly, a large number of different shareholders will be there, and it is contended that it is a misuse of language and unrealistic to say that the resumed meeting is a continuation H of the meeting which was held on Jan. 20. I am unable to accept that contention. The sole reason that the meeting did not proceed on Jan. 20 was due to the physical impossibility of its doing so. Had that been possible, it would have continued. If the poll had taken, perhaps, half an hour, the meeting would have continued and the main business before the meeting would have been debated. If I am to treat the meeting as having been dissolved because it was physically impossible to count the votes then and there and continue the meeting, the result would, indeed, be extraordinary, because in law the re-convened meeting

would be a new meeting at which new business could be considered, and, therefore, the result of the opposition to the adjournment, on which the plaintiffs succeeded, would be to place them in a far worse position than if they had supported the adjournment.

Common sense has been appealed to in this case, but, in my judgment, common sense is entirely on the side of the plaintiffs. If for physical reasons, such as I have mentioned, it is impossible to continue the meeting then and there, I feel no difficulty in assuming that the new meeting which is to be convened when the result of the poll is known is a continuation of the existing meeting. The argument to the contrary, to which I have briefly referred, is addressed to a precise meaning of the word "meeting" and is somewhat metaphysical. Fortunately, metaphysics and business men seldom meet. It seems to me that I must give business efficacy to art. 67 of the company's articles. The words "A poll . . . on any question of adjournment shall be taken immediately" mean that the poll must be taken as soon as practicable in all the circumstances, and if, owing to the size of the company or for some other reason, it is impossible then and there to go on with the meeting, it seems to me plain that any meeting that is convened to hear the result of the poll and to continue with the business of the meeting must be a continuation of the existing meeting.

I am supported in that view by *Shaw v. Tati Concessions, Ltd.* (1). I do not propose to examine that case in detail because it was in some respects different from the present case. A poll demanded at a meeting of the company was to be taken at a future date, and the question before the court, viz., whether fresh proxies could be lodged for use at the poll, depended largely on the form of one of the articles of association of the company in that case, which is not present in this case. But SWINFEN EADY, J., did not feel any difficulty in holding that a meeting was to be deemed to continue for the purpose of taking a poll until the poll was closed. I feel no difficulty here in finding that the meeting must be deemed to continue for the transaction of the business at the original meeting which has been interrupted for the purely physical reasons which I have already indicated. Accordingly, I propose to declare that the meeting which will be convened by the directors in due course is a continuation of the meeting on Jan. 20, and that no proxies deposited after the hour of mid-day on Jan. 18 will be valid.

Orōer accordingly.

Solicitors: *Tudor & Rowe* (for the plaintiffs); *Markby, Stewart & Wadesons* (for the defendants).

[*Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.*]

CROSSLEY v. CROSSLEY.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Davies, J.), March 11, 1953.]

Adoption—Child subject of custody order by Divorce Court—Effect of adoption on custody order—Duty of county court and justices—Adoption Act, 1950 (c. 26), s. 10 (1), (2).

A *Divorce—Custody—Adoption of child—Effect on custody order—Adoption Act, 1950 (c. 26), s. 10 (1), (2).*

On a decree of dissolution of marriage made in favour of the wife on Apr. 16, 1947, it was ordered that the child of the marriage should remain in the custody of the wife, but that he should not be removed out of the jurisdiction without the leave of the court. On Dec. 16, 1950, the wife re-married, and on Apr. 11, 1951, the child was adopted by the wife and her second husband. On a summons by the wife for leave to take the "child of the marriage" out of the jurisdiction,

B HELD: by virtue of s. 10 (1) and (2) of the Adoption Act, 1950, when the adoption order was made the child ceased to be the child of any previous marriage and became the child of the marriage between the wife and her second husband, and, therefore, it was incorrect to describe the child as the "child of the marriage" which was dissolved in 1947, and the court had no power to make the order sought.

C Where a person desires to adopt a child in respect of whom a custody order has been made in the Divorce Court, the application can be dealt with by a county court or a court of summary jurisdiction under the Adoption of Children Acts in the ordinary way, and it is not necessary for the discharge of the custody order to be obtained before the application is made: see direction of LORD MERRIMAN, P. (RAYDEN ON DIVORCE, 2nd supp. to 5th ed., p. B 63).

D FOR THE ADOPTION ACT, 1950, s. 10, see HALSBURY'S STATUTES, Second Edn., Vol. 29, p. 474.

E SUMMONS ADJOURNED INTO COURT.

Crispin for the wife.

F DAVIES, J.: This is an application by Mrs. Edith Gertrude England, as she now is, for leave to take what is described in the summons as "the child of the marriage, Brian Michael" out of the jurisdiction of the court for the summer holidays and at any future dates for holidays or otherwise without obtaining further leave of the court. Though the matter is, in my judgment, very simple, I have adjourned it into court because there appears to be a certain amount of ignorance, not only among litigants, but also among clerks of courts of summary jurisdiction and registrars of county courts, as to the effect of an adoption order and the proper steps to be taken with regard to adoption orders in respect of children who are the subject of an order of this court.

G On Apr. 16, 1947, the applicant—Mrs. Crossley as she then was—obtained a decree of dissolution of her then existing marriage, and on the decree it was ordered that this child, Brian Michael Crossley, as he then was, should remain in the custody of his mother, but should not be removed out of the jurisdiction without the leave of the court. On Dec. 16, 1950, the applicant married Frederick England. On Apr. 11, 1951, the child was adopted by his own mother, Mrs. England as she had become, and her second husband. The adoption by the mother was in accordance with s. 1 (3) of the Adoption Act, 1950, which permits a parent, odd though it may sound, to adopt his or her own child. There were in evidence before me not only the adoption order, but also the original birth certificate of the child and his new birth certificate which correctly describes him as "Brian Michael England" and not "Crossley". That adoption order

having been made, it is only necessary to look at one section of the Act to see what effect that order has. Section 10 provides as follows:

"(1) Upon an adoption order being made, all rights, duties, obligations and liabilities of the parents or guardians of the infant in relation to the future custody, maintenance and education of the infant, including all rights to appoint a guardian and (in England) to consent or give notice of dissent to marriage, shall be extinguished, and all such rights, duties, obligations and liabilities shall vest in and be exercisable by and enforceable against the adopter as if the infant were a child born to the adopter in lawful wedlock; and in respect of the matters aforesaid . . . the infant shall stand to the adopter exclusively in the position of a child born to the adopter in lawful wedlock. (2) In any case where two spouses are the adopters, the spouses shall in respect of the matters aforesaid, and for the purpose of the jurisdiction of any court to make orders as to the custody and maintenance of and right of access to children, stand to each other and to the infant in the same relation as they would have stood if they had been the lawful father and mother of the infant and the infant shall stand to them respectively in the same relation as to a lawful father and mother respectively."

As I read those two sub-sections, it seems to me that, once an adoption order has properly been made, the adopted child ceases to be the child of any previous marriage. That is to say, when Mrs. Crossley—as she is correctly called in this summons, because the summons is in the suit, but Mrs. England as she now is—applies for permission to take Brian Michael, "the child of the marriage", out of the jurisdiction, it is wrong to describe him as "the child of the marriage". He is not. He is the child of Mr. and Mrs. England, and is no longer the child of the marriage between Mr. and Mrs. Crossley. This court, in my judgment, has no power to make the order which is sought. By the same token, though I am not deciding what the Passport Office should or should not do, it seems to me that the Passport Office need not concern themselves at all with any order that was made on the decree in this suit when this boy was Brian Michael Crossley, the child of the marriage between Edith Gertrude Crossley and Victor Henry Crossley. He is no longer a child of that marriage. He is the lawful child of Frederick England and Edith Gertrude England. That, therefore, disposes of this summons.

I should like to add this, though it is not strictly germane to the present summons. This term there have been before me a number of applications, and I know that at various times there have been many before other judges in this Division, in connection with proposed adoption orders in respect of children with regard to whom there is an order for custody of this court in force. The typical example, and this happens very often, is a case like the present one where a wife divorces her husband, obtains custody of the child or children, thereafter re-marries, and then seeks to have the child or children adopted by herself and her new husband. The view is, apparently, taken by some courts of summary jurisdiction and by some county courts which have jurisdiction in this matter that out of deference to this court the inferior court ought not to proceed to make such an order unless the order of the High Court is first cleared out of the way. That matter has been dealt with by a direction of LORD MERRIMAN, P., and it is in order that the attention of those concerned might be called to that direction that I have adjourned this summons into court. The direction is printed in *RAYDEN ON DIVORCE*, 2nd supp. to 5th ed., p. B 63, and reads as follows:

"Where a person or persons are desirous of adopting a child in respect of whom a custody order has been made in the Divorce Division of the High Court, the application can be dealt with in the ordinary way at a county court or a court of summary jurisdiction notwithstanding the custody order, provided that the requirements of the Adoption of Children Acts are com-

plied with. It is not necessary to obtain the discharge of the custody order before making the application. The adoption order, when made, extinguishes and supersedes the custody order and the child is treated thereafter as the child of the adopter or adopters."

I hope, therefore, though, as I say, it is not immediately germane to the present summons, that in future persons who are seeking to obtain adoption orders in such
A circumstances as these will be spared the expense and the trouble of having to apply to this court to discharge the custody order when it is plain from the direction of the learned President, with which I respectfully agree, that it is unnecessary to make any such application. If the statutory procedure is complied with, that is an end of a custody order made in proceedings arising out of an entirely different marriage. On this summons, therefore, I make no order.

B Solicitors: *Denton, Hall & Burgin* (for the wife).

[Reported by A. T. HOOLAHAN, ESQ., Barrister-at-Law.]

C ATLANTIC MARITIME CO., INC. v. GIBBON.

[QUEEN'S BENCH DIVISION (Sellers, J.), November 17, 18, 19, 20, 1952, March 16, 1953.]

Insurance—Marine insurance—Freight—Cover for loss caused through restraint, warlike operations, and civil war, etc.—Frustration clause if voyage or adventure lost through restraint of princes—Delay—Institute Time Clauses
D (Freight), cl. 8.

The assured, the owners of a Panamanian vessel, were insured under a Lloyd's marine policy from July 15 to Oct. 15, 1949 in respect of (inter alia) "freight and/or anticipated freight and/or chartered freight in the sum of \$93,600". The policy contained, among others, the following clauses.
E " (1) This policy covers:—(a) the risks excluded from the standard form of English marine policy by the clause:—' Warranted free of capture, seizure, arrest, restraint or detainment, and the consequences thereof or of any attempt thereat; also from the consequences of hostilities or warlike operations, whether there be declaration of war or not . . . Further warranted free from the consequences of civil war, revolution, rebellion, insurrection or civil strife arising therefrom . . . '. (b) loss (total or partial) of the subject-matter hereby insured caused by:— (i) hostilities, warlike operations, civil war, revolution, rebellion, insurrection or civil strife arising therefrom . . . Nevertheless this policy is warranted free of any claim based upon loss of, or frustration of, any voyage or adventure caused by arrests . . . or detainments of kings, princes, peoples, usurpers or persons attempting to
F usurp power. (2) Warranted free of loss proximately caused by delay". The policy incorporated the Institute Time Clauses: Freight, cl. 8 of which stated: " Warranted free from any claim consequent upon loss of time
G whether arising from a peril of the sea or otherwise".

By a charterparty dated July 16, 1949, it was agreed between the agents of the assured and charterers that the vessel should proceed to Taku Bar in
H North China to load a cargo of salt and thence to a port in Japan to deliver the cargo. At all material times Taku Bar was in territory under the control of Chinese communist forces who were engaged in civil war against the National government. The vessel arrived at Taku Bar on Aug. 1, and at 10.30 a.m. on Aug. 8, while she was still awaiting instructions to load, a Chinese nationalist destroyer arrived and an armed party boarded the vessel and forbade the master to communicate with the shore. At 4.30 p.m. a second destroyer arrived, and at 5.30 the master of the vessel was instructed

to leave the anchorage. A Chinese ship in the harbour was shelled and sunk, and at 7 p.m. the vessel, with all the other vessels at Taku Bar, put to sea. On Aug. 9 the master received instructions to proceed to British Columbia to load another cargo and he immediately complied with them. In an action against the insurer for an indemnity under the policy it was contended on his behalf, first, that the proximate cause of the loss of the freight was the loss of the adventure within the frustration clause in the policy, and/or, secondly, the loss of freight was due to delay, which excluded the insurer's liability under the policy. It was contended on behalf of the assured that their claim was not based on the loss or frustration of the voyage or adventure, but on the perils insured.

HELD: the situation had to be considered as it confronted the master on the information which he had at the time, and in the circumstances so viewed the three risks of civil war, restraint and warlike operations had been established and the act of the master in leaving the harbour was under compulsion and in no way a voluntary act: dictum of LORD DUNEDIN in *Watts, Watts & Co., Ltd. v. Mitsui & Co., Ltd.* ([1917] A.C. 238) applied; but (a) there had been a loss of the voyage or adventure and the insurers were entitled to rely on the frustration clause in so far as the claim was made for loss of freight caused by "arrests or detentions of kings, princes, peoples, usurpers or persons attempting to usurp power", and (b) the proximate cause of the loss of freight was that the charter could not be performed within a foreseeable or reasonable time, and, as, under cl. 8 of the Institute Time Clauses: Freight, the policy was warranted "free from any claim consequent upon loss of time whether arising from a peril of the sea or otherwise" the liability of the insurers under this head was also excluded.

Bensaude v. Thames & Mersey Marine Insurance Co. ([1897] A.C. 609), applied.

AS TO "WAR RISKS" CLAUSE IN LLOYD'S POLICIES, see HALSBURY, *Hailsham Edn.*, Vol. 18, pp. 314-319, paras. 439-443.

Cases referred to:

- (1) *Bank Line, Ltd. v. Capel (Arthur) & Co.*, [1919] A.C. 435; 88 L.J.K.B. 211; 120 L.T. 129; 41 Digest 366, 2136.
- (2) *Watts, Watts & Co., Ltd. v. Mitsui & Co., Ltd.*, [1917] A.C. 227; 86 L.J.K.B. 873; 116 L.T. 353; 41 Digest 409, 2549.
- (3) *Becker, Gray & Co. v. London Assurance Corpn.*, [1918] A.C. 101; 87 L.J.K.B. 69; 117 L.T. 609; 29 Digest 208, 1675.
- (4) *Rodoconachi v. Elliott*, (1874), L.R. 9 C.P. 518; 43 L.J.C.P. 255; 31 L.T. 239; 29 Digest 218, 1747.
- (5) *Nobel's Explosives Co. v. Jenkins & Co.*, [1896] 2 Q.B. 326; 65 L.J.Q.B. 638; 75 L.T. 163; 41 Digest 521, 3501.
- (6) *British & Foreign Marine Insurance Co., Ltd. v. Sanday (Samuel) & Co.*, [1916] 1 A.C. 650; 85 L.J.K.B. 550; 114 L.T. 521; 29 Digest 276, 1906.
- (7) *Rickards v. Forestal Land, Timber & Rys. Co.*, *Robertson v. Middows, Ltd.*, *Kahn v. Howard Bros. & Co., Ltd.*, [1941] 3 All E.R. 62; [1942] A.C. 50; 110 L.J.K.B. 593; 165 L.T. 257; 2nd Digest Supp.
- (8) *Carras v. London & Scottish Assurance Corpn., Ltd.*, [1936] 1 K.B. 291; 105 L.J.K.B. 689; 154 L.T. 69; Digest Supp.
- (9) *Potter v. Rankin*, (1870), L.R. 5 C.P. 341; 39 L.J.C.P. 147; 22 L.T. 347; *affd.* H.L., *sub nom.* *Rankin v. Potter*, (1873), L.R. 6 H.L. 83; 42 L.J.C.P. 169; 29 L.T. 142; 29 Digest 278, 2258.
- (10) *Robertson v. Petros M. Nomikos, Ltd.*, [1939] 2 All E.R. 723; [1939] A.C. 371; 108 L.J.K.B. 433; 160 L.T. 542; Digest Supp.
- (11) *Bensaude v. Thames & Mersey Marine Insurance Co.*, [1897] A.C. 609; 66 L.J.Q.B. 666; 77 L.T. 282; 29 Digest 47, 93.

ACTION against an insurer for loss of freight under a charterparty.

The following is taken from an agreed statement of facts. The plaintiffs were a shipowning company, incorporated under the laws of Panama, and the owners of a Panamanian ship called the Atlantic Trader. The defendant was an underwriter at Lloyd's. By a Lloyd's policy of marine insurance, No. F. 10412/10657, dated Aug. 29, 1949, the plaintiffs were insured by the defendant and other underwriters for three calendar months from July 15, 1949, to Oct. 15, 1949, in respect of (inter alia) "freight and/or anticipated freight and/or chartered freight in the sum of \$93,600", in the Atlantic Trader against risks as contained in the "Institute War and Strikes Clauses: Freight-Time" attached to the policy. Those clauses provided (inter alia) as follows:

- B (1) This policy covers:—(a) the risks excluded from the standard form of English marine policy by the clause:—'Warranted free of capture, seizure, arrest, restraint or detainment, and the consequences thereof or of any attempt thereat; also from the consequences of hostilities or war-like operations, whether there be declaration of war or not . . . Further warranted free from the consequences of civil war, revolution, rebellion, insurrection or civil strife arising therefrom . . . ' (b) loss (total or partial) of the subject-matter hereby insured caused by:—(i) hostilities, warlike operations, civil war, revolution, rebellion, insurrection or civil strife arising therefrom . . . Nevertheless this policy is warranted free of any claim based upon loss of, or frustration of, any voyage or adventure caused by arrests, restraints or detainments of kings, princes, peoples, usurpers or persons attempting to usurp power. (2) Warranted free of loss proximately caused by delay . . . (4) The Institute Time Clauses—Freight (except cl. 9, cl. 12 and cl. 14) are deemed to be incorporated in this policy . . ."

The Institute Time Clauses: Freight, relevant to the case, provided (inter alia) as follows:

- E (6) In the event of the total loss (actual or constructive) of the vessel named herein the amount insured shall be paid in full, whether the vessel be fully or partly loaded or in ballast chartered or unchartered. . . . (7) Except in respect of a claim arising under cl. 6, the amount recoverable hereunder for any claim for loss of freight shall not exceed the gross freight actually lost. (8) Warranted free from any claim consequent upon loss of time whether arising from a peril of the sea or otherwise."

- F By a charterparty dated July 16, 1949, between S. Livanos and Co., Ltd., as agents for the plaintiffs, and Wallam and Co., of Hong Kong, as agents for the charterers, it was agreed that the Atlantic Trader, carrying 9,700 tons of dead weight cargo ten per cent. more or less at owners' option and expected ready to load about Aug. 4, 1949, should proceed to Taku Bar and there load outside the Bar a full and complete cargo of salt which the charterers bound themselves to ship, and, being so loaded, should proceed to one safe port Japan or one safe port South Korea as ordered on signing bills of lading and there deliver the cargo on being paid freight on bill of lading quantity at 24s. per ton of 2,240 pounds. The Atlantic Trader had performed a similar voyage before, and on July 29 she left Moji, in Japan, for Taku Bar in pursuance of the charterparty. The vessel arrived at Taku Bar (which is at the mouth of the Paiho river in North China) and anchored in the normal place, twelve miles outside, at 5 p.m. on Aug. 1. At 10.30 p.m. the vessel received free pratique from port officials and the master gave written notice of readiness to a representative of the agents of the charterers, who accepted such notice. On the Atlantic Trader's arrival, there were no other vessels present, but afterwards three Panamanian vessels and one Chinese vessel (K. 264) arrived. One Panamanian ship had come from inside the harbour partly loaded and

continued loading salt, and then was engaged in loading cargo other than salt from lighters. At all material times Taku Bar was in territory under the control of Chinese communist forces who were engaged in civil war with the National government of China. On Aug. 6 the master wired to the agents at Tientsin asking when the vessel was to start loading.

On Aug. 8 a destroyer arrived at the anchorage flying a Chinese nationalist flag and at 10.30 the Atlantic Trader was approached by an officer and twelve men from the destroyer armed with revolvers and sub-machine guns. The officer went into the master's cabin leaving some of his men, armed, outside. The master was forbidden by the Chinese officer to communicate in any way with the shore while the vessel was at Taku Bar. The officer then said: "Leave the northern Chinese ports as soon as possible. If any damage happens, the nationalists won't take any responsibility". He then left the vessel and went toward other ships in the anchorage. Soon afterwards the master received a wireless message from the charterer's agents for loading cargo, saying: "13th instant start loading salt". No reply was sent to this message. The master gave directions that the vessel was to be made ready to sail. Between 3.30 and 4 p.m. the same day the destroyer shelled and sank the Chinese ship K. 264. The master continued to wait in the anchorage. Just after 4.30 p.m. a second destroyer arrived and at 5.30 the following message was transmitted by morse code to the ships in the anchorage: "Messages to all Panama ships from Chinese navy. Good advice to you. Better leave here before 8 p.m. New activity will take place here even if you are close to port. Otherwise you are responsible." Before 7 p.m. all lighters and tug boats were collected together and anchored in one spot by Chinese naval craft. At 7 p.m. the Atlantic Trader, with the other three Panamanian ships, left the anchorage and put to sea. At 8 p.m. flashes were seen and gunfire was heard from the direction of Taku Bar and it was later heard that a vessel had been sunk in the harbour that night.

When clear of Taku Bar the master sent wireless reports to the plaintiff's agents in London. On the night of Aug. 8/9 the master received an inquiry from the charterers' agents in Tientsin in the following terms: "Please advise immediately whether you are unexpected trouble regarding safety", to which the master replied: "Left Taku Bar 19.00 eighth." At 8.30 p.m. Aug. 9, the master received orders to proceed to British Columbia to load a cargo of lumber after bunkering at Sasebo (Japan). These instructions were immediately complied with, and, after loading a complete cargo of lumber, the Atlantic Trader carried it to Callao and United States Atlantic ports where discharge was complete on Nov. 23, 1949. Neither the plaintiffs' London agents nor anyone else on behalf of the plaintiffs made any inquiries as to the possibility of the Atlantic Trader returning to Taku Bar to start loading under the charterparty. Neither did the master make any inquiries before acting on his new instructions. A United States vessel, the Iran Victory, arrived at Taku Bar on Aug. 10 and sailed for Honolulu on Aug. 11, having loaded a general cargo, and many other ships also entered the port and loaded cargo in the following months. [The agreed statement of facts then went on to particularise the amount of freight actually earned under the new charterparty and the freight that would have been earned had the salt been loaded at Taku Bar, together with a calculation of dates for loading, time for voyages, etc., so that damages might be assessed.]

Mocatta, Q.C., and C. T. Bailhache for the plaintiffs.

Sir Robert Aske, Q.C., and E. W. Roskill for the defendant.

Cur. adv. vult.

Mar. 16. **SELLERS, J.**, read the following judgment. This action came before the court on an agreed statement of facts, which statement I incorporate

into this judgment without repeating it. No witnesses were called at the trial to amplify that which the parties agreed, and the only additional evidence adduced was the translation of a telegram dated Aug. 8, 1949, from the captain of the Atlantic Trader to his owners' agents in London. The court has, therefore, to arrive at a decision on what happened at Taku Bar and the effect of it on this evidence alone.

- A The issues between the parties on the events at Taku Bar are that the claimants, the shipowners, say that their vessel the Atlantic Trader was obliged to leave Taku Bar and so failed to load the cargo and perform the voyage which would have earned the freight the loss of which is now claimed under the policy of insurance, whereas the defendant, as a representative underwriter, alleges that the sailing away from the port on Aug. 8 was a voluntary act of the master, or, if that was not a voluntary act, it was so to leave the port
- B permanently and not return and take up the cargo, and that it was a voluntary act of the shipowners or their agents to send the ship on another engagement. In considering these issues I was invited by learned counsel for the defendant to have regard to what happened after the Atlantic Trader left Taku Bar as showing what the probabilities really were, and in support of the submission
- C he quoted the observation of LORD SUMNER in *Bank Line, Ltd. v. Arthur Capel & Co.* (1) ([1919] A.C. 454): "What happens afterwards may assist in showing what the probabilities really were, if they had been reasonably forecasted . . ." Particulars have been furnished of vessels which called at Taku Bar after Aug. 8. The Iran Victory arrived on Aug. 10, 1949, loaded just over one thousand tons, and left the next day. She was a liner and so were most, if not all, of the other ships which loaded there in the ensuing weeks, and none
- D was from Panama. On this evidence I do not feel able to say affirmatively what the fate of the Atlantic Trader would have been if her master had decided to ignore the orders or warnings he had received and had either remained where he was or had temporarily moved away and returned in a day or two. But, even if I could, I find it extremely difficult to apply LORD SUMNER's dictum. I have to consider the situation as it confronted the master on the
- E information which he had and which he had to assess or, in the military term, appreciate. Unless what happened afterwards could have been reasonably foreseen any knowledge of after events or any inference to be drawn from them cannot, as I see it, be attributable to the master.

- If a master acts on a mere or even a reasonable apprehension (though justified) of danger or loss he would be acting voluntarily: *Watts, Watts & Co., Ltd. v. Mitsui & Co., Ltd.* (2), *Becker, Gray & Co. v. London Assurance Corpn.* (3). But if he acts when a danger is on him, when there is an existing and present peril, then he need not wait until force has been used before his act may be held to be an involuntary one: *Rodoconachi v. Elliott* (4), *Nobel's Explosives Co. v. Jenkins & Co.* (5), and I will quote from *British & Foreign Marine Insurance Co., Ltd. v. Samuel Sanday & Co.* (6) where LORD WRENBURY says
- G ([1916] 1 A.C. 672):

"Restraint is equally imposed when obedience is given by reason of the existence of force in reserve as when it is given by reason of force employed."

And both sides relied on the statement of EARL LOREBURN (*ibid.*, 659):

- H " . . . I am not pressed by the circumstance that force was neither exerted nor present, for force is in reserve behind every State command. And it would be a strange law which deprived the assured, if otherwise entitled to his indemnity, upon the ground that he had not resisted, till the hand of power was laid upon him, an order which it was his duty to obey. If it were an order which he was not bound to obey, and which he might have successfully resisted either by violence or by process of law, a question might arise whether or not there had been in fact a restraint."

LORD DUNEDIN put the question thus in *Watts, Watts & Co., Ltd. v. Mitsui & Co., Ltd.* (2) ([1917] A.C. 238):

"Restraint of princes, to fall within the words of the exception, must be an existing fact and not a mere apprehension . . . it may be possible to invoke the exception when a reasonable man in face of an existing restraint may consider that the restraint, though it does not affect him at the moment, will do so if he continue the adventure. It would be useless to try to fix by definition the precise imminence of peril which would make the restraint a present fact as contrasted with a future fear. The circumstances in each particular case must be considered."

That was a charterparty case and not one of insurance, but the observations apply equally, I think, to the one as to the other.

The agreed facts show that there was civil war in Taku Bar and the neighbourhood. The port and its hinterland were in the hands of and under the control of the Chinese communist forces and obviously active trading was taking place. The destroyer which arrived early on Aug. 8, 1949, was flying the Chinese flag and was acting on behalf of the then government of China, the so-called National government, with which the communists were at war. The boarding party which the destroyer put on board the *Atlantic Trader* carried revolvers and tommy guns. Later in the day another National government destroyer arrived at the port. During the afternoon and later in the evening there was gunfire, and it appears that more than one vessel was sunk in the harbour. The master's telegram stated that at 10.30 a.m. the boarding party ordered him to abandon immediately both the port and the North China coast. At 17.30 he was again ordered to leave immediately, otherwise the warships would not be responsible for the consequences. The master had been forbidden to communicate in any way with the shore while his ship was at Taku Bar, and two at least of the other vessels in the harbour were compelled by threats from the warships to leave the port and were warned not to return, and they did not return. The master of the *Atlantic Trader* had remained throughout the day to await developments, notwithstanding the early order to leave, and I find that he left under compulsion and the action he took was in no way a voluntary act. It may be that he was not infringing any rule of law. The *Atlantic Trader* was a neutral vessel and was not engaged in anything contrary to the rights of a neutral vessel, but I do not think the situation was such that he could safely stand on his legal rights. The threat of force was there. It was being exercised against some ships in the harbour. It was in the interest of both the owners and the insurers that the vessel should not be unduly hazarded to a loss by gunfire or arrest, and the master would have been blamed for reckless disregard of the safety of his ship if he had become a casualty in either of these ways after the two warnings which had been given and in the conditions which he had himself observed during the day.

I find that the *Atlantic Trader* left Taku Bar on the evening of Aug. 8, 1949, because of the civil war which was taking place there, because of the restraint placed on her by the Chinese government forces who restrained her master from communicating with the shore and from remaining in the harbour and because of warlike operations. The same facts and circumstances seem to me to establish the three separate risks of civil war, restraint and warlike operations. In the light of the known circumstances I do not think a prudent master could have ignored the warnings and the happenings which he himself saw. It would seem that it was not only Taku Bar, but also the northern Chinese ports which had to be left, and he had no reason to think the risks were slight or the interference was only temporary. In those circumstances I find against the defendant's submission that the act of the master at any material stage was voluntary.

The Atlantic Trader had arrived at Taku Bar on Aug. 1, and had given the necessary five days' notice of the steamer's readiness to load, and the lay-days commenced to run at 8 a.m. on Aug. 8. The probabilities were that, but for the events which happened that day, the Atlantic Trader would in due course have loaded the cargo of salt at Taku Bar in accordance with the charterparty of July 16, 1949, and would have been paid the freight thereon which was to be paid in cash in sterling in London "on signing bills of lading, discountless, not returnable ship and/or cargo lost or not lost." In the events which happened that freight was not received and it is for the gross amount which would have been payable under the charterparty that the claimants seek to be indemnified under the policy of insurance with the defendant and others.

The policy is a combined policy covering four separate heads of cover of which the third and only relevant one in this action is:

"Freight and/or anticipated freight and/or chartered freight in the sum of \$93,600."

The traditional Lloyd's form of policy has been subjected to some deletions and the whole policy is made up of no less than ten separate documents attached to and incorporated in the policy. The relevant parts of the policy are set out in the agreed statement of facts. As LORD WRIGHT pointed out in *Rickards v. Forestal Land, Timber & Rys. Co.* (7) ([1941] 3 All E.R. 75), the words: "capture, seizure, arrest, restraint or detainment" were intended to repeat the words printed in the body of the policy: "enemies . . . takings at sea, arrests, restraints and detainments of all kings, princes and peoples . . ." LORD WRIGHT added (*ibid.*): "It is also clear that it is this peril or class of perils which is dealt with in the frustration clause" by which name is described the clause

" . . . warranted free of any claim based upon loss of, or frustration of, the insured voyage or venture caused by arrests, restraints or detainments of kings, princes, peoples, usurpers or persons attempting to usurp power."

I have found that the Atlantic Trader was prevented from remaining at or entering into shore communication with Taku Bar by reason of civil war and restraint of princes (warlike operations includes civil war and adds nothing in the circumstances of this claim) and that thereby she was prevented from loading the cargo agreed and earning the freight thereon. On these findings the claimants ask to be indemnified under the policy. This claim is resisted by the underwriters on two grounds, the first that the proximate cause of the loss of the freight was the loss of the adventure, and they rely on the frustration clause, and the second that the policy was "warranted free of loss proximately caused by delay", that it was subject to cl. 8 of the Institute Time Clauses, and that it was delay which caused the loss of the freight here.

The decision on the matter turns on the proper interpretation of the contract of insurance, which interpretation has to be in the light of established principles in relation to this particular type of contract and with regard to the decisions on its interpretation as far as they are applicable. A large number of cases were cited in argument, not all of which were cases of freight insurance or cases of insurance at all, and many of which I do not find it helpful to review in this judgment, although they may contain decisions or observations which are a guide. Freight insurance entered into on the old form of marine insurance policy with deletions and additions to adapt the form to the intended contract has almost invariably given rise to difficulties of interpretation and I do not regard this case as one of the exceptions.

What the claimants have lost is the money which would have been paid over to them under the terms of the charterparty when the cargo was loaded at Taku Bar, and this did not take place because of the action taken by the

National government's naval forces on Aug. 8. Therefore, it would seem that the loss of freight was caused by that action. But the frustration clause exempts the insurers from liability if the claim is based on loss of or frustration of any voyage caused by restraints of princes. The voyage which would have earned the freight, a voyage which had already begun and in respect of which the lay days had commenced to run was lost by the restraints of princes, and, in my opinion, in so far as the claim has to be made on the restraint of princes peril the underwriters are not liable. A

It was argued that the claim was not based on the loss or frustration of the voyage or adventure, but on the peril or perils insured, and that this was so even though the voyage or adventure was, in fact, lost or frustrated. There has been divergence of opinion on the effect of the words "based upon", but it does not seem to me that any special effect can be given to them which would, in its effect, express this clause more favourably for the claimants. B The question is: Can this freight be regarded as lost by the restraint of princes proximately causing its loss, the loss arising eo instanti, or must it be held to be lost by the failure of the voyage or adventure which failure was, in my finding, caused by the restraint or civil war?

In *Carras v. London & Scottish Assurance Corpn., Ltd.* (8) LORD WRIGHT, M.R., defined ([1936] 1 K.B. 304) freight insurance as follows: C

"What is insured under the freight policy is not a chattel like a ship or a cargo; it is, even in the case of chartered freight, as in the present case, which is the most definite type of insurable interest in freight, merely a chose in action, a right of earning freight under the charter; a fortiori where there is merely an expectancy of earning freight, though enough to constitute an insurable interest." D

GREENE, L.J. (*ibid.*, 315), likewise says that in a freight policy,

"The subject matter of the insurance is a chose in action—viz., the contractual right to receive the freight from the charterer under the charter-party. If that right is lost through a peril of the sea the underwriters are liable as on a total loss." E

That would be so here, I think, substituting the insured peril of restraint of princes for a peril of the sea, were it not for the exceptions of the frustration clause and the clauses relating to delay. I will add the citation from CLEASBY, B., in *Potter v. Rankin* (9) (L.R. 5 C.P. 354) quoted in ARNOULD ON MARINE INSURANCE, 13th ed., p. 1058: F

"It is not, as is usually the case, an interest in anything which exists and of which possession can be had, as, for instance, a ship, or cargo, or even freight of cargo on board, of which the lien on the cargo gives a qualified possession: but, in such a case of chartered freight as the present, the interest is only a right to have cargo provided; it can only be enforced by action; and is in the nature of a chose in action." G

In so far as there is any difference in definition or approach between the earlier and the later statements, I accept the later, but for the purposes of this case I doubt if there is any material difference.

In the light of this approach the present case is quite distinct from the cases which have arisen for consideration, or any case where there has been a loss of the ship or cargo, actual or constructive, as, for instance, in *Robertson v. Petros M. Nomikos, Ltd.* (10). Here all that was lost was the voyage or the adventure and thereby the freight to be earned thereunder. The ship was sound and free and was not only an unfettered vehicle capable of earning freight, but, in fact, with the minimum of delay she sailed away to perform another engagement and earned freight under another charterparty. Whatever the original purpose of the clause may have been, in my opinion, it H

effectively exempts the underwriters from liability in a case such as the present in so far as the claim is made for a loss of freight caused by restraint of princes, or, put in the other way, by reason of the clause the shipowners have not covered themselves for a loss of freight by restraint incurred in the way it has arisen here.

A If it is said that at first sight the policy does not make this entirely clear to the insured I would readily agree. At a glance the policy appears to give with one hand and take away with the other that which it has given. But where parties agree a policy which once strikes out and then restores that which has been erased, there seems to be no reason in contract why the policy cannot repeat such methods, and a rule of construction which would give effect to a substantive obligation and not permit it to be nullified by an exception would not appear to be applicable. In any event, the freight insurance clauses in the policy give a wide cover and the restrictive clauses dealing with frustration and delay do not nullify the cover, but only qualify or limit its incidence. B The charterparty of July 16, 1949, contained a war risk clause, and, apparently, the charterers accepted its non-fulfilment without complaint and without any claim for damages for its breach against the shipowners. It was agreed that in these circumstances the charterparty was not strictly or technically frustrated, C but that it terminated by reason of its own express terms. It is sufficient for me to hold, as I have done, that the voyage was lost without considering further this doubtful submission that the charterparty was not frustrated.

The frustration clause is, however, limited to loss or frustration of a voyage or adventure caused by arrests, restraints or detentions of kings, princes, peoples, usurpers or persons attempting to usurp power. Any one of these three types of interference may arise, I apprehend, without civil war, and the policy gives a separate cover for loss of freight caused by civil war. It has been agreed that civil war was in progress and the incidents of Aug. 8, as far as they affected the Atlantic Trader, were the consequences of civil war. The claimants are entitled, as I see it, to base their claim on this separate head of cover to which the frustration clause does not apply, and were it not for the other two clauses E relied on by the underwriters I would be prepared to construe the policy (certainly by application of the contra proferentes rule) in their favour on the facts established here. But the policy is "warranted free of loss proximately caused by delay," and by cl. 8 of the Institute Time Clauses: "Warranted free from any claim consequent upon loss of time whether arising from a peril F of the sea or otherwise".

Since the Atlantic Trader retained her full carrying powers as a ship, if and when the civil war ended, or if and when its effect no longer affected the loading of vessels at Taku Bar, the Atlantic Trader could have returned and loaded the cargo of salt under the charterparty in question. The voyage under the charterparty was lost and thereby the freight to be earned thereunder by reason of the delay involved. G It was because the cargo could not be loaded and the contractual voyage could not be performed within any foreseeable or assessable period of time that the master abandoned the contract and sailed away and the owners entered into a new engagement for the services of the ship. If the right view is that the voyage, notwithstanding the events of Aug. 8, could have been performed within a reasonable time, or, more accurately, within a time which H the charterparty (having regard to all its terms) must be held to have contemplated as the period for its fulfilment, then the freight would have to be held to have been lost by the voluntary act of the claimants or their servants and there could be no claim for indemnity under the policy.

In my opinion, this case is covered by the authority of *Bensaude v. Thames & Mersey Marine Insurance Co.* (11). In that case the vessel's main shaft broke through a peril of the sea and the vessel returned to her port of loading. The delay necessary for taking the vessel to Cadiz and repairing the damage

was such as to frustrate the objects of the adventure, and the charterers lawfully put an end to the contract. LORD HALSBURY, L.C., said ([1897] A.C. 611):

" . . . the reason why the loss of freight had been incurred must be that the damage was of such a character that there was an impossibility of prosecuting the voyage within the time within which it was necessary to prosecute it."

LORD WATSON (*ibid.*, 613) put it succinctly:

" . . . but for the delay occasioned by the breaking of the shaft there would have been no loss to claim."

In *Robertson v. Petros M. Nomikos, Ltd.* (10), the *Bensaude* case (11) was distinguished and LORD ATKIN ([1939] 2 All E.R. 724) made these observations:

" I wish, however, to reserve the question whether the claim in this case was in any view consequent on loss of time. The question appears to me to be in every case a question of fact, and the authorities should be treated from that point of view. It may prove that the words 'consequent on loss of time' have received too wide a construction in some of the cases . . ."

No judicial pronouncement of LORD ATKIN should go unheeded, but, notwithstanding his warning and dealing with the question as one of fact, I find in this case as I have already indicated, and it follows that the time clauses would defeat the claim based on restraint of princes in the absence of the frustration clause. If the clauses do not apply here where an unladen vessel waiting to load is not lost, not damaged, not arrested, and not detained, but sound and free and merely held up at the time from performing her contractual obligations, I find it difficult to give any real effect to the two clauses on which the underwriters rely. In my opinion, the claim for indemnity fails, and there will be judgment for the defendant with costs.

Judgment for defendant.

Solicitors: *Ince & Co.* (for the plaintiffs); *Thomas Cooper & Co.* (for the defendant).

[Reported by MICHAEL MALONEY, Esq., Barrister-at-Law.]

HARRISON & JONES, LTD. v. BUNTEN & LANCASTER, LTD.

[QUEEN'S BENCH DIVISION (Pilcher, J.), March 9, 10, 19, 1953.]

Sale of Goods—Trade description—Mutual ignorance as to deficiency in quality—Goods of contract description supplied—Validity of contract.

By two contracts in writing, the sellers agreed to sell, and the buyers agreed to buy, a quantity of Calcutta Kapok "Sree" brand. After the goods had been delivered, the buyers found that, instead of being pure kapok, they contained an admixture of cotton, which was unsuitable for their machinery. It appeared that both parties thought that Calcutta Kapok "Sree" brand was tree kapok, whereas in the kapok trade it was a brand which was known to contain an admixture of bush cotton. On the question whether the contracts were nullities on the ground of mutual mistake of fact,

HELD: when goods, whether specific or unascertained, are sold under a known trade description, without misrepresentation or breach of warranty, the fact that both parties are unaware that goods of that known trade description lack any particular quality is irrelevant; if goods answering to the particular description are supplied, the parties are bound by their contract and there is no room for the doctrine that the contract can be treated as a nullity on the ground of mutual mistake, even though the mistake, from the purchaser's point of view, may turn out to be of a fundamental character; and, therefore, the contracts were not nullities and the buyers were bound by them.

AS TO MUTUAL MISTAKE AS TO THE QUALITY OF THE SUBJECT-MATTER OF A CONTRACT, see HALSBURY, Hailsham Edn., Vol. 23, p. 136, para. 191; and FOR CASES, see DIGEST, Vol. 35, pp. 105-107, Nos. 110-122.

Cases referred to:

(1) *Bell v. Lever Bros., Ltd.*, [1932] A.C. 161; 101 L.J.K.B. 129; 146 L.T. 566; Digest Supp.

(2) *Solle v. Butcher*, [1949] 2 All E.R. 1107; [1950] 1 K.B. 671; 31 Digest, Replacement, 674, 7699.

(3) *Norwich Union Fire Insurance Society, Ltd. v. Price, Ltd.*, [1934] A.C. 455; 103 L.J.P.C. 115; 151 L.T. 309; Digest Supp.

(4) *Heyman v. Darwins, Ltd.*, [1942] 1 All E.R. 337; [1942] A.C. 356; 111 L.J.K.B. 241; 166 L.T. 306; 2nd Digest Supp.

(5) *Ryder v. Woodley*, (1862), 10 W.R. 294; 17 Digest 45, 504.

(6) *Leaf v. International Galleries*, [1950] 1 All E.R. 693; [1950] 2 K.B. 86; 2nd Digest Supp.

CONSULTATIVE CASE stated under s. 21 (1) (a) of the Arbitration Act, 1950, by the appeal committee of the Kapok Trade Association.

By a contract in writing, dated Feb. 21, 1951, contained in the abridged form of contract of the Kapok Trade Association, the sellers, Buntten & Lancaster, Ltd., of London, who were importers of kapok and members of the Kapok Trade Association, agreed to sell, and the buyers, Harrison & Jones, Ltd., of Liverpool, who were manufacturers of articles made of kapok, agreed to buy, a hundred bales of Calcutta Kapok "Sree" brand. The contract contained a guarantee of quality in the following words: "To be equal to standard sample marked 'Sree' brand in our [the sellers'] possession". The buyers confirmed their acceptance of the contract, and on May 24, 1951, the sellers sent to the buyers a sample of Calcutta Kapok "Sree" brand. By a second contract, dated May 28, 1951, made in substantially the same terms, the sellers agreed to sell and the buyers agreed to buy two hundred bales of the same commodity. The bales were duly shipped from Calcutta and arrived at Liverpool on Aug. 22, 1951. On Oct. 11, 1951, the buyers informed the sellers that, having begun to use the two hundred bales of kapok which formed

the subject-matter of the second contract, it had been found that the kapok contained an admixture of cotton, and on Oct. 12, 1951, they complained that an admixture of cotton had been found in all the material. From correspondence which took place between the parties, it appeared that the buyers, when entering into the two contracts, had intended to buy pure kapok, and the sellers, having had their attention drawn to the fact that the commodity in which they had dealt was not pure kapok, agreed that they had then no knowledge that it was other than pure kapok. The buyers claimed that they were entitled to reject the goods. Arbitrators were appointed by the parties, but they were unable to agree, and an umpire was appointed. On May 27, 1952, the umpire awarded that the dispute under each of the contracts was one of quality, and should, therefore, be dealt with under the quality clause of the standard form of contract of the Kapok Trade Association.

From these two awards, the buyers appealed to the appeal committee of the Kapok Trade Association. They contended, *inter alia*, that the goods sold under the contracts were sold by description as Calcutta Kapok "Sree" brand; in the kapok trade the term "kapok" meant species and grades of tree cotton and no other type of cotton, the term "cotton" being applied only to species and grades of bush cotton; the goods delivered under the contracts consisted of kapok mixed with ten to twelve per cent. of cotton; in the kapok trade any reference to kapok, with or without the addition of a reference to any particular brand of kapok, meant pure kapok, and a mixture of kapok and cotton was described as cotton/kapok; the sellers, had they known when they entered into the contracts that the goods would contain an admixture of cotton, would have quoted them to the buyers as cotton/kapok and sold them with that description; the goods were not suitable for the buyers' requirements and it was not commercially possible for them to have discovered that they were, in fact, cotton/kapok before putting them through their machinery which could not work cotton/kapok; in the circumstances the goods delivered under the contracts were not Calcutta kapok, and the dispute between the parties was not one as to quality; and the buyers were entitled to reject the goods, or, alternatively, to damages for breach of contract. The sellers contended, *inter alia*, that Calcutta Kapok "Sree" brand was a brand of kapok which always contained an admixture of cotton which might be as high as fifteen per cent.; the goods delivered to the buyers were kapok containing an admixture of cotton of between ten and twelve per cent., and answered the description in commercial language of Calcutta kapok; and, therefore, the dispute between the parties was one as to quality only.

On Nov. 25, 1952, on these contentions, so far as they were questions of fact, the appeal committee found as follows:

- "(i) The word 'kapok' means all species and grades of tree cotton. (ii) What is commonly called cotton is comprised of bush cotton which is different from tree cotton. (iii) Calcutta Kapok 'Sree' brand is a brand of kapok which is known in the kapok trade to contain an admixture of bush cotton. (iv) The said goods consisted of kapok with an admixture of approximately ten per cent. to twelve per cent. of cotton fibres. (v) It was not proved to the satisfaction of the committee that the said goods did not correspond with the standard sample referred to in each of the said contracts. (vi) The said goods delivered by the [sellers] to the [buyers] answered the description of Calcutta Kapok 'Sree' brand contained in the said contracts."

The appeal committee stated their award in the form of a consultative case and asked the court for their opinion on the questions whether on the facts found and on the true construction of the contracts (i) the dispute between the buyers and the sellers was a dispute as to quality within the meaning of

the provisions of the standard form of contract of the Kapok Trade Association, (ii) the buyers were entitled to reject the goods delivered by the sellers, and (iii) the buyers were entitled to recover damages from the sellers.

Ashton Roskill, Q.C., and Nicklin for the buyers.

MacKenna, Q.C., and H. E. Park for the sellers.

Cour. adv. vult.

- A Mar. 19. **PILCHER, J.:** This matter arises on a consultative case for the consideration of the court stated under s. 21 (1) (a) of the Arbitration Act, 1950, by the appeal committee of the Kapok Trade Association. [His LORDSHIP stated the facts and continued:] Counsel for the buyers contended that it was clear on the face of the award and the documents scheduled to the award that both buyers and sellers intended to deal in pure kapok not
- B containing any admixture of cotton. No specific finding of fact on this point was made by the appeal committee. Certain letters which passed between the parties after the buyers had found that the commodity was unsuitable for their purposes seemed to indicate that the sellers were recognising at that time that they did not then realise that what they had sold was not pure kapok. Founding himself on the proposition that both the parties had entered into
- C the contracts in question in a mistaken belief as to a fundamental question of fact (namely, that they both thought they were dealing in pure kapok, whereas, in fact, they were not), counsel for the buyers submitted that the two contracts were nullities. No information is provided in the award as to the circumstances in which the contracts were negotiated between the parties—that is to say, whether the sellers were informed that the buyers required pure kapok, or
- D which party suggested that the commodity to be dealt in should be Calcutta Kapok “Sree” brand, and it is essential to bear in mind that no question arises of representation, misrepresentation, or breach of warranty of any kind. On the other hand, the fact seems to be that the buyers, who were manufacturers of articles made of kapok, were ignorant of what the committee has found to be a fact, namely, that Calcutta Kapok “Sree” brand is a brand of kapok
- E which is known in the kapok trade to contain an admixture of bush cotton. When the minds of the sellers were directed to this particular point after the trouble arose, it would seem that they, also, were equally ignorant of the exact composition of Calcutta Kapok “Sree” brand.

- Counsel for the buyers submitted that the contracts in question, as I have said, were nullities on the ground of mutual mistake of fact on a fundamental
- F point. He cited certain passages from the speeches of their Lordships in *Bell v. Lever Bros., Ltd.* (1). I will deal with those passages later. He also relied on the judgment of DENNING, L.J., in *Solle v. Butcher* (2) in support of an argument which he advanced that, even if the contracts were not void ab initio, they were in all the circumstances voidable on equitable grounds. He further relied on a passage in *Norwich Union Fire Insurance Society, Ltd. v. Price, Ltd.*
- G (3), which was delivered by LORD WRIGHT ([1934] A.C. 463):

- “It is true that in general the test of intention in the formation of contracts and the transfer of property is objective; that is, intention is to be ascertained from what the parties said or did. But proof of mistake affirmatively excludes intention. It is, however, essential that the mistake relied on should be of such a nature that it can be properly described
- H as a mistake in respect of the underlying assumption of the contract or transaction or as being fundamental or basic. Whether the mistake does satisfy this description may often be a matter of great difficulty.”

Counsel for the buyers' argument was twofold—that the contracts were either void on the ground of mutual fundamental mistake or voidable in equity. The first matter to which I wish to draw attention is that the point which he sought to make was not made at the arbitration or at the appeal arbitration, and found no place in the buyers' contentions. He conceded that no

reference had been made to this point at the arbitration. One of the principal issues between the parties at the arbitration and before the appeal committee seems to have been whether the dispute was as to the quality of the goods or not. Neither party asked the appeal committee to state the point which counsel for the buyers now seeks to make as a point of law for the consideration of the court, but he contended that he is none the less entitled to raise the point here and to have it decided in his favour, if it is a good one. He conceded that, if his point was good, the result would be, on one view, that there never were any contracts, and, consequently, that there never was an arbitration clause under which the parties could arbitrate their disputes, whether as to quality or otherwise. That is a fact which is made quite clear in many cases, particularly in *Heyman v. Darwins, Ltd.* (4), where VISCOUNT SIMON, L.C., said ([1942] 1 All E.R. 343):

“If the dispute is as to whether the contract which contains the clause has ever been entered into at all, that issue cannot go to arbitration under the clause, for the party who denies that he has ever entered into the contract is thereby denying that he has ever joined in the submission. Similarly, if one party to the alleged contract is contending that it is void ab initio (because, for example, the making of such a contract is illegal), the arbitration clause cannot operate, for on this view the clause itself is also void.”

On the view that the contracts were voidable in equity, counsel for the buyers submitted that the court should answer the only really material question—namely, whether the buyers were entitled to reject the goods—in the affirmative. On the facts of the case, in so far as they appear in the award, neither party was at fault, unless it can be said that one or other or both of them should have known the composition of the commodity with which they were dealing under a trade description or brand. I am well satisfied that it would not be right on the facts to say that the contracts were voidable on equitable grounds, and I do not propose to say any more about that. If the buyers argue that the contracts were void ab initio on the grounds of mutual mistake of a fundamental character, the curious result follows that the contracts, with their arbitration clauses, were nullities, and proceedings which have been taken under the arbitration clauses have been so much waste of time.

I think, however, that the point which counsel for the buyers now seeks to raise is unsound. The true view of the situation is, in my view, as follows. These were sales by description of unascertained goods for future delivery with a provision that the sellers should be provided with samples; the contracts were in writing, and in each contract the goods were described as “Calcutta Kapok ‘Sree’ brand”; Calcutta Kapok “Sree” brand is a brand of kapok known in the kapok trade to contain an admixture of cotton; the goods supplied by the sellers to the buyers answered the trade description of Calcutta Kapok “Sree” brand; samples were sent; the buyers did not satisfy the appeal committee that the goods supplied did not correspond to the sample; and no question of misrepresentation or breach of warranty arises. In these circumstances, I can see no ground for the suggestion that the buyers are entitled to reject the goods which in quality and composition correspond accurately to the description by which they were known in the trade, merely because they—the buyers—when entering into the contract, and the sellers, after the trouble arose, were under the impression that goods of this description consisted of pure kapok. As the point now argued was not raised at the arbitration, there is no finding whether the mistake was of a fundamental character. This is a question of fact which, as has often been pointed out in this type of case, is by no means always easy to determine.

Had I felt any real doubt as to how the case ought to be decided in law, I should have been tempted to remit the case to the appeal committee for a

specific finding of fact on this point. Taking the view which I do of the law, I find it unnecessary to take this course. *Ryder v. Woodley* (5) seems to show that, in this type of case, a mistaken belief by the buyers as to the nature and the quality of goods bought by description is immaterial, provided that goods which answered the description are delivered. It is not easy in principle to see why the fact that the sellers also shared the mistaken belief should be material. Bearing in mind that the case with which I am concerned is one in which no question of misrepresentation or breach of warranty arises, the following passage from the speech of LORD ATKIN in *Bell v. Lever Bros., Ltd.* (1) seems to be in point ([1932] A.C. 224):

"A. buys B.'s horse; he thinks the horse is sound and he pays the price of a sound horse; he would certainly not have bought the horse if he had known as the fact is that the horse is unsound. If B. has made no representation as to soundness and has not contracted that the horse is sound, A. is bound and cannot recover back the price. A. buys a picture from B.; both A. and B. believe it to be the work of an old master, and a high price is paid. It turns out to be a modern copy. A. has no remedy in the absence of representation or warranty. A. agrees to take on lease or to buy from B. an unfurnished dwelling-house. The house is in fact uninhabitable. A. would never have entered into the bargain if he had known the fact. A. has no remedy, and the position is the same whether B. knew the facts or not, so long as he made no representation or gave no warranty. A. buys a roadside garage business from B. abutting on a public thoroughfare: unknown to A., but known to B., it has already been decided to construct a byepass road which will divert substantially the whole of the traffic from passing A.'s garage. Again A. has no remedy. All these cases involve hardship on A. and benefit B., as most people would say, unjustly. They can be supported on the ground that it is of paramount importance that contracts should be observed, and that if parties honestly comply with the essentials of the formation of contracts—i.e., agree in the same terms on the same subject-matter—they are bound, and must rely on the stipulations of the contract for protection from the effect of facts unknown to them."

Leaf v. International Galleries (6) concerned the sale of a picture innocently represented by the vendor to have been painted by Constable. After five years the buyer claimed rescission of the contract on the ground of innocent misrepresentation. I only refer to this case because of the following passage in DENNING, L.J.'s judgment ([1950] 1 All E.R. 694):

"In my opinion, this case is to be decided according to the well known principles applicable to the sale of goods. This was a contract for the sale of goods. There was a mistake about the quality of the subject-matter, because both parties believed the picture to be a Constable, and that mistake was in one sense essential or fundamental. Such a mistake, however, does not avoid the contract. There was no mistake about the subject-matter of the sale. It was a specific picture of 'Salisbury Cathedral'. The parties were agreed in the same terms on the same subject-matter, and that is sufficient to make a contract."

Leaf v. International Galleries (6) concerned the sale of specific goods, namely, a picture, and counsel for the buyers argued that, whereas it might be true to say that a genuine and mutual fundamental mistake as to the quality of the specific article might not, in the absence of misrepresentation or breach of warranty, avoid the contract, the same principle did not apply in the case of a sale of unascertained goods, such as were in question in the present case. He contended that, where the contract was for the sale of unascertained goods, the parties do not agree on the same subject-matter, even though they give

it its correct trade description, if they are under a mutual mistake as to the character or quality of the described subject-matter, provided it is a mistake of a fundamental character. So framed, he submitted that his proposition was covered by a passage in *Bell v. Lever Bros., Ltd.* (1), in which, dealing with mistake as to quality, LORD ATKIN said ([1932] A.C. 218):

"Mistake as to quality of the thing contracted for raises more difficult questions. In such a case a mistake will not affect assent unless it is the mistake of both parties, and is as to the existence of some quality which makes the thing without the quality essentially different from the thing as it was believed to be. Of course it may appear that the parties contracted that the article should possess the quality which one or other or both mistakenly believed it to possess."

While there are, no doubt, many cases in which proof of a mutual mistake as to quality of a fundamental character will serve to avoid a contract of sale, it will be remembered that *Bell v. Lever Bros., Ltd.* (1) was not a case of that sort. It was not a case which concerned the sale of goods, and I cannot think that in stating the general proposition, as he did in the passage which I have quoted above, LORD ATKIN had in mind the case of the sale of goods in the way of commerce under a well-known trade description.

In this connection, I desire to quote a passage from the judgment of DENNING, L.J., in *Solle v. Butcher* (2). In dealing with mistake which renders the contract a nullity, he said ([1949] 2 All E.R. 1119):

"All previous decisions on this subject must now be read in the light of *Bell v. Lever Bros., Ltd.* (1). The correct interpretation of that case, to my mind, is that once a contract has been made, that is to say, once the parties, whatever their inmost states of mind, have to all outward appearances agreed with sufficient certainty in the same terms on the same subject-matter, then the contract is good unless and until it is set aside for breach of some condition expressed or implied in it, or for fraud, or on some equitable ground. Neither party can rely on his own mistake to say it was a nullity from the beginning, no matter that it was a mistake which to his mind was fundamental, and no matter that the other party knew he was under a mistake. A fortiori if the other party did not know of the mistake, but shared it."

Disputes between commercial men concerning sale by description of unascertained goods in the way of business in which no question of misrepresentation or breach of warranty arise are not common. A sale in a particular trade by a description known in that trade would ordinarily negative the possibility of mutual mistake of a fundamental character. In this particular case, while it would seem that when the trouble arose both parties thought that the commodity in which they were dealing was pure kapok, there is no finding of fact in the award that the minds of the sellers, or, indeed, of the buyers, were, at the time of the making of the contract, directed to the particular point whether the commodity in which they were dealing did, or did not, contain any admixture of cotton. Without any representation or warranty on the part of the sellers the buyers agreed to purchase Calcutta Kapok "Sree" brand. The sellers delivered goods of the contract description. Samples were supplied by the sellers. The buyers had every opportunity of examining the samples. There is no finding that the bulk did not comply with the samples. I find it difficult to believe that a proper and timely examination of the samples by the buyers would not have revealed the admixture of cotton complained of by the buyers, and, in any case, there is no finding of fact in the award that this would not have been so. If manufacturers who buy their raw material in a particular trade choose to order goods, whether ascertained or unascertained, by a description or brand known in the particular trade, and goods answering

to the particular description or brand are supplied, I cannot see why they should, in the absence of any misrepresentation or breach of warranty by the seller, have any cause for complaint. The seller has complied with the provisions of s. 13 of the Sale of Goods Act, 1893, and that, in my view, is the extent of his liability in cases of this type.

A When goods, whether specific or unascertained, are sold under a known trade description, without misrepresentation, innocent or guilty, and without breach of warranty, the fact that both parties are unaware that goods of that known trade description lack any particular quality is, in my view, completely irrelevant. The parties are bound by their contract, and there is no room for the doctrine that the contract can be treated as a nullity on the ground of mutual mistake, even though the mistake, from the point of view of the purchaser, may turn out to be of a fundamental character. Counsel for the buyers could not, and doubtless would not, have attempted to argue the point which he has if it had not been for the fact that, after the trouble arose, the sellers adopted a sympathetic attitude towards the buyers and wrote a number of letters to them, in which the following passages appear. In the letter of Oct. 11, 1951, dealing with the buyers' complaint that there was an admixture of cotton, they said:

C "This we realise is a very serious matter and we have immediately telegraphed to the shippers asking for their comments, which will be passed to you as soon as they are received. In the meantime, it is noted that you are carrying out tests and will let us have details and report at your earliest convenience. Meanwhile, for good order's sake we have provisionally claimed arbitration pending an amicable settlement. We are extremely sorry that this has happened and can assure you that we had no previous knowledge or intimation that this was not pure kapok, and we can only hope your final report will not prove as serious as it at the moment seems probable."

E In a letter dated Oct. 18, 1951, they said:

"We are very sorry that this unfortunate affair should have occurred and to be perfectly honest with you this is the first time, as far as we can remember, that we have had a claim of this sort, but we can assure you that we shall do everything possible to protect your interests."

F In a letter of Nov. 29, 1951, they said:

"We feel as you do that a false delivery has been made, in that a mixture of cotton and kapok has been delivered against a kapok contract."

G It is, perhaps, natural that the buyers should rely on those passages and on certain other, perhaps, less convincing passages in the sellers' letters, but whether the minds of the sellers were, at the time they made the contract in question, specifically directed to the question whether Calcutta Kapok "Sree" brand did, or did not, contain an admixture of cotton, may be doubtful. In any case, there is no finding of fact on this point. If the sellers' minds were not directed to this point when they entered into the contract, then no question of a mutual mistake of fact arises. That, I think, is made clear in LORD THANKERTON'S speech in *Bell v. Lever Bros., Ltd.* (1) when he said this, dealing with the phrase "underlying assumption by the parties" ([1932] A.C. 235):

H "The phrase 'underlying assumption by the parties', as applied to the subject-matter of a contract, may be too widely interpreted so as to include something which one of the parties had not necessarily in his mind at the time of the contract; in my opinion it can only properly relate to something which both must necessarily have accepted in their minds as an essential and integral element of the subject-matter. In the present

case, however probable it may be, we are not necessarily forced to that assumption."

If I may say so (and it may not be material from my point of view in this case) I do not feel that I am necessarily forced to that assumption either.

For the reasons which I have given, and even on the assumption that there was, at the time the contract was made, a mutual mistake of fact by buyers and sellers as to the composition of the commodity they were dealing in, I am satisfied that counsel for the buyers' point is unsound. In a case of this kind where the buyer mistakenly believes that goods of a known trade description have a particular composition, he has no right to relief in the absence of misrepresentation or breach of warranty by the seller, and I can see no reason in principle why the fact that the seller may entertain the same unexpressed but erroneous belief should have any relevance when the rights of the parties come to be considered. Accordingly, I am satisfied that the questions asked by the appeal committee must be answered in favour of the sellers. Dealing with these questions, in so far as the first question put by the appeal committee is material, I determine that the dispute between the parties was a dispute as to quality; I answer the second and third questions in the negative; and the result of this judgment must be that the buyers will pay the sellers' costs.

Judgment for the sellers.

Solicitors: *Pritchard, Englefield & Co.*, agents for *Aneurin Rees & Davies*, Liverpool (for the buyers); *Monro, Saw & Co.* (for the sellers).

[Reported by G. A. KIDNER, Esq., Barrister-at-Law.]

DIXON v. DIXON.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Davies, J.), March 11, 1953.]

Divorce—Desertion—Defence of "just cause" and counter-charge of constructive desertion—Pleading based on substantially the same items as relied on to support charges of cruelty in former unsuccessful suit—Summons to strike out pleading.

On Mar. 1, 1951, a divorce commissioner dismissed both the wife's petition for judicial separation alleging cruelty by the husband and the husband's cross-prayer for judicial separation alleging cruelty by the wife. On Nov. 11, 1952, the husband filed a petition for divorce on the ground of the wife's desertion. By her answer the wife denied desertion, but admitted that she had ceased to live with the husband, alleging that she had just cause for so doing "by reason of the particulars herein set out". In those particulars the wife set out substantially the same matters as those on which she had relied to found the charge of cruelty in the former suit, and she further relied on those particulars to support an allegation of constructive desertion. On a summons by the husband to strike out the parts of the wife's pleadings alleging "just cause" and constructive desertion,

HELD: in view of the conflicting decisions of the Court of Appeal in *Edwards v. Edwards* ([1949] 2 All E.R. 145) and *Pike v. Pike* (ante, p. 232) on the question whether conduct falling short of legal cruelty can justify one spouse in leaving another or can support a charge of constructive desertion, and, as it was not clear from his judgment whether the commissioner decided that the alleged acts of cruelty did not take place or that the acts which were proved did not amount to cruelty, the case was not so clear as to admit of there being adopted the summary course of striking out a defence of "just cause", and, although the allegation of constructive desertion was, not a defence, but a counter-charge, it was merely an alternative way of stating the consequences in law of any facts which

might be proved under the particulars of "just cause", and this allegation should, likewise, be allowed to stand.

AS TO RES JUDICATA AS A BAR TO RELIEF IN MATRIMONIAL SUITS, see HALSBURY, Hailsham Edn., Vol. 10, pp. 670-673, paras. 990-994; and FOR CASES, see DIGEST, Replacement Vol. 27, pp. 374-378, Nos. 3088-3117.

Cases referred to:

- A (1) *Russell v. Russell*, [1895] P. 315; 64 L.J.P. 105; 73 L.T. 295; *affd.*, H.L., [1897] A.C. 395; 66 L.J.P. 122; 77 L.T. 249; 61 J.P. 771; 27 Digest, Replacement, 356, 2948.
- (2) *Hoystead v. Taxation Comr.*, [1926] A.C. 155; 94 L.J.P.C. 79; 134 L.T. 354; Digest Supp.
- B (3) *Henderson v. Henderson*, (1843), 3 Hare, 100; 1 L.T.O.S. 410; 67 E.R. 313; 21 Digest 174, 276.
- (4) *Greenhalgh v. Mallard*, [1947] 2 All E.R. 255; 2nd Digest Supp.
- (5) *Finney v. Finney*, (1868), L.R. 1 P. & D. 483; 37 L.J.P. & M. 43; 18 L.T. 489; 27 Digest, Replacement, 375, 3092.
- (6) *Pike v. Pike*, [1953] 1 All E.R. 232.
- C (7) *Edwards v. Edwards*, [1949] 2 All E.R. 145; [1950] P. 8; [1948] L.J.R. 1335; 113 J.P. 383; 27 Digest, Replacement, 366, 3022.
- (8) *Butland v. Butland*, (1913), 29 T.L.R. 729; 27 Digest, Replacement, 444, 3754.
- (9) *Barker v. Barker*, [1949] 1 All E.R. 247; [1949] P. 219; [1949] L.J.R. 464; 113 J.P. 91; 27 Digest, Replacement, 700, 6699.
- (10) *Oldroyd v. Oldroyd*, [1896] P. 175; 65 L.J.P. 113; 75 L.T. 281; 27 Digest, Replacement, 289, 2349.
- D (11) *Buchler v. Buchler*, [1947] 1 All E.R. 319; [1947] P. 25; [1947] L.J.R. 820; 176 L.T. 341; 111 J.P. 179; 27 Digest, Replacement, 350, 2899.

APPEAL by the wife against a decision of Mr. Registrar FORBES, dated Feb. 19, 1953.

- E The parties were married on Nov. 8, 1947. On July 9, 1949, the wife left the matrimonial home, and on Dec. 8, 1949, she filed a petition for judicial separation on the ground of the husband's cruelty. By his answer the husband denied cruelty and prayed for a decree of judicial separation also on the ground of cruelty. On Mar. 1, 1951, Mr. Commissioner BUSH JAMES dismissed the petition and the cross-prayer. On Nov. 11, 1952, the husband filed a petition for dissolution of the marriage on the ground of the wife's desertion. By her answer the wife denied desertion. In para. 2 she admitted that she had ceased to live with the husband, but said that she had just cause for so doing "by reason of the particulars herein set out", and by paras. 3 and 4 the wife charged constructive desertion on the part of the husband, alleging that, by the conduct referred to in the particulars to para. 2 he forced her to leave the matrimonial home. On a summons by the husband Mr. Registrar FORBES made an order dated Feb. 19, 1953, that, except for the words admitting that she had ceased to live with the husband, paras. 2, 3, and 4 of the wife's answer should be struck out, on the ground that by those paragraphs the wife was seeking to re-litigate or to set up for a second time the matters which had already been determined by Mr. Commissioner BUSH JAMES. The wife appealed, and on Feb. 27, 1953, DAVIES, J., in chambers adjourned the matter into court.

H *R. T. Barnard* and *A. B. Hollis* for the wife.

Baskerville for the husband.

DAVIES, J.: This is an appeal by the wife from a decision of Mr. Registrar FORBES dated Feb. 19, 1953. It came before me on Feb. 27 in chambers, when I adjourned it into court for further argument. By her answer to her husband's petition, which is the pleading with which this summons was concerned, she first denies desertion, and then, in para. 2, she admits that she ceased to live

with the husband. Those words have been left undisturbed by the order of the registrar, but the remainder of this paragraph has been struck out in toto. It pleaded:

"but she had and still has just cause for so doing by reason of the particulars herein set out."

She goes on in paras. 3 and 4, which constitute an allegation of constructive desertion, as follows:

"3. By such conduct as aforesaid the petitioner evinced an intention to bring cohabitation between the petitioner and the respondent permanently to an end and the respondent was thereby compelled on the said July 9, 1949, to leave the matrimonial home at 'Blue Hills' Esher Close in the county of Surrey and has not returned to cohabit with the petitioner. 4. That the petitioner has deserted the respondent without cause for a period of at least three years immediately preceding the presentation of this answer, to wit, from and since on or about July 9, 1949 in the circumstances referred to in para. 2 hereof."

It is plain that all the matters sought to be raised in the particulars under para. 2, with the exception of the last three sub-paras., are precisely the same as matters which the wife raised in the former suit. Counsel for the husband has given me a comparative table about which there is no dispute and it is clear that of the particulars in the present proceedings those numbered from (a) to (k) inclusive are the same as allegations of cruelty raised in the former suit. In regard to the last three, (l), (m) and (n), while those were not explicitly raised in the former suit, it is pointed out with force by counsel that they could have been raised, and, he says, should have been raised, since they were matters which occurred prior to the break-up of the marriage and the departure of the wife from the matrimonial home on July 9, 1949. Really what the wife is doing now is to seek by para. 2 at any rate (we will leave out paras. 3 and 4 for the moment) to raise, as constituting just cause for her leaving her husband, the same matters as those on which she relied as constituting acts of ill-treatment for the purpose of founding a charge of cruelty in the former suit, with the exception that in the former suit there were allegations by both parties of excessive sexual demands and what I suppose could be described as esoteric sexual practices, which each of the parties alleged as acts of cruelty by the other. With regard to the sexual matters Mr. Commissioner BUSH JAMES expressly found that, whatever took place, took place with the knowledge and consent of both of them, and the wife does not now seek to repeat any of her former complaints in this respect. I propose to complete the story of the pleadings by adding this. In the husband's answer in the previous petition he alleged that, if and in so far as he had been guilty of cruelty to the wife, the wife had condoned it by staying with him until July 9, 1949, when she left him, and also—I suppose by way of reviving any antecedent act by the wife which he could establish, although it was not expressly put in that way—the husband alleged in his previous answer that the wife deserted him when she left on July 9. I say that I suppose that this was done for the purpose of reviving the earlier acts because, of course, he could not obtain a decree on the ground of desertion in that suit, as the desertion, if any, was for less than three years.

The main contention of counsel for the husband in support of the order of the learned registrar on this summons is that, as the learned commissioner decided in the former suit that the acts which the wife now seeks to plead did not amount to cruelty, they cannot be relied on by her as constituting either constructive desertion on the part of the husband or just cause for her leaving him so as to constitute a defence by her to his charge of simple desertion. He also contends, though this is not really in the forefront of his case as I understand it, that just as in the former suit the husband alleged that by deserting him the wife

had revived any earlier acts which she had committed, so also the wife could have alleged that her departure on July 9 was caused by the husband's conduct and constituted constructive desertion by him then so as to revive any acts which he had previously committed. He also contends that if Mr. Commissioner BUSH JAMES had been of the opinion in the former suit that the wife was entitled by reason of the husband's conduct to leave him, the learned commissioner would have said so. Finally, he argues that as in any event in the

- A former suit the wife could have pleaded that she had just cause for leaving her husband, but did not so plead, she cannot be heard to make that contention now. He also points out with force that it is a great hardship to the husband to have these allegations tried all over again. In the previous suit the husband was ordered to pay his wife's costs up to the amount of the security, which was £300. Counsel asks why the husband should be put to the expense of
- B having all these matters litigated again with, it is to be presumed, leading counsel on either side as was the case on the former occasion. Therefore, says counsel, the summary procedure of striking out is the proper and appropriate one in this case.

I think it is right and essential that I should look at the judgment of the learned commissioner in the former suit. It is a very short judgment consisting

C of about two and a half foolscap pages. After reciting the history of the parties, which takes the first page, he deals in the next two paragraphs with the sexual matters with which we need not further concern ourselves on this summons. With regard to what I might call the other cruelty he says:

- D “The husband is a man of a cantankerous and pugnacious nature, and I do not think at his age he is at all a fit subject for matrimony. Be this as it may, as I said a moment ago, the wife entered into this marriage with her eyes open. I think she is capable of taking care of herself. Had she been subjected to the conduct she now says she was, her remedy would have been simple, she could have taken refuge with her mother in the Isle of Man.”

- E I do not know whether the learned commissioner is talking there about the sexual matters or the other matters. I rather think he means sexual matters because at the end of his judgment, having explained that they lived together as man and wife before the marriage, he says:

- F “She was a woman of thirty-seven, of business and sex experience, and far from being unsophisticated, and it was with her eyes open that she contracted this marriage.”

One would have thought that the expression “with her eyes open” was more apposite to sexual eccentricities than to physical violence. However, he goes on:

- G “In support of the wife's evidence I have the evidence of the two maids who were serving in the matrimonial home, and they say the matrimonial home was an unhappy one—that the husband was in the habit of slamming doors and windows and behaving in an unrestrained manner. I accept their evidence in its entirety. In addition, I have the evidence of two policemen who were called to the house on two separate occasions when they found
- H the husband in a temper and the wife distressed. I think that, apart from the evidence by the doctor of the maltreatment, is really the substance of the case.”

I pause there to say that it is unfortunate for anybody who has got to decide this application that the learned commissioner did not say what the doctor's evidence was or state his finding about it. I imagine that when he speaks of “the evidence by the doctor of the maltreatment” what he must mean is

evidence by the doctor of having seen things which might have been occasioned by maltreatment. At any rate, we are left in the dark as to what that evidence was, and so I do not know whether he was finding that there was physical injury or that there was not. He continues:

"I do not propose to go into all these details of sexual malpractices. The husband says she was a woman of violent temperament, and that she on various occasions assaulted him, and once she kicked him violently on the buttocks. Well, there it is. I cannot decide the case on any balance of probabilities. The burden of proof lies on the party making the allegations. The husband's daughter by his first marriage who has been called before me—and I accept her evidence—says that her step-mother was on occasion uncontrolled and on at least one occasion she insulted her late mother by calling her a prostitute, and I think that is a fact. I think this case is far from being made out on either side. I, therefore, reject the prayer of the answer and dismiss the petition."

As I say, it is difficult to know whether the learned commissioner, sex matters apart, is saying that he is not satisfied that the acts took place, or is saying, and I think this is highly improbable, that he is not satisfied that they were the kind of acts that could amount to cruelty, or that he is saying that he is not satisfied that they amounted to cruelty within the well-known definition in *Russell v. Russell* (1)—that is to say, he was not satisfied that there was any actual injury or reasonable apprehension of injury to the bodily or mental health of the wife. I do not know what he decided save that the case was not made out.

Counsel for the husband has cited to me the well known authority of *Hoystead v. Taxation Comr.* (2). LORD SHAW in giving the opinion of the Judicial Committee cited the well-known passage (3 Hare 114) from *Henderson v. Henderson* (3) on res judicata ([1926] A.C. 170):

" 'I believe I state the rule of the court correctly when I say, that where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time '."

Counsel also cited *Greenhalgh v. Mallard* (4), which it is not necessary for me to quote. Finally, he referred me to *Finney v. Finney* (5), a case in this Division where the principle was applied. The point in *Finney* (5) was that a wife had petitioned unsuccessfully for a judicial separation on the ground of cruelty. Having failed in that petition, she subsequently obtained evidence on which she was able to make a charge of adultery, and she then sought to petition for a decree of dissolution on the then essential double ground of adultery and cruelty, the cruelty being the same cruelty which she had already charged in the judicial separation suit. Not surprisingly, the court held that she could not re-litigate the same charge of cruelty which she had litigated before and which had been decided against her.

The real cornerstone of the argument of counsel for the husband was the recent

decision of the Court of Appeal in *Pike v. Pike* (6). In considering *Pike v. Pike* (6) it is important to consider the issue which was before the Court of Appeal. As I understand it, what had happened was that a wife's petition alleging constructive desertion by the husband was heard by Mr. Commissioner GOODMAN ROBERTS, Q.C., and he granted the wife a decree on the ground of constructive desertion. The husband appealed against that decree, the appeal was allowed, and the decree was set aside. It is important to notice that the husband did not cross-petition in that case. He did not allege that his wife had deserted him, and, therefore, the Court of Appeal were not expressly, at any rate, considering whether or not the wife had just cause for leaving her husband. It is also to be noticed that *Edwards v. Edwards* (7) was not cited in *Pike v. Pike* (6), although it is naturally to be expected that the court must have had *Edwards v. Edwards* (7) in mind. That having been said, there is no doubt at all that, if the observations made by two of the members of the Court of Appeal in *Pike v. Pike* (6) are to be taken at their face value, and I am bound by them if they form a part of the decision of the court, they constitute strong authority in favour of the proposition of counsel for the husband, that the wife cannot rely for a second time on the acts which she has previously pleaded. HODSON, L.J., who gave the first judgment, said (ante, p. 235):

"The commissioner found inferentially, if not expressly, that the husband's requests to the wife to return were not genuine, and, accordingly, he found that the husband had driven the wife from the house, and so was guilty of desertion. In my judgment, that decision cannot stand. The case of driving away made out by the wife was substantially different from that pleaded, both in substance and also in time. There was no evidence of privation, on which the commissioner relied in part. Apart from this, there was no other grave and weighty matter relied on as amounting to constructive desertion unless it consisted of cruelty. No cruelty was alleged in terms, and the serious allegation of threatening to choke the wife was not referred to at all in the petition, and, moreover, there was no corroboration of that charge. I want to make it as clear as I can that when the case sought to be made is in the nature of a case of cruelty, it is not possible to build up a case of constructive desertion by what is really a case of unproved cruelty. That, of course, does not cover the whole area of constructive desertion, for grave and weighty matters might be alleged which are quite different in kind and quite as serious, if not more serious, than cruelty. One has in mind the well-known case of *Russell v. Russell* (1), where false charges were made, persisted in, and not withdrawn, or, of course, one can take the simple case of constructive desertion where there is an order or direction by one spouse to the other to leave. If that order is obeyed and the direction is followed and not withdrawn, then, again, desertion may run. This case was never made out on those lines. On that basis the finding cannot stand. If it should be said that there was a case of cruelty, and the matter, although not specifically raised, was dealt with between the parties, and, therefore, that the remedy open to the husband in this court is to obtain an order for a new trial, my answer is that in this case that is not the right way in which to proceed. A serious charge like a charge of cruelty which is, after all, the substantive case which the wife was trying to make, ought to be pleaded as such and dealt with as such, and no injustice could possibly be done to her, because if she has a case of cruelty, any finding of this court that she has not made out a case of desertion does not operate as an estoppel in any cruelty proceedings which she may, if so advised, bring in the future. No charge of cruelty has been disposed of either in the court below or in this court. For these reasons, I think that the appeal should be allowed."

Pausing there for one moment, it may be thought that the last phrase of the learned lord justice is not altogether inapposite to the point in the present case, because it does appear that HODSON, L.J., was there saying that, although the wife was not entitled to set up those matters in support of a charge of constructive desertion, she could, if she wished, set them up again as a substantive charge of cruelty in another suit, since the issue of cruelty had not been dealt with. If that is to be applied here, and I am not sure that it is, it would seem to me that the fact that these acts have been adjudicated on by Mr. Commissioner BUSH JAMES between the present parties on a charge of cruelty does not necessarily prevent the wife from setting them up again for the purpose which she now seeks to do. DENNING, L.J.'s judgment is even more emphatic than HODSON, L.J.'s, if I may use that expression without disrespect. He says (*ibid.*, 235):

"If he had previously treated her with cruelty, so much so that there was a reasonable apprehension of injury to her if she went back, she would, of course, be justified in refusing to go back, but, if his conduct was less than cruelty recognised by law, I do not think she was justified. There may be conduct different from cruelty—not less than it—which gives her reasonable cause for staying away, as in *Russell v. Russell* (1), but even such conduct does not automatically make him guilty of desertion . . . In the circumstances of this case, the husband's conduct was either cruelty or it was not. It was not something different from cruelty. For the wife to justify her refusal to return, the only thing she could rely on would be the husband's cruelty, and in such a case cruelty must be pleaded and proved."

At the end DENNING, L.J., says that, if the wife wishes to rely on cruelty,

"Her proper course would be to charge cruelty. It is open to her, no doubt, to bring another petition charging cruelty, but I certainly would not wish to encourage it."

As I say, that case is, I think, on the whole strong authority for the proposition which counsel argues. But there is at least one authority in the Court of Appeal which seems to be the other way. That is the case to which I have already referred, *Edwards v. Edwards* (7), but before I cite that case, I should refer to one other earlier case which seems not altogether inapposite to the present problem, viz., *Butland v. Butland* (8), where the wife petitioned for a decree of restitution of conjugal rights. The husband alleged that the wife drank to excess and that she had been guilty of cruelty. The finding of the jury was that the wife had been guilty of physical violence, but that it was not cruelty, that the wife did drink to excess, and that it was not unsafe at the time when the husband left the wife for the parties to live together. BARGRAVE DEANE, J., said (29 T.L.R. 729):

"The respondent husband did not establish cruelty, but only such conduct on the part of the petitioner wife as would justify the court in refusing her a decree of restitution. The whole trouble was brought upon the parties by the wife's conduct. She drank to excess, and when under the influence of drink acted in such a way to the husband as led the jury to find that she had been guilty not of cruelty but of physical violence towards him. I do not think the parties should be made to come together again. As regards the respondent, I do not think his charge of cruelty was established. The wife's petition will be dismissed."

There you have a case where the husband failed to prove that his wife had been guilty of cruelty, but the wife was refused a decree of restitution—in other words, it was held that the husband had just cause for leaving her.

The matter was considered at some length in *Edwards v. Edwards* (7) in the Court of Appeal. It was an appeal from Mr. Commissioner GRAZEBROOK, K.C., who found that the wife had failed to prove cruelty, but had proved a course of conduct by the husband which justified her in leaving him in 1930. Accordingly, the wife had not deserted her husband without cause. It is interesting to note that the argument of counsel for the wife was as follows:

A "The commissioner's judgment is right. He has found as a fact that the wife was justified in leaving her husband in 1930. The reason for her leaving was her husband's violence towards her which the commissioner found did not amount to 'cruelty'. But violence short of cruelty can constitute such a grave and weighty matter as to justify a spouse in withdrawing from cohabitation",

B and then there is a reference to *Butland* (8). BUCKNILL, L.J., gave the leading judgment in that case and he quoted ([1949] 2 All E.R. 146) the commissioner's judgment:

C "Then comes the question of the wife leaving her husband which is on a somewhat different footing because in regard to that it would not be necessary for her to have to prove cruelty. It would be necessary for her to prove some course of conduct which justified her in leaving her husband. There again I am satisfied that she did leave her husband by reason of some treatment of his, and I am satisfied to that extent that she was justified in leaving him . . .' On that counsel for the husband has put forward three points. The first is a point of law—that in view of the judgment of HODSON, J., in *Barker v. Barker* (9), it was not open to the commissioner to find that the wife was justified in leaving her husband once he (the commissioner) had decided that the case of cruelty alleged by the wife had not been made out. The second point was that, on the facts, the commissioner was wrong in holding that there were sufficient grounds to justify the wife's leaving. The third point was that the commissioner's judgment was illogical because, if there were sufficient grounds for the wife to leave the husband, the husband himself was a constructive deserter and, that being so, the wife ought to have succeeded in her plea for a judicial separation on the ground of the husband's desertion."

F Then BUCKNILL, L.J., goes on to deal with the first point which does seem to me to be precisely the point in question in the present case, viz., whether it is open to a court to find that acts of violence, while not amounting to cruelty, may yet constitute just cause for the complaining spouse to leave. He cites *Russell v. Russell* (1), and, after quoting the judgment of LOPES, L.J., in the Court of Appeal, says (*ibid.*, 147):

G "It is plain that the lord justice is saying in effect that the husband had failed to make out a case of cruelty against the wife, but, nevertheless, her conduct towards him prevented her from contending that the desertion was without cause. In other words, one can have cause for desertion which falls short of legal cruelty."

I suppose that it might well be said, as, indeed, it has been said, that the acts of the wife in *Russell v. Russell* (1) were different in kind from cruelty and were not merely acts falling short of cruelty. Then BUCKNILL, L.J., cites *Oldroyd v. Oldroyd* (10) where GORELL BARNES, J., said ([1896] P. 184):

"The effect of that case [*Russell v. Russell* (1)] appears to be that in cases where the conduct of the petitioner has led to desertion by the respondent, and has amounted to sufficient cause to disentitle the petitioner to maintain a suit for judicial separation on the ground of desertion, the

court is now empowered to refuse to pronounce a decree compelling the respondent to return to cohabitation with the petitioner. The truth is that in such cases it has become practically impossible for the spouses to live properly together."

Next, BUCKNILL, L.J., quotes (ibid.) the well-known passage of LORD GREENE, M.R., in *Buchler v. Buchler* (11). The only sentence I need read from that quotation is where LORD GREENE is referring ([1947] 1 All E.R. 321) to the argument of counsel for the husband:

" . . . but he [counsel for the husband] eventually found himself compelled to agree that conduct short of an actual matrimonial offence might be sufficient. In this I agree with him . . ."

BUCKNILL, L.J., also cites the passage ([1947] 1 All E.R. 326) in the judgment of ASQUITH, L.J.:

" . . . to afford such justification the conduct of the party staying on need not have amounted to a matrimonial offence, such as cruelty or adultery."

BUCKNILL, L.J., next dealt with *Barker v. Barker* (9), a case in the Divisional Court in which *Buchler v. Buchler* (11) was not cited. In that case HODSON, J., said ([1949] 1 All E.R. 250):

" On the other branch of this case, namely, wilful neglect to maintain, counsel for the wife argued that something less than cruelty would justify a wife remaining apart from her husband. I think that that is an unsound proposition. It will not do to say that because a grave and weighty matter will justify one spouse in leaving the other, therefore something less than cruelty will do."

BUCKNILL, L.J., proceeds (ibid., 149):

" If HODSON, J., meant to say that, once a charge of cruelty has failed to be established, it is impossible for a wife to establish grounds justifying her in refusing to live with her husband, with great respect to the learned judge, it seems to me that that decision is inconsistent with the judgments in *Russell v. Russell* (1) and *Buchler v. Buchler* (11) which this court ought to follow. I myself think that that is not what the judge meant to say. I think he meant to say in effect: 'Here is a case where the blows inflicted by the husband on the wife either amounted to cruelty in that they injured her health, or were likely to injure it, or they were not of such a nature. If they were not of such a nature then, there being no other evidence in the case to justify desertion, the court ought not to say: "Although they were, in effect, trivial blows, they justify her in leaving the husband" '."

To the same effect is the passage in the short judgment of COHEN, L.J., who says ([1950] P. 16) with regard to the judgment of Mr. Commissioner GRAZEBROOK, K.C.:

" I do not think that he is there saying that the facts alleged are not proved, but that, whether or not the acts were proved, they did not have the effect on the health of the wife requisite to justify giving her any relief on the ground of cruelty. He must have found that some of the acts which constituted the alleged cruelty had in fact been committed by the husband; otherwise he could not have found that she was justified 'to that extent', which I think means 'in this respect', in leaving him."

Edwards v. Edwards (7), therefore, does seem to me to be a direct decision in favour of the proposition contended for by counsel for the wife in the present case with regard to para. 2 of the wife's answer.

- This being the state of the law, with those two somewhat opposing views being expressed in the Court of Appeal and with the judgment of the learned commissioner in this case being short and not making it, as I have said, very clear exactly what he did find, save that he dismissed the charges of cruelty, it seems to me that it is impossible for the summary course of striking out a pleading to be adopted here. As we all know, there is abundant authority for the proposition that the summary course of striking out a pleading is only
- A to be taken in plain and obvious cases. In my judgment, it is impossible to say that the present case is a plain and obvious one. I have the utmost sympathy with the husband, who may well in any event have to put his hand deeply into his pocket again if these matters are litigated, but I cannot see that I ought to allow that consideration to influence the view which I have formed as to the proper course to be adopted in this case.
- B What I have said covers para. 2. Paragraphs 3 and 4 are slightly different in that they involve, not the defence of just cause, but a counter-charge of constructive desertion. It seems to me that there is a good deal more to be said in favour of the husband's argument on those paragraphs than there was on para. 2, but even with regard to those I am not satisfied that the law is so clear that this summary remedy ought to be adopted. I am consoled with regard
- C to this part of my decision by the reflection that any expense which may be involved in the decision of the issue on the facts alleged in para. 2 will not, I apprehend, be increased in any way by the matters alleged in paras. 3 and 4, for, in effect, paras. 3 and 4 are merely alternative ways of putting the consequences in law of any facts which may be proved under para. 2. I, therefore, allow the appeal in toto, both in regard to paras. 3 and 4 and in regard to
- D para. 2. Accordingly, the appeal will be allowed.

Appeal allowed.

Solicitors: *Bernard Oberman & Co.* (for the wife); *Courtenay, Croome & Finch* (for the husband).

[*Reported by A. T. HOOLAHAN, ESQ., Barrister-at-Law.*]

Re ROBB'S WILL TRUSTS.
MARSHALL *v.* MARSHALL AND OTHERS.

[CHANCERY DIVISION (Danckwerts, J.), March 19, 1953.]

Accumulation—Restriction—Power, as distinct from direction, to accumulate—Annuities continuing charge on income—Title to income unlawfully accumulated—Law of Property Act, 1925 (c. 20), s. 164 (1) (b).

By his will dated Sept. 7, 1916, a testator, who died on Nov. 25, 1916, directed the sale and conversion of his residuary real and personal estate and gave the usual directions for payment of his debts, funeral and testamentary expenses and legacies, and the investment of the residue (called his "residuary estate"). He further directed his trustees "to pay to my wife during her life an annuity of £120 commencing from my death by monthly payments and to my said daughter Alice during her life an annuity of £52 commencing from my death by monthly payments and after the deaths of my said wife and daughter I direct my trustees to stand possessed of my residuary estate and of the investments for the time being representing the same in trust for all my grandchildren who shall be living at my death or any of them born at any time afterwards and who being male attain the age of twenty-five years before the expiration of twenty-one years from the death of the survivor of my said wife and daughter or being female attain the age of twenty-five years or marry before the expiration of such twenty-one years if more than one in equal shares". The will continued: "I empower my trustees to accumulate the surplus income (if any) of my residuary estate at compound interest by investing the same and the resulting income thereof in any investments hereby authorised with power from time to time to vary such investments at discretion." On Dec. 9, 1921, the testator's widow died. Thirteen of the testator's fifteen grandchildren attained the age of twenty-five. On a question as to the disposal of surplus income arising after Nov. 25, 1937 (when the period of twenty-one years from the testator's death expired) was distributed by the trustees to the testator's next of kin,

HELD: (i) notwithstanding that the will contained only a power to accumulate and not a direction to accumulate, accumulation after the expiration of twenty-one years from the testator's death was prohibited by the Law of Property Act, 1925, s. 164 (1); furthermore, the annuities were a continuing charge on the income of the residuary estate (so that surplus income in one year could be applied to supply deficiency in another); and, therefore, a trust to accumulate was implied to which s. 164 (1) was applicable.

Dictum of ROMER, L.J., in *Re Coller's Deed Trusts* ([1937] 3 All E.R. 293), applied.

(ii) on the true construction of the will the grandchildren were given nothing until after the death of the testator's wife and daughter, and, therefore, the surplus income which could not lawfully be accumulated was not given to the grandchildren, but was undisposed of by the will and passed under the testator's partial intestacy.

Re Blake ([1938] 2 All E.R. 362), applied.

AS TO APPLICATION OF SURPLUS ACCUMULATIONS, see HALSBURY, Hails- ham Edn., Vol. 25, pp. 183-186, paras. 313-319; and FOR CASES, see DIGEST, Vol. 37, pp. 146-151, Nos. 719-761.

Cases referred to:

- (1) *Re Coller's Deed Trusts*, [1937] 3 All E.R. 292; [1939] Ch. 277; 106 L.J.Ch. 326; 157 L.T. 84; Digest Supp.
- (2) *Tench v. Cheese*, (1855), 6 De G. M. & G. 453; 24 L.J.Ch. 716; 25 L.T.O.S. 189; 43 E.R. 1309; 37 Digest 132, 617.

- (3) *Mathews v. Keble*, (1868), 3 Ch. App. 691; 37 L.J.Ch. 657; 19 L.T. 243; 37 Digest 132, 619.
- (4) *Re Maber*, [1928] Ch. 88; 97 L.J.Ch. 101; 138 L.T. 318; 44 Digest 770, 6286.
- (5) *Re Blake, Berry v. Geen*, [1938] 2 All E.R. 362; 107 L.J.Ch. 173; *sub nom. Berry v. Geen*, [1938] A.C. 575; 159 L.T. 122; Digest Supp.

A ADJOURNED SUMMONS to determine inter alia whether on the true construction of the will of the testator and in the events which had happened the income of the residuary estate of John Robb, deceased, from time to time arising after the expiration of twenty-one years from the death of the testator and pending the death of the surviving annuitant, the defendant, Alice Margaret Anne Marshall, ought, subject to payment of the annuity given by the said will to the said defendant, to have been and to be held by the trustees or trustee for the time being of the said will (i) on trust for the next of kin of the testator as under a partial intestacy; or (ii) on trust to divide the same equally between such of the grandchildren of the testator as for the time being being male had attained the age of twenty-five years or being female had attained that age or had married (or their personal representatives); or (iii) on some other and what trusts.

C *Hillaby* for the plaintiff, Joyce Christian Marshall, one of the trustees of the will.

Harold Christie, Q.C., and *G. B. H. Dillon* for the first three defendants, the next of kin.

D *Bathurst, Q.C.*, and *D. S. Chetwood*, for the fourth defendant, Winifred Thompson, a grandchild of the testator, representing the grandchildren interested in the capital of the residuary estate (other than the grandson, James Morrison Robb).

Raymond Jennings, Q.C., and *B. S. Tatham* for the fifth defendant, James Morrison Robb, a grandson of the testator.

E **DANCKWERTS, J**: I have to decide a question of a good deal of difficulty arising from the will dated Sept. 7, 1916, of John Robb, who died on Nov. 25, 1916.

F By his will, so far as material, the testator devised and bequeathed all his real and personal estate not otherwise disposed of unto his trustees on trust to sell, call in and convert into money the same or such part thereof as should not consist of money and with and out of the proceeds of such sale, calling in and conversion, and with and out of his ready money, to pay all his just debts, funeral and testamentary expenses, and he directed his trustees to invest the residue thereof in or on such stocks, funds, shares or securities as should be authorised by law. The will proceeds:

G " . . . and out of the annual income thereof I direct my trustees to pay to my wife during her life an annuity of £120 commencing from my death by monthly payments and to my said daughter Alice during her life an annuity of £52 commencing from my death by monthly payments and after the deaths of my said wife and daughter I direct my trustees to stand possessed of my residuary estate and of the investments for the time being representing the same in trust for all my grandchildren who shall be living at my death or any of them born at any time afterwards and who being male attain the age of twenty-five years before the expiration of twenty-one years from the death of the survivor of my said wife and daughter or being female attain the age of twenty-five years or marry before the expiration of such twenty-one years if more than one in equal shares."

The testator proceeded to give a series of powers:

"I empower my trustees to accumulate the surplus income (if any)

of my residuary estate at compound interest by investing the same and the resulting income thereof in any investments hereby authorised with power from time to time to vary such investments at discretion."

Then there is a peculiar provision inserted, apparently, for the benefit of one only of his grandchildren:

"I declare that my trustees may pay or apply the whole or any part at their discretion of the income or the capital of the share to which my grandson James shall for the time being be entitled in expectancy and would if of the age of twenty-five years be entitled in possession under the trusts hereinbefore declared for or towards his maintenance education advancement or benefit and shall invest the surplus income (if any) in any such investments as are hereby authorised in augmentation of the capital of such share."

On Dec. 9, 1921, the testator's widow died, and her annuity of £120 a year came to an end. Only the annuity of £52 a year to his daughter, who is the first defendant to this application, remains. The testator had three children, the first defendant and two sons, one of whom died on Oct. 7, 1923, and the other on June 7, 1944. He had fifteen grandchildren, of whom twelve are still living and have attained the age of twenty-five. Of the remaining three grandchildren, one died after attaining the age of twenty-five, and two have died under that age. The last defendant, James Morrison Robb, is the grandchild who is referred to by name in the will as James, and he was born on Dec. 15, 1893, so that at the date of the testator's will he was already nearly twenty-three years old.

The income has been accumulated, so far as not required for the annuities, for a considerable period, but as from the expiration of twenty-one years after the death of the testator, i.e., from Nov. 25, 1937, it has been suggested that no further accumulation should be authorised, having regard to the provisions of the Law of Property Act, 1925, s. 164, or the provisions of the Thellusson Act (39 & 40 Geo. 3, c. 98), which were in similar terms. It is submitted by counsel for the next of kin, and by counsel for the grandson, James, that no further accumulation could lawfully be made after that date, but the unlawfulness of such accumulation is contested by counsel for the grandchildren (other than James), who argued against there being any intestacy. Counsel for the grandchildren points out that there is no express trust for accumulation in this will, which is true, but only a power of accumulation, and he contends that the power to accumulate is not in any way contrary to the provisions of s. 164 of the Law of Property Act, 1925.

Section 164 (1) of the Act of 1925 provides:

"No person may by any instrument or otherwise settle or dispose of any property in such manner that the income thereof shall, save as hereinafter mentioned, be wholly or partially accumulated for any longer period than one of the following, namely . . ."

and then four periods are named, of which only the second could be material in the present case: a term of twenty-one years from the death of the testator. The section then proceeds:

" . . . In every case where any accumulation is directed otherwise than as aforesaid, the direction shall (save as hereinafter mentioned) be void; and the income of the property directed to be accumulated shall, so long as the same is directed to be accumulated contrary to this section, go to and be received by the person or persons who would have been entitled thereto if such accumulation had not been directed."

Section 164 (3) provides:

"The restrictions imposed by this section apply to instruments made on or after July 28, 1800, but in the case of wills only where the testator

was living and of testamentary capacity after the end of one year from that date."

It is quite clear, therefore, that I need only refer to the provisions of s. 164 of this Act, and I need not refer back to the provisions of the original Thellusson Act.

It is said by counsel for the grandchildren that the power to accumulate means that accumulation need not necessarily be carried out and is not a direction, in any event, to accumulate, and, therefore, s. 164 of the Act of 1925 has nothing whatever to do with the matter, but I do not consider that that is the right result. There is not only a reference to directions towards the end of sub-s. (1), but there is the provision that

A

B

"No person may by any instrument or otherwise settle or dispose of any property in such manner that the income thereof shall . . . be wholly or partially accumulated for any longer period"

than those which are mentioned, and it seems to me, therefore, that while a power to accumulate unlimited in form need not be necessarily bad in itself, it could not be exercised lawfully by the persons to whom such a power has been given, the trustees, so as to accumulate for a longer period than twenty-one years from the death of the testator. Any other result would be contrary to the prohibition which is contained in the opening portion of s. 164 (1).

C

There is a further difficulty in the present case. The rights of annuitants have been laid down by the Court of Appeal in very plain terms in *Re Collier's Deed Trusts* (1) by ROMER, L.J. ([1937] 3 All E.R. 293), and as the annuitants in the present case are given the benefit of a continuing charge on the income of the testator's residuary estate, they are entitled to have the annuities, in any year in which the income is insufficient, made up out of the income of subsequent or past years. Consequently, it would appear that that would necessarily involve an accumulation, according to the principles laid down in that case, of the income of the residuary estate until finally the fund was released by the death of the last of the annuitants. There is, therefore, as it seems to me, apart from anything else, an implied trust for accumulation unless the provisions in this will amount to a charge on the income of each year only in respect of the annual sum payable in that year. In the present case the words are "out of the annual income" to pay an annuity to the wife and an annuity to the daughter. It is suggested that "annual income" means the income of any particular year. I do not think that is the proper construction. It seems to me that "annual income" is equivalent for this purpose to "income". All income is annual for the purpose of administration, and, therefore, there are no special terms in this will which prevent the annuities being a continuing charge on the whole of the income until the last of the annuitants has died. Consequently, it seems to me that there is an implied trust for accumulation, and it is well settled that the provisions of the Law of Property Act, 1925, s. 164, apply to implied as well as to express directions for accumulation: see *Tench v. Cheese* (2), and *Mathews v. Keble* (3). The contention that any accumulation could lawfully be made after the expiration of twenty-one years from the death of the testator in the present case fails.

D

E

F

G

H

I come to consider, therefore, the question what is to be done with the income from the time when the accumulation ceased to be lawful. One contention which has been put forward is that the income as from that date should be divided among the grandchildren who had obtained an interest by attaining the age of twenty-five years. The alternative to the grandchildren taking is an intestacy, so that the income until the death of the last tenant for life will have to be divided between the next of kin of the testator according to the law of intestacy. It is to be observed that this is not a case where the annuities are given to a class who may have to qualify by satisfying certain conditions.

There is simply a provision that the annuities in this case come out of the annual income of the residuary estate, and then there is no gift whatever until the words "after the death of my said wife and daughter". Then, and then only, the testator's trustees are directed to stand possessed of the residuary estate in trust for the relevant grandchildren. The peculiar provision in respect of James which is to be found in the will is obviously a power of advancement and maintenance which was, no doubt, necessary in the year when the will was made, because the Conveyancing Act, 1881, did not apply, and I am unable to gain any real assistance in construing this will from that peculiar and difficult clause.

A number of authorities have been cited, but many of them seem to me not to be in point. In particular, *Re Maber* (4), which was relied on for the grandchildren, is different from the present case. It is not an easy case to follow, and I do not find I am assisted by it.

I find it impossible to distinguish this case from the decision of the House of Lords in *Re Blake, Berry v. Geen* (5), but it is true that there was an express direction for accumulation in that case which is not to be found in the present one. In that case the testator directed a large number of annuities, and he gave the whole of his property after the death of the last personal annuitant to the Congregational Union of England and Wales to be invested as capital. LORD MAUGHAM, L.C., said ([1938] 2 All E.R. 365):

"On the other hand, there may no doubt be cases where the final gift of residue is so worded as to include all income not effectually disposed of in the preceding dispositions. In the present case, such a construction seems to me to be impossible, since it is clear that the Congregational Union is given nothing until the death of the last personal annuitant. The words 'after the death of the last personal annuitant' cannot be disregarded, and it is to be observed that the phrase is in effect a repetition of the previous sentence 'and on the death of last personal annuitant', which introduces the gifts of pecuniary legacies to the four named Congregational Churches. It follows that, unless the accumulations can be stopped, the released income down to the death of the last surviving personal annuitant will pass as on an intestacy to the next of kin and the heir-at-law."

In the present case nothing is given to the grandchildren until the death of the survivor of the testator's widow and daughter who are given annuities. Therefore, there are no appropriate words, so far as I can see in the present case, which would take the will which I have to consider outside the principles which have been laid down by LORD MAUGHAM, L.C., in *Re Blake* (5). It seems to me that income which may not lawfully be accumulated is not given to the grandchildren, but is undisposed of and goes to the next of kin.

Order accordingly.

Solicitors: *Hyde, Mahon & Pascall*, agents for *Keenlyside & Forster*, Newcastle-upon-Tyne (for all parties other than the fifth defendant); *Wilberforce Allen & Bryant*, agents for *A. H. Headley*, Leicester (for the fifth defendant).

[Reported by R. D. H. OSBORNE, Esq., Barrister-at-Law.]

STEBBINGS v. HOLST & CO., LTD.

van, J.), March 13, 16, 1953.]

Distinguished. FINNEGAN v. CEMENT-
ATION CO., LTD., *post*, p. 1130.

Issue by "widow and administratrix" before grant of letters of administration—Statement of representative capacity—Fatal Accidents Act, 1846 (c. 93), s. 2—Fatal Accidents Act, 1864 (c. 95), s. 1—R.S.C., Ord. 2, r. 3, Ord. 3, r. 4.

A The plaintiff was one of the dependants of her husband who died as the result of an accident on June 15, 1951. On Jan. 24, 1952, the plaintiff issued a writ against the defendants describing herself in the title as "widow and administratrix" of the estate of the deceased, and in the indorsement claiming "damages under the Fatal Accidents Acts and the Law Reform (Miscellaneous Provisions) Act, 1934, as widow and administratrix" of the deceased. The particulars of the persons on whose behalf the action was brought were not shown in the indorsement of the writ, but were included in the statement of claim. At the time of issuing the writ letters of administration had not been taken out by the plaintiff and a grant of administration was not obtained until Feb. 2, 1952. The defendants contended that the writ was a nullity and the plaintiff agreed that this plea was good as against the cause of action under the Law Reform (Miscellaneous Provisions) Act, 1934. As regards the claim under the Fatal Accidents Acts,

HELD: (i) the words "widow" and "administratrix" in the description of the plaintiff in the title simply described her personal status and did not declare the capacity in which she brought the action.

D (ii) a fair and grammatical interpretation of the indorsement of the writ was that the claim under the Fatal Accidents Acts was brought as widow and the claim under the Law Reform (Miscellaneous Provisions) Act, 1934, as administratrix. Alternatively, the words "as administratrix" could be treated as an error and disregarded.

E (iii) the indorsement of the writ stated sufficiently the plaintiff's representative capacity and nothing in R.S.C., Ord. 3, r. 4 (1), required the identity of those whom she represented to be added to the indorsement.

(iv) the defendants' objection to the writ was, therefore, overruled.

Hilton v. Sutton Steam Laundry ([1945] 2 All E.R. 425), distinguished.

F AS TO INDORSEMENT ON WRIT OF REPRESENTATIVE CAPACITY, see HALSBURY, Hailsham Edn., Vol. 26, p. 24, para. 28.

Cases referred to:

- (1) *Hilton v. Sutton Steam Laundry*, [1945] 2 All E.R. 425; [1946] K.B. 105; 115 L.J.K.B. 33; 174 L.T. 31; 2nd Digest Supp.
- (2) *Ingall v. Moran*, [1944] 1 All E.R. 97; [1944] K.B. 160; 113 L.J.K.B. 298; 170 L.T. 57; 2nd Digest Supp.

G ACTION.

The facts are fully set out in the headnote and the judgment of DONOVAN, J., which was delivered after hearing all the evidence in the action. This report covers only that part of the judgment which deals with the preliminary objection by the defendants.

H *Parris* for the plaintiff.

Veale, Q.C., and *Waller* for the defendants.

DONOVAN, J.: The plaintiff by her writ in this action claims damages under the Fatal Accidents Acts and under the Law Reform (Miscellaneous Provisions) Act, 1934, in respect of the death of her late husband. The defendants take the preliminary point that the writ is a nullity and they base their argument on these grounds. The deceased died on June 15, 1951. The action

was commenced on Jan. 24, 1952. Letters of administration were not granted to the plaintiff until Feb. 2, 1952. Therefore, say the defendants, the plaintiff began this action in a representative capacity which she did not at that time possess, and the decision of the Court of Appeal in *Hilton v. Sutton Steam Laundry* (1) is relied on. The plaintiff agrees that the plea is good as against the cause of action under the Act of 1934. That means that she will have to start again under that Act, as she still has time to do. As regards the claim under the Fatal Accidents Acts, the plaintiff replies that she has brought the claim "as widow" and she was entitled to bring it "as widow" notwithstanding the absence of any grant of letters of administration. The defendants' answer to that is that the plaintiff has not sued "as widow", and that, even if she has, the writ is still a nullity because she did not name in it the dependants on whose behalf she sued. This last objection is, of course, technicality with a vengeance, but I am not concerned that it is a technicality devoid of merits. I have to decide the issue strictly as one of law.

The starting point must be the language of the relevant provisions of the Fatal Accidents Acts. The Act of 1846 provides, by s. 2, that the action shall be brought by and in the name of the executor or administrator of the person deceased and be for the benefit of the wife, husband, parent and child of the deceased. The Act of 1864, by s. 1, provides that, if there is no executor or administrator, or, if there is an executor or administrator and no action is brought by him within six months after the death of the deceased, then an action may be brought by and in the name or names of all or any of the persons (if more than one) for whose benefit such action would have been, if it had been brought by and in the name of such executor or administrator. One notices in both sections the distinction drawn between the person who is to bring the action and the person or persons for whose benefit the action is to be.

Turning to the writ in the present case, the title of the action is: "Between Winifred May Stebbings (widow and administratrix of the estate of Alfred Stebbings), plaintiff, and Holst & Co., Ltd., defendants". I regard the words "widow" and "administratrix", where they appear in the description of the plaintiff, simply as describing the plaintiff's personal status and not as declaring the capacity in which she brings the action. It is to be observed that R.S.C., Ord. 2, r. 3, and the form of writ which is specified in Appendix A, Part I, do not expressly require that a plaintiff's personal status should be shown after his name. The indorsement to the writ, so far as is material, is as follows:

"The plaintiff's claim is for damages under the Fatal Accidents Acts and the Law Reform (Miscellaneous Provisions) Act, 1934, as widow and administratrix of the estate of Alfred Stebbings, deceased . . ."

The defendants contend that this should be construed as a declaration that the plaintiff is suing simply as administratrix in relation to both causes of action. It is against common sense, they say, to regard her as suing in two capacities when she must have thought at the time that her one capacity of administratrix would have served for both causes of action, which it would have done had that capacity in fact existed.

That contention, in effect, asks me to erase the words "as widow" from the indorsement. The words "as widow" are wholly appropriate. The plaintiff was the widow. She was entitled under the Act of 1864 to bring her claim as widow. She was not entitled under the Act of 1934 to bring her claim as widow. Nevertheless, I am asked to disregard these words because they are found in conjunction with the words "and administratrix". If any words ought to be disregarded, it is these latter words, for the plaintiff was not administratrix at the time. That being so, it seems to me to be sense and not nonsense that the two capacities are referred to in the indorsement, for whether or not the claim under the Act of 1934 turned out to be premature because of the absence of a grant of representation, the claim under the Fatal Accidents Acts would,

nevertheless, still be effectively begun "as widow". It seems to me to be a fair and reasonable, and, indeed, grammatical, interpretation of the indorsement that the claim under the Fatal Accidents Acts is brought "as widow" and the claim under the Act of 1934 "as administratrix of the estate". Alternatively, the proper thing to do, in my view, would be to treat the words "as administratrix" simply as an error and to disregard them.

A The defendants then say that, even so, the writ is still a nullity because the statement of claim discloses that there are dependants other than the widow herself, and, by virtue of Ord. 3, r. 4, she should have stated her representative capacity in the indorsement. The first answer to that contention is that the plaintiff has done so by saying that she sues "as widow". This is the capacity in which the Act of 1864 allows her to sue. The identity of the persons for whom, in that capacity, she sues is a different consideration. Order 3, r. 4 (1) B provides that:

"If the plaintiff sues . . . in a representative capacity, the indorsement shall show, in manner appearing by such of the forms in Appendix A, Part III, s. 7, as shall be applicable to the case, or by any other statement to the like effect, in what capacity the plaintiff . . . sues."

C There is nothing in the rule itself requiring the identity of those whom the plaintiff represents to be added to the indorsement, either in general or in particular terms. Reference to Part III, s. 7, of Appendix A, to which the rule refers, discloses no form requiring such information. Examples of what is there required are "The plaintiff's claim is as executor" or "as trustee" or "as public officer of [a company]" and so on. In the present case the plaintiff's D claim is "as widow" of Alfred Stebbings, deceased. If Ord. 3, r. 4, applies, I think it has been complied with. That view is reinforced by the circumstance that the Fatal Accidents Act, 1846, requires the particulars of the dependants for whom the action is brought to be shown in quite another manner. Section 4 of the Act provides that:

E " . . . In every such action the plaintiff on the record shall be required, together with the declaration, to deliver to the defendant or his attorney a full particular of the person or persons for whom and on whose behalf such action shall be brought, and of the nature of the claim in respect of which damages shall be sought to be recovered."

F In conformity with the section these particulars were shown in the statement of claim in the present case. The plaintiff contends that Ord. 3, r. 4, does not apply in this case at all, because no action is a representative action within that rule if the plaintiff is himself an interested party. I doubt the soundness of that view, but it is unnecessary for me to consider it. I might say, however, that, if I had thought that r. 4 had not been complied with, I should have G given leave to amend the indorsement. Non-compliance with a rule does not render proceedings void unless the court or judge so direct: see Ord. 70, r. 1. To allow an amendment such as I have indicated would not have deprived the defendants of any benefit which had already accrued to them under s. 3 of the Act of 1846, because an action had already been effectively begun by the plaintiff as widow.

H Finally, the decision in *Hilton v. Sutton Steam Laundry* (1) affords, in my view, no assistance to the defendants. There both causes of action, that is, both under the Fatal Accidents Acts and under the Act of 1934, were the subject of a writ which in the indorsement simply proclaimed that the plaintiff brought the action as administratrix, when she had not in fact at the time taken out letters of administration. The writ was, therefore, treated as a nullity. There was nothing which indicated that she had brought the action under the

Fatal Accidents Acts as widow of the deceased. Here there is such an indication. For these reasons the preliminary objection is overruled.

[His LORDSHIP then dealt with the evidence.]

Judgment for the plaintiff.

Solicitors: *Philip Niman*, Middlesbrough (for the plaintiff); *Cohen, Jackson & Scott*, Stockton-on-Tees (for the defendants).

[Reported by G. M. SMAILES, Esq., Barrister-at-Law.]

Re LANGSTON (deceased).

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Davies, J.), March 25, 1953.]

Will—Revocation—Will made in contemplation of marriage—“I bequeath unto my fiancée . . .”—*Law of Property Act, 1925 (c. 20), s. 177 (1).*

On Nov. 4, 1935, the testator made a will leaving everything “unto my fiancée [M.E.B.]”, and appointing her sole executrix. On Jan. 7, 1936, the testator married M.E.B. and on Dec. 28, 1952, he died. On a motion by M.E.B. for a grant of probate,

HELD: by using the words “unto my fiancée [M.E.B.]” the testator was expressing the fact that he was contemplating marriage with that named person, and, therefore, the will was “expressed to be made in contemplation of a marriage” within the meaning of s. 177 (1) of the Law of Property Act, 1925, and was not revoked by the testator’s subsequent marriage.

AS TO REVOCATION BY MARRIAGE, see HALSBURY, Hailsham Edn., Vol. 34, pp. 73-75, paras. 100-103; and FOR CASES, see DIGEST, Vol. 44, pp. 318-320, Nos. 1516-1531.

FOR THE LAW OF PROPERTY ACT, 1925, s. 177 (1), see HALSBURY’S STATUTES, Second Edn., Vol. 20, p. 793.

Cases referred to:

(1) *Pilot v. Gainfort*, [1931] P. 103; 100 L.J.P. 60; 145 L.T. 22; Digest Supp.

(2) *Sallis v. Jones*, [1936] P. 43; 105 L.J.P. 17; 154 L.T. 112; Digest Supp.

(3) *Re Knight*, (1944). Unreported.

PROBATE MOTION.

J. C. Mortimer for the applicant.

DAVIES, J.: This is a motion by the applicant, the widow of the testator, for a grant of probate of a will of the testator made on Nov. 4, 1935. The testator had been married before, his first wife died on July 1, 1935, this will was made on Nov. 4, 1935, and he was married to the applicant two months later, namely, on Jan. 7, 1936. The testator died on Dec. 28, 1952.

By s. 18 of the Wills Act, 1837, so far as it is relevant, it is provided:

“ . . . Every will made by a man or woman shall be revoked by his or her marriage . . . ”

But, by s. 177 (1) of the Law of Property Act, 1925—which applies in the present case as the will was made after Jan. 1, 1926—it was provided:

“ A will expressed to be made in contemplation of a marriage shall, notwithstanding anything in s. 18 of the Wills Act, 1837, or any other statutory provision or rule of law to the contrary, not be revoked by the solemnisation of the marriage contemplated.”

The material words are “expressed to be made in contemplation of a marriage”.

The present will, after stating the name and address of the testator, proceeds as follows:

“ I direct all my just debts funeral and testamentary expenses to be

paid and satisfied by my executrix hereinafter named as soon as conveniently may be after my decease I give devise and bequeath unto my fiancée Maida Edith Beck of 108 Regents Park Road, London, N.W.1 . . .”

The testator then gives to this lady all his property and appoints her sole executrix. The question which arises is whether or not that will, by reason of the expression “unto my fiancée Maida Edith Beck”, is a will “expressed to be made in contemplation of a marriage” so as to remain valid after the

A marriage which was solemnised between the applicant and the testator on Jan. 7, 1936. If it is not, it would be subject to the general provisions of s. 18 of the Wills Act, 1837, and there would be an intestacy. The only persons other than the applicant who are interested in this estate on an intestacy are three nieces of the deceased, and they have all signed consents to this application.

B Counsel has cited to me three authorities on which I am satisfied that, as a matter of law, I can come to a decision which I feel gives effect to what the testator would, undoubtedly, have desired. The first is *Pilot v. Gainfort* (1). In that case the testator's wife had disappeared. Some years later he set up a home with another woman, who was named Pilot, and lived with her as his wife. Having lived with her for about three years, in February, 1927, he made

C a will of which the material portion was as follows: “I herewith bequeath and leave to Diana Featherstone Pilot my wife all my worldly goods”. On Aug. 15, 1928, seven years having elapsed since the disappearance of the testator's wife, he married the lady with whom he had been living for some years, being, I suppose, advised that in any event he would have a defence to a charge of bigamy if the first wife re-appeared. The material words there

D were “my wife”. The lady was not his wife at the date of the will. It was held by LORD MERRIVALE, P., first (for, otherwise, of course, this point would not arise) that the marriage between the testator and the woman with whom he had been living at the time when he made the will was a valid marriage, and that, therefore, the will would otherwise be caught by the provisions of the Wills Act, 1837, but the learned President held, secondly, that the use of the

E words “my wife” in those circumstances was the expression of a contemplation of marriage to that particular woman. LORD MERRIVALE summarised his conclusion at the end of a very short judgment in these words ([1931] P. 104):

F “Under the circumstances I do not think that it can be doubted that the will was in contemplation of the subsequent marriage and practically expresses that contemplation and is good.”

That decision on the particular facts has been criticised in THEOBALD ON WILLS, 10th ed., p. 37, but the learned President there applied the test whether there was a practical expression of the fact of a contemplation of marriage. It would, therefore, appear to be the law that the test is: Does the testator express

G the fact that he is contemplating marriage to a particular person?

The authority for the words “particular person” is to be found in *Sallis v. Jones* (2). There BENNETT, J., sitting in this Division, held against the will. The expression used in that will made before marriage was: “This will is made in contemplation of marriage”. At the conclusion of his judgment the learned judge says this ([1936] P. 46):

H “In my judgment s. 177 of the Law of Property Act, 1925, upon its true construction excludes the operation of s. 18 of the Wills Act if the will made before a marriage is expressed to be made in contemplation of a particular marriage and is followed by the solemnisation of that marriage.”

He said that that principle excluded the will under consideration in that case because, to quote the judgment again (*ibid.*):

"All that is to be found in the present will is a declaration that the will was made 'in contemplation of marriage' and nothing more."

The last authority that was cited to me is an unreported case in 1944 which is referred to in TRISTRAM AND COOTE'S PROBATE PRACTICE, 19th ed., p. 25, *Re Knight* (3), where, according to the text-book:

"By his will the testator gave all his estate 'to E.L.B. my future wife'. On his death she (as widow) applied. It was held that the will was not revoked."

Those authorities all seem to me to make it quite clear that when, in the present case, the testator used the words "unto my fiancée Maida Edith Beck" he was expressing a contemplation of marriage to that named lady. *Re Knight* (3) is, in my opinion, a direct authority in favour of the present motion. There is obviously no effective difference between "my future wife" and "my fiancée". Accordingly, I hold that this will was expressed to be made in contemplation of a marriage to the applicant and was not revoked by his subsequent marriage to her. There will be a grant of probate as prayed.

Order accordingly.

Solicitors: *Lindus & Hortin* (for the applicant).

[*Reported by A. T. HOOLAHAN, Esq., Barrister-at-Law.*]

WORTH v. INLAND REVENUE COMMISSIONERS. INLAND REVENUE COMMISSIONERS v. WORTH.

[COURT OF APPEAL (Singleton, Jenkins and Hodson, L.J.J.), March 16, 17, 1953.]

Special Contribution—"Investment income"—Exclusion of "income arising to persons carrying on a trade . . . from property occupied . . . by them for the purposes thereof"—Land let to farmer by his wife—Farmer's land occupied by him in partnership—Finance Act, 1948 (c. 49), s. 49 (2) (b).

The wife of the taxpayer, a farmer, was the tenant for life in fee simple of part of the land he occupied and farmed and owner of the remainder, and she let it to him at a rent. The net sched. A assessment of the whole of the land was treated as "investment income" of the taxpayer within s. 47 (1) of the Finance Act, 1948, as being "income from any source other than a source of earned income" within s. 49 (1), for the purposes of the special contribution imposed by s. 47 (1) on individuals whose total income exceeded £2,000, and whose aggregate investment income exceeded £250 for 1947-48.

HELD: although the taxpayer's income was required to be ascertained for the purposes of the special contribution in the same way as for the purposes of surtax, for which the incomes of the taxpayer and his wife would be aggregated, the wife's income from the rent, as measured by the net sched. A assessment, arose to her, and was not, therefore, "income arising to [the taxpayer] carrying on a trade . . . from property occupied . . . by [him] for the purposes thereof" and so excluded from investment income by s. 49 (2) (b) of the Act.

The taxpayer, a farmer, owned land which he occupied in partnership with his son and for which he received rent from the partnership. The net sched. A assessment of the land was treated as "investment income" of the taxpayer for the purposes of the special contribution imposed by the Finance Act, 1948, s. 47.

HELD: the taxpayer and his son individually occupied the land, albeit in partnership, and, therefore, the income from it arose to the taxpayer as a person "carrying on a trade . . . from property occupied . . . by

[him] for the purposes thereof" and was to be excluded from investment income under s. 49 (2) (b) of the Act.

FOR THE FINANCE ACT, 1948, s. 49 (2), see HALSBURY'S STATUTES, Second Edn., Vol. 12, p. 843.

Cases referred to:

- (1) *Income Tax Comrs. v. Gibbs*, [1942] 1 All E.R. 415; [1942] A.C. 402; 111 L.J.K.B. 301; *sub nom. Inland Revenue Comrs. v. Gibbs*, 166 L.T. 345; *sub nom. R. v. Income Tax General Comrs. Ex p. Gibbs*, 24 Tax Cas. 221; 2nd Digest Supp.
- (2) *Whiteman v. Sadler*, [1910] A.C. 514; 79 L.J.K.B. 1050; 103 L.T. 296; *varying S.C. sub nom. Sadler v. Whiteman*, [1910] 1 K.B. 868; 79 L.J.K.B. 786; 102 L.T. 472; 35 Digest 204, 294.

APPEALS from orders of HARMAN, J., dated Oct. 9, 1952, dismissing the taxpayer's appeal and allowing the Crown's cross-appeal and appeal against decisions of the Special Commissioners of Income Tax.

The taxpayer was a farmer who had been assessed to the special contribution for 1947-48 under s. 47 (1) of the Finance Act, 1948. His investment income for the purposes of the special contribution, ascertained under s. 49 (1) of the Act, was treated as including the sched. A assessments of: (i) land in his occupation which was let to him at a rent by his wife, and (ii) land occupied by himself and his son in partnership and which he owned. He contended in each case that the income from the land as measured by the net sched. A assessment should be excluded from his investment income by virtue of s. 49 (2) (b) of the Act, as being income arising to a person "carrying on a trade . . . from property occupied and used by [him] for the purposes thereof". The Crown contended that the income in the first case arose to the taxpayer's wife and not to the taxpayer, and that the land in the second case was occupied by the partnership and not by the taxpayer. HARMAN, J., upheld the Crown's contentions. The taxpayer appealed.

Graham-Dixon, Q.C., and *H. H. Monroe* for the taxpayer.

Heyworth Talbot, Q.C., and *Sir Reginald Hills* for the Crown.

SINGLETON, L.J.: Under Part V of the Finance Act, 1948, there was established what became known as the "special contribution" which was to be charged on individuals whose total income for 1947-1948 exceeded £2,000, and whose aggregate investment income for that year exceeded £250. The last words in Part V, s. 68 (2), are:

"Save as expressly provided in this Part of this Act, expressions used therein have the same meanings as in the Income Tax Acts."

Section 47 of the Act provides for the charge and the amount of contribution of the individual, and by sub-s. (5):

"Subject to the provisions of this Part of this Act and of regulations thereunder, contribution shall be charged by assessment on the individual by reference to whose income it is charged, and shall be payable by that individual."

The taxpayer fell within the provisions of s. 47 (1). He carries on the trade or business of farming at Soham in Cambridgeshire. His wife is the tenant for life in fee simple of a part of the land which he farms and is the owner of the remainder. The net sched. A assessment on the whole of the land was £1,136. The taxpayer paid rent to his wife. The question for determination, on the first part of this case, is whether the sum of £1,136 is to be included in the figures of the taxpayer's assessment for the purposes of the special contribution.

Section 48 of the Act provides:

"Subject to the provisions of this Part of this Act, income from any

source and total income shall be ascertained for the purposes of this Part of this Act as they are ascertained for the purposes of surtax; and subject as aforesaid income shall be treated for the purposes of this Part of this Act as income of an individual if it would be so treated for the purposes of surtax."

It would, I think, have sufficed to have said that the income or the total income was to be ascertained in the way in which it was ascertained under the provisions of the Income Tax Acts, but, clearly, any individual who became chargeable to the special contribution levied under s. 47 would be one who was a payer of surtax, and, accordingly, s. 48 provided that the total income was to be ascertained in the same way as it was ascertained for the purposes of surtax.

Rule 16 of the All Schedules Rules under the Income Tax Act, 1918 (which was applicable until 1950) was in these terms:

"A married woman acting as a sole trader, or being entitled to any property or profits to her separate use, shall be assessable and chargeable to tax as if she were sole and unmarried: Provided that—(1) the profits of a married woman living with her husband shall be deemed the profits of the husband, and shall be assessed and charged in his name, and not in her name or the name of her trustee . . ."

Section 100 (1) of the Income Tax Act, 1918, provides:

"Every person chargeable under this Act, when required to do so by any general or particular notice given in pursuance of this Act, shall, within the period limited by such notice, prepare and deliver to the assessor, a true and correct statement in writing as required by this Act, signed by him, containing—(a) the annual value of all land and tenements in his occupation, whether situate in one, or more than one, parish; (b) the amount of the profits or gains arising to him, from each and every source chargeable according to the respective schedules, estimated for the period and according to the provisions and rules of this Act."

Counsel for the taxpayer especially directed our attention to the words in sub-s. (1) (b) "arising to him", similar words to which appear in s. 49 (2) (b) of the Finance Act, 1948. For the purposes of the taxpayer's surtax assessment, his income and his wife's income had to be aggregated. The £1,136 is income of his wife and it is investment income which under s. 49 (1) of the Act

"means income from any source other than a source of earned income."

Thus, it is submitted on behalf of the Crown that the £1,136 is investment income of the taxpayer's wife and so it had to be included in the taxpayer's assessment for the purpose of the assessment of surtax and also it falls to be included in his assessment for the purposes of the special contribution.

The concluding words of s. 48 are of importance and form the basis of a considerable part of the argument by learned counsel on both sides. Those words are:

"and subject as aforesaid income shall be treated for the purposes of this Part of this Act as income of an individual if it would be so treated for the purposes of surtax."

The effect seems to me to be that the total income of the individual is to be treated for the purposes of the special contribution as the income of the individual (i.e., of the taxpayer) "if it were so treated for the purposes of surtax", as to which there is here no question.

It was submitted by counsel for the taxpayer that the £1,136 ought not to be taken into account by reason of the terms of s. 49 (2) of the Act which provides:

"The following shall not in any case be treated as investment income, that is to say . . . (b) income arising to persons carrying on a trade,

profession or vocation from property occupied and used by them for the purposes thereof . . .”

In the Case Stated the contention is stated in this way:

A “It is said by [the taxpayer] that this land would not be part of his total income as an individual within the meaning of s. 47, but for the provisions of s. 48, which lay down that total income shall be ascertained for the purposes of the special contribution as it is ascertained for the purposes of surtax. It is, therefore, contended that the income of his wife, derived from the rent payable in respect thereof by her husband, and measured for purposes of the Income Tax Acts by the net sched. A assessment, must be deemed to arise to him for the purposes of the special contribution, within the meaning of s. 49 (2) (b) with the result, that he is entitled to claim that the said net sched. A assessment is not to be included in computing his aggregate investment income.”

B I cannot agree with that contention. The income was not the husband's income, nor did it arise to a person carrying on a trade, profession or vocation from property occupied and used by him for the purposes thereof. Under s. 48 it fell to be treated as income of the taxpayer for the purposes of Part V of the C Act, because it was so treated for the purposes of surtax. The fact that it had to be treated for this purpose as though it was the husband's income does not alter its character. It remains investment income, and it cannot be said to be income arising to the taxpayer as a person carrying on business from property occupied and used by him for the purposes of the business. That was the opinion and finding of the Special Commissioners, and it was also D the view of *HARMAN, J.*, and the appeal on that point fails.

E I come to the second point. The taxpayer owns other farm land in the neighbourhood, and he farms that land in partnership with his son. The net sched. A assessment of that land is £1,489 10s., and the rent is paid by the father and son to the father in respect of that land. The father and son have been in partnership for a good many years. At first the son held a one-fifth interest, but, latterly, he has had a half share with his father in the profits from the farm. The contention of the Crown is that that £1,489 10s. is investment income, and that it should be taken into consideration in arriving at the total liability of the taxpayer under the provisions as to the special contribution. The submission of counsel for the taxpayer is that it does not fall to be included at all. The question arises under the same provision of the Act F of 1948, s. 49 (2):

“The following shall not in any case be treated as investment income, that is to say . . . (b) income arising to persons carrying on a trade, profession or vocation from property occupied and used by them for the purposes thereof . . .”

G It is said, on the one side, that this was investment income arising to the taxpayer in carrying on the trade of farming on the farm, the property being “occupied and used” by him “for the purposes thereof”. As against that it is submitted by counsel for the Crown that it could not be said that the taxpayer was entitled to exemption under s. 49 (2) (b) for he was not occupying and using the farm. The farm was occupied and used by him and his son who were farming in partnership. The submission of the Crown was that, unless H the income from the property belongs to the identical individual who is carrying on the trade, there cannot be any exemption under the terms of that sub-section. It was common ground between learned counsel that, in order to read s. 49 (2) (b) in its sense plainly intended, one ought to put in the place of the word “persons”, the words “an individual”, and it was agreed that, if this income arose to the taxpayer in carrying on the trade, profession or vocation on property occupied and used by him alone he would be entitled to

exemption, but it was said that the exemption did not apply if user and occupation were shared by two partners of whom the owner of the property was one. Our attention was called to *Income Tax Comrs. v. Gibbs* (1), in which VISCOUNT SIMON, L.C., said ([1942] 1 All E.R. 421, 422):

"I concede without any doubt or qualification the proposition relating to the English law of partnership upon which the judgment of the Court of Appeal is largely based. Strictly speaking, it is certainly true that an old partnership cannot be regarded as 'ceasing' to carry on the trade, and the new partnership cannot be regarded as 'succeeding' to it when some members of the old partnership are also members of the new, and thus do not individually cease to carry on the trade at all. A, B, C and D are carrying on the trade throughout the year. How, then, can it be said that they, or any of them, have in the course of the year ceased to carry it on? If language is accurately used, a partnership firm does not carry on a trade at all. It is the individuals in the firm who carry on the trade in partnership. It is not the firm which is liable to income tax. The individuals composing the firm are so liable, though by r. 10 when a trade is carried on by two or more persons jointly the tax is computed and stated jointly and in one sum and is separate and distinct from any other tax chargeable to those persons or any of them, and a joint assessment is made in the partnership name. If, therefore, (it is argued) r. 9 is applied to a partnership, it applies not because a partnership is 'a person charged under this schedule', but because the singular includes the plural, and instead of a single person the case is one of a number of persons who are jointly so charged. So far as English law is concerned, it is indisputable that a partnership firm is not a single persona, though a different view obtains in Scotland, and in construing a taxing statute which applies to England and Scotland alike, it is desirable to adopt a construction of statutory words which avoids differences of interpretation of a technical character such as are calculated to produce inequalities in taxation as between citizens of the two countries . . . As a strict proposition of English law, there is no doubt at all that a partnership is not, as such, a single juristic person. As FARWELL, L.J., said in *Sadler v. Whiteman* (2) ([1910] 1 K.B. 889): 'In English law a firm, as such, has no existence; partners carry on business both as principals and as agents for each other within the scope of the partnership business; the firm name is a mere expression, not a legal entity, although for convenience under R.S.C., Ord. 48A, it may be used for the sake of suing and being sued . . . It is not correct to say that a firm carries on business; the members of the firm carry on business in partnership under the name or style of the firm'."

I have referred to LORD SIMON's words in that case because of the reliance placed in the course of the argument on the wording of r. 10 of the Rules Applicable to Cases 1 and 2 of sched. D as to partnership assessments. That rule, which is of very long standing was, no doubt, made for the convenience of those who had to make assessments, on the one hand, and of those who had to suffer under assessments, on the other. It was a great convenience if a trading partnership could be assessed as such though the liability of the individual members remained, but, as was said by LORD SIMON, the fact is that strictly the firm does not carry on business. The members of the firm carry on the business in partnership. On behalf of the Crown it is said boldly that, if a man has been farming a farm for thirty or forty years and thereafter gives the bailiff a small interest or a share in the profits, or makes him a partner to a small extent, the farmer himself, the owner of the farm, ceases to be in occupation for the purposes of this section. I do not think that that is right.

The Special Commissioners state their finding in this way:

"In our opinion, [the taxpayer] does occupy and use the property for

the purposes of the trade of farming carried on by him, and we do not consider that the fact that his son also occupies and uses the same land for the same purpose and that a joint assessment under sched. D in respect of the profits falls to be made in the partnership name debars him from the relief claimed. We, therefore, hold that he is entitled to exclude the net annual value of the land owned and farmed by him in computing his aggregate investment income for the purposes of the special contribution."

A On appeal HARMAN, J., took a different view. The ground for his decision can, I think, be stated from the words in his judgment as follows:

"Nevertheless, it seems to me that it is not true to say that [the taxpayer] occupies this land or that [the taxpayer] carries on this trade. He and another person carry it on; he and another person occupy the land. The person who pays the money is not identical with the person who receives it. In my judgment, para. (b) does postulate an identity of payer and payee before the exemption comes into operation."

B
C I do not agree. The taxpayer owned the farm. He had been farming it for many years. If the question had been asked, after his son had become a partner: "Is the taxpayer occupying and using the land for the purposes of farming?", the answer, I think, would be: "Yes, he is". It is true that someone else was there, too. It is impossible to find an answer covering every side of every problem which might arise under this sub-section, but the view which I hold on this part of the case is that the income arose to the taxpayer as to a person carrying on the trade of farming from property occupied and used by him for the purposes thereof, and that, consequently, the sum of £1,489 10s. is not to be treated as investment income. To that extent, in my view, this appeal should be allowed.

JENKINS, L.J.: I agree on both points.

HODSON, L.J.: I also agree on both points.

Orders accordingly.

Solicitors: *Smiles & Co.*, agents for *Mossop & Bowser*, Holbeach (for the taxpayer); *Solicitor of Inland Revenue* (for the Crown).

[*Reported by F. A. AMIES, Esq., Barrister-at-Law.*]

Re NESBITT'S WILL TRUSTS. DR. BARNARDO'S HOMES
NATIONAL INCORPORATED ASSOCIATION *v.*
BOARD OF GOVERNORS OF THE UNITED NEWCASTLE-
UPON-TYNE HOSPITALS AND OTHERS.

[CHANCERY DIVISION (Roxburgh, J.), March 20, 1953.]

Will—Falsa demonstratio non nocet—Identity of beneficiary.

By her will dated Feb. 16, 1946, a testatrix, who died on Jan. 10, 1949, bequeathed, inter alia, the following legacies: "... (2) To the Royal Infirmary of Victoria Street Newcastle-on-Tyne the sum of £500 for the general purposes of such institution; (3) To the Victoria Hospital of Newcastle-on-Tyne the sum of £500 for the general purposes of such institution . . ." Prior to the coming into operation on July 5, 1948, of the National Health Service Act, 1946, there were two general hospitals in Newcastle-upon-Tyne, viz., the Royal Victoria Infirmary for the Sick and Lane Poor of the counties of Durham, Northumberland and Newcastle-upon-Tyne, in Queen Victoria Road, Newcastle-upon-Tyne, and the General Hospital, in West Road, Newcastle-upon-Tyne. In an earlier will dated May 11, 1943 (which had been revoked), the testatrix had provided: "I give and bequeath to the Royal Infirmary Victoria Road Newcastle-upon-Tyne £500, to the hospital also of Newcastle-on-Tyne £500." On the question as to the identity of the legatees,

HELD: the gift numbered (2) contained a misdescription of the Royal Victoria Infirmary, which was clearly intended to be the legatee, and, on the true construction of the will, having regard to the facts and also to the revoked will of 1943 (which was admissible evidence), the gift numbered (3) contained a further misdescription from which the word "Victoria" should be struck out, and that legacy ought to be construed as being a gift to the General Hospital, Newcastle-upon-Tyne, and not as a second gift to the Royal Victoria Infirmary.

Will—Gift to "charitable institutions referred to by me in this my will"—Unitarian church.

The testatrix bequeathed: "... (13) To the Rev. C. W. Townsend of the Unity Church Torquay or if he predeceases me then his successor at such church for the general purposes of such church the sum of £100; (14) To the Rev. H. Barnes of The Divine Unity Ellison Place for Unitarian Work Newcastle or if he predeceases me then his successor at such church for the general purposes of such church the sum of £100; . . . Subject to the payment of the foregoing legacies . . . my trustee shall pay or transfer the residue of the said money in equal shares between the charitable institutions referred to by me in this my will".

HELD: on the true construction of the will, the Unity Church and The Divine Unity were "charitable institutions" within the meaning of that term as used in the will, and they were entitled to participate in "the residue of the said money" notwithstanding that they were not the legatees under gift No. (13) and gift No. (14) respectively.

Estate Duty—Incidence—Legacy payable in part out of Australian assets—Liability to bear proportion of estate duty paid in respect of Australian assets.

The testatrix by her will having directed the sale and conversion of her real and personal estate further provided: "My trustee shall out of the moneys to arise from such sale and conversion of my said real and personal estate and out of my ready money pay my funeral and testamentary expenses death duties and legacy duties (if any) and my debts and shall stand possessed of the residue [of the said moneys] upon trust to pay

thereout " a number of legacies. The testatrix's estate included Australian assets.

HELD: on the true construction of the will, all estate duty, including that exigible in respect of the Australian assets, was to be paid before the fund out of which the legacies were payable was constituted, and, therefore, the amount payable to the legatees was not to be diminished by a rateable proportion of the estate duty paid in respect of the Australian assets.

- A AS TO THE RULE FALSA DEMONSTRATIO NON NOCET, see HALSBURY, Hailsham Edn., Vol. 34, p. 228, para. 285; and FOR CASES, see DIGEST, Vol. 44, pp. 904-908, Nos. 7649-7677.

Case referred to:

- (1) *Re Ofner*, [1909] 1 Ch. 60; 78 L.J.Ch. 50; 99 L.T. 813; 44 Digest 616, 4437.

- B ADJOURNED SUMMONS to determine inter alia whether (1) on the true construction of the will of Sarah Ann Nesbitt, deceased, and in the events which had happened (a) the board of governors of the United Newcastle-upon-Tyne Hospitals (the first defendant) was entitled to the legacies numbered (2) and (3) of £500 each under cl. 3 (a) of the said will, or to one legacy of £500 only; (b) each of them the third and fourth defendants, Charles William Townsend and Herbert Barnes, was entitled to a share in the residuary estate under cl. 3 (b) of the said will, or whether the churches named in cl. 3 (a) (13) and cl. 3 (a) (14) were so entitled; and also whether (2) each of the pecuniary legacies bequeathed by the said will ought to be charged with a rateable or some and what other part of any estate duty payable in respect of such assets
- D situate out of the United Kingdom.

By her will dated Feb. 16, 1946, the testatrix who died on Jan. 10, 1949, directed the sale and conversion of her real and personal estate and continued:

- " 3. My trustee shall out of the moneys to arise from such sale and conversion of my said real and personal estate and out of my ready money pay my funeral and testamentary expenses death duties and legacy duties (if any) and my debts and shall stand possessed of the residue of the said moneys upon trust to pay thereout—(a) the following legacies free of all legacy duty (if any) namely: (1) To Doctor Barnardo's Home for Orphan and Destitute Children of London the sum of £1,000 for the general purposes of such institution; (2) To the Royal Infirmary of Victoria Street Newcastle-on-Tyne the sum of £500 for the general purposes of such institution; (3) To the Victoria Hospital of Newcastle-on-Tyne the sum of £500 for the general purposes of such institution; (4) To the Blinded Soldiers and Sailors Hostel of Regents Park London the sum of £250 for the general purposes of such hostel; (5) To the Home for Aged Artists of Denville Hall Middlesex the sum of £250 if such home shall still be in existence and if in existence for the general purposes of such home; (6) To the Royal Society for the Prevention of Cruelty to Children of London the sum of £250 for the general purposes of such institution; (7) To Noble's Isle of Man Hospital and Dispensary of Douglas Isle of Man the sum of £100 for the general purposes of such hospital; (8) To the Isle of Man Homes for Destitute and Orphan Children of Douglas now at Castletown Isle of Man the sum of £50 for the general purposes of such institution; (9) To the Manx Blind Welfare Society of the Isle of Man the sum of £100 for the general purposes of such institution; (10) To Mr. J. E. Elliot of Victory House Leicester Square London if living at my death the sum of £250; (11) To Miss Mabel Dunn nurse Emergency Hospital Shotley Bridge county Durham if living at my death the sum of £250; (12) To Ivy Isabella Sharp of Whitely Bay in the county of Northumberland if living at my death the sum of £250; (13) To the Reverend C. W.

Townsend of the Unity Church Torquay or if he predeceases me then his successor at such church for the general purposes of such church the sum of £100; (14) To the Reverend H. Barnes of The Divine Unity Ellison Place for Unitarian Work Newcastle or if he predeceases me then his successor at such church for the general purposes of such church the sum of £100; (15) To The Royal Victoria School for the Blind of Benwell Dene Newcastle-on-Tyne the sum of £100 for the general purposes of such institution; (16) To Mrs. Teare of West Mount Barrule Foxdale Isle of Man the sum of £50 if living at my death; (17) To Mrs. M. A. Huddleston of 10 Hill Street Douglas Isle of Man if living at my death the sum of £25; (18) To my trustee if he accepts the office of trustee the sum of £100; (b) Subject to the payment of the foregoing legacies and all legacy duty (if any) my trustee shall pay or transfer the residue of the said money in equal shares between the charitable institutions referred to by me in this my will. 4. I declare that the receipt of the treasurer for the time being of the foregoing charitable institutions shall be a good and sufficient discharge to my trustee for any moneys bequeathed by this my will to any such charitable institutions."

Wilfrid Hunt for the plaintiff, the administrator of the estate of the testatrix.

A. L. Stott for the first defendant, the board of governors of the United Newcastle-upon-Tyne Hospitals.

E. I. Goulding for the second defendant, a pecuniary legatee.

Newcombe for the third and fourth defendants, the Rev. C. W. Townsend and the Rev. Herbert Barnes.

Ian Campbell for the fifth defendant, a pecuniary legatee.

J. H. Stamp for the Inland Revenue Commissioners.

Denys B. Buckley for the Attorney-General.

ROXBURGH, J. (having read part of cl. 3 (a) of the will): The gifts numbered (2) and (3) raise questions of identification. The facts which are indubitably admissible, as distinct from certain facts to which I shall refer later, are that there was, prior to the nationalisation of hospitals, a Royal Victoria Infirmary for the Sick and Lame Poor of the counties of Durham, Northumberland and Newcastle-upon-Tyne in Queen Victoria Road, Newcastle-upon-Tyne. The only other general hospital in Newcastle-upon-Tyne was the General Hospital in West Road, Newcastle-upon-Tyne. I have no doubt whatever that the first gift contains a misdescription of the Royal Victoria Infirmary of Queen Victoria Road. That is a very small misdescription, but it has, in my judgment, an important bearing on the construction of the more difficult bequest. The word "Victoria", it will be noted, is not in the title of the infirmary in the will, though it would have been if the description had been wholly accurate. On the other hand, in the gift to the Victoria Hospital the word "Victoria" is wholly out of place. It cannot be imagined that the testatrix meant to give this legacy to a non-existent body. On the evidence, therefore, by that gift she must have either meant the Royal Victoria Infirmary or the General Hospital, so that, unless she intended by these two separate gifts to make a gift of the same sum of money to the same body, I am driven to the conclusion that the word "Victoria" is a misdescription and that it should be deleted.

The explanation of the confusion suggests itself on a mere inspection of the will proved. It was easy for the word "Victoria", which was, undoubtedly, associated in the mind of the testatrix with one of the hospitals, to have been accidentally by her transferred from the right hospital to the wrong hospital, and the two clauses are complementary. The word "Victoria" is not only erroneous in gift (3), but it is lacking in gift (2), and I would, I think, have been prepared, on the mere language of the will itself, without any other extrinsic evidence except the precise state of hospitals in Newcastle, to come to the conclusion that that was a misdescription and that that is what had

happened. If one leaves out the word "Victoria" from the gift (3) on the footing that it has been erroneously transposed from gift (2) to gift (3), the meaning is clear. A gift in these circumstances to the hospital of Newcastle-on-Tyne would, without any question, be a gift to the General Hospital, but there is a curious circumstance which does, in my view, confirm that interpretation of the document. I have been a good deal exercised as to the admissibility of what I regard as confirmatory evidence. Before I read it and

- A before I refer to one or two authorities, I must point out that there is no doubt about the intention of the testatrix in one sense of the word "intention". There is no doubt that she intended to give a legacy to a hospital in Newcastle. That is not ambiguous and no evidence is required to enable the court to reach that conclusion. What is ambiguous (and it is a latent ambiguity, because until one knows the facts about hospitals in Newcastle one would not see that
- B the gift involved any difficulty at all) is the identification of the particular body to which the testatrix referred. Two counsel have argued that this testatrix intended to give two legacies of the same amount to the same institution.

There is a rule of construction laid down in HAWKINS ON WILLS, 3rd ed., p. 352, as follows:

- C "If a legacy of the same amount to the same person be repeated in two separate testamentary instruments, as a will and codicil, prima facie the legatee is entitled to both legacies. But if the repetition occurs in one and the same testamentary instrument, prima facie the legatee is entitled to one legacy only."

- D It is to be observed that the reason of that last mentioned rule, or the last mentioned branch of the rule, must be that the court thinks that it would be quite absurd to attribute to any testator or testatrix an intention to give two legacies of precisely the same amount to the same legatee by two separate sentences. If that be so, I resile from the submission which has been made to me that I should take words which are not the same and apply the doctrine of falsa demonstratio so as to make them the same, with the result that I
- E should reach a situation which the courts have regarded as so absurd that I should have to put a blue pencil through what I had done. That argument makes no appeal to me. I am sure that the testatrix intended to give to two separate institutions.

- F Therefore, the only question is: Can I identify the second institution, or am I driven to say that the gift is to a non-existent body, or that it is uncertain to what the gift is given? In my judgment, I am not, but I am entitled to look at the document to which I am leading up. The document is an earlier will which was signed. I doubt if it was attested properly, but, on any view, it was revoked, and, therefore, could not have been admitted to probate. May I look at it for the purpose neatly stated by COZENS-

- G HARDY, M.R., in *Re Ofner* (1) ([1909] 1 Ch. 65)—to identify (or, I interpose, to assist in identifying) the object which has been misdescribed? In my judgment, I may, and it seems to me that if I do so it will confirm the reasoning which I should have adopted apart altogether from this document. This document, in which the testatrix says, amongst other things:

- H "I give and bequeath to the Royal Infirmary Victoria Road Newcastle-upon-Tyne £500, to the hospital also of Newcastle-on-Tyne £500", seems to me to show that the confusion to which I have referred is the true explanation of the position. It is to be noted that in that document (which is dated May 11, 1943) she was a little nearer the true address of the Royal Infirmary. She mentioned "Victoria Road". It should have been "Queen Victoria Road", but it was more accurate than "Victoria Street". She does not there use the word "Victoria" in any connection except as regards the address. She does not give the hospital any description except "the hospital also of Newcastle-

on-Tyne". To me it seems quite clear that between May 11, 1943, when she made that document, and 1946, when she made her last will, it occurred to her that the name "Victoria" formed part of the name of one of the two Newcastle hospitals which had been the object of her previous but ineffective disposition. To that extent she was right, but she attached the word "Victoria" to the wrong member of the two. That seems to me to be confirmation (though not, of course, conclusive evidence of its rectitude) of the conclusion at which I arrived by looking merely at the will and the known facts about the hospitals.

In my judgment, this is a case of misdescription, the word "Victoria" having appeared in the second gift by inadvertence when it should have appeared in the first of the two. If that word is struck out, there is no doubt, in the circumstances of this case, that the hospital which the testatrix intended to benefit was the only other general hospital, other than that which is the subject-matter of the previous gift, in Newcastle-upon-Tyne. Therefore, gift (3) was an effective bequest to the General Hospital, Newcastle-upon-Tyne. Having regard to the nationalisation legislation, that is not the body to which the legacy can now be paid, but it is payable to the appropriate hospital management committee.

[HIS LORDSHIP heard further argument.]

ROXBURGH, J. (having read cl. 3 and cl. 4 of the will): The question which has arisen is whether or not the Unity Churches at Torquay and Newcastle respectively are entitled to participate in the residuary estate of the testatrix. The testatrix has used the word "institution" in a somewhat enlarged sense. The Manx Blind Welfare Society, while obviously a charity, is hardly what one would normally describe as an institution. I think that is, perhaps, some pointer. It would be difficult, I think, to say that a church was not an institution if the Manx Blind Welfare Society is, and the testatrix has said that it is. On what ground can it be said that the Unity Church is not charitable? I think that it is unnecessary to look at the statute 43 Eliz. c. 4 to answer that question. I think that any ordinary lay man or woman would regard a church as a charitable institution. Therefore, *prima facie*, I should have thought that these two churches were charitable institutions within the meaning of this will, as they, undoubtedly, are in the intent of the general law.

I stress that the residuary gift in cl. 3 (b) is not to "the charitable institutions to which I have made bequests by this my will" and in that respect it differs noticeably from cl. 4. It is to "the charitable institutions referred to by me in this my will". I regard that as a point of importance. I could not possibly have held that gift (13) and gift (14) in cl. 3 (a) constituted bequests to the respective churches. They are bequests to two named persons or their successors in office, but it is plain that those persons cannot take beneficially. On the contrary, they take as trustees, and their trust is to apply the money for the benefit of the churches, so that the position is that these words in cl. 3 (b) are strictly apposite for the situation if the churches are included. The churches are referred to in the will, but they are not directly the recipients of bequests up to this point. Of course, the moment that they come within the category enumerated in cl. 3 (b), they become residuary legatees, and cl. 4 fits precisely, for it applies to them. They are now charitable institutions to which money was bequeathed by the will. I do not think that the Rev. C. W. Townsend or the Rev. H. Barnes have anything to do with the gift of residue unless they happen to be treasurers or unless, pursuant to something in the nature of a scheme, I were to direct payment to them as trustees for the general purposes of the church. In my view, cl. 4 can and does apply to the bequest of residue to, *inter alia*, the churches. It is a technical difference rather than a difference of substance, but the bequest of residue under cl. 3 (b) is not to the Rev. C. W. Townsend nor the Rev. H. Barnes at all, but to the churches.

[His LORDSHIP heard further argument.]

ROXBURGH, J.: The next question is whether or not the English estate duty on the Australian assets has to be borne in proper proportions by legatees. It is conceded that there is authority binding me to hold that it must be so borne unless there is any direction in the will to the contrary. Therefore, the question is: Is there a direction in this will to the contrary? I think there is. Clause 3 provides:

A

"My trustee shall out of the moneys to arise from such sale and conversion of my said real and personal estate and out of my ready money pay my funeral and testamentary expenses death duties and legacy duties (if any) and my debts and shall stand possessed of the residue . . . upon trust to pay thereout—(a) the following legacies . . ."

B

It seems to me that it would be impossible so to construe the words "death duties" that they included estate duty on English assets and did not include estate duty on Australian assets. I see no reason for construing them as meaning only those death duties which are testamentary expenses. Indeed, so to construe them would make them entirely otiose, because testamentary expenses have already been mentioned. Therefore, I feel no doubt that the direction is to

C

pay estate duty including this particular estate duty before any legacies are payable and before the fund is constituted out of which the legacies are payable.

The argument to the contrary stands on the fact that the testatrix has directed payment of "the following legacies free of all legacy duty (if any)" and it is said that it was unnecessary to free them from legacy duty, because that had already been done if the words are intended to affect beneficial interests. It

D

may be unnecessary, but it is logically consistent so to do. Having directed that the legacy duties were to be paid, the testatrix now says the legatees are not to have legacy duty deducted from their legacies and then, subject to the payment of the foregoing legacies and all legacy duty (if any), the residue is to be dealt with as she directs. That is quite consistent with the view that there was complete exoneration from legacy duty throughout. In other words,

E

it was to be paid before the fund was ever constituted and payments of legacies were to be made only out of the net fund after payment of duty. As regards death duties other than legacy duty—i.e., estate duty in particular—there is nothing else in the will. There is no exoneration from other death duties. I should not expect to find any such exoneration, but I cannot myself construe

F

the absence of any further exoneration of legacies from death duties as an indication that they were to be freed from such death duties as were testamentary expenses and subject to such death duties as were not. That seems to me to be an entirely artificial approach to the problem. In my view, the testatrix meant that all death duties were to be paid before any fund was constituted, without any person having a right of recoupment.

G

Order accordingly.
Solicitors: *Fournier & Roberts* (for the plaintiff); *Hyde, Mahon & Pascall*, agents for *Clayton & Gibson*, Newcastle-upon-Tyne, and agents for *Ralph W. T. Lubbock*, Newcastle-upon-Tyne (for the first and fifth defendants); *Ranger, Burton & Frost* (for the second defendant); *Arthur E. & C. Burton*, agents for *Samuel Phillips & Co.*, Newcastle-upon-Tyne (for the third and fourth defendants); *Solicitor of Inland Revenue*; *Treasury Solicitor*.

[Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.]

SEALEY (otherwise CALLAN) v. CALLAN.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Davies, J.), March 20, 1953.]

Practice—Stay of proceedings—Divorce petition presented in England—Proceedings against petitioner begun by respondent abroad—Advantage to petitioner from proceeding in England—Delay by respondent.

On Nov. 28, 1952, the wife filed a petition for dissolution of the marriage in which, for the purpose of s. 18 (1) (b) of the Matrimonial Causes Act, 1950, she stated that she had been resident within the jurisdiction for three years. On Mar. 9, 1953, the husband obtained leave from the Supreme Court of South Africa to issue proceedings for divorce on the ground of the wife's adultery, and these were served on the wife on Mar. 19. On a summons by the husband to stay the wife's petition until after the determination of his suit in South Africa,

HELD: when the court undoubtedly had jurisdiction in a matter, it required a very strong case to persuade the court to prevent a party from proceeding with an action or petition on the ground that the defendant or respondent had, either before or after the commencement of the proceedings in this country, started in a foreign jurisdiction an action or petition against the plaintiff or petitioner; in the present case the wife might be able to derive advantage from exercising her right to proceed in this country and there had been some delay by the husband in proceeding in South Africa; and in the circumstances the husband had not made out a case for a stay.

Observations of COTTON, L.J., and BOWEN, L.J., in *Thornton v. Thornton* (1886) (11 P.D. 179, 180), of SCOTT, L.J., in *St. Pierre v. South American Stores (Gath & Chaves), Ltd.* ([1936] 1 K.B. 398), and of VAUGHAN WILLIAMS, L.J., in *Re Norton's Settlement* ([1908] 1 Ch. 479), applied.

AS TO STAY OF ENGLISH PROCEEDINGS IN CASE OF LIS ALIBI PENDENS, see HALSBURY, Hailsham Edn., Vol. 6, pp. 357-360, paras. 414, 415; and FOR CASES, see DIGEST, Vol. 11, pp. 477-480, Nos. 1310-1330.

FOR THE MATRIMONIAL CAUSES ACT, 1950, s. 18 (1) (b), see HALSBURY'S STATUTES, Second Edn., Vol. 29, p. 405.

Cases referred to:

- (1) *Boettcher v. Boettcher*, [1949] W.N. 83; 2nd Digest Supp.
- (2) *Le Mesurier v. Le Mesurier*, [1895] A.C. 517; 64 L.J.P.C. 97; 72 L.T. 873; 11 Digest 422, 885.
- (3) *Wilson v. Wilson*, (1872), L.R. 2 P. & D. 435; 41 L.J.P. & M. 74; 27 L.T. 351; 11 Digest 422, 884.
- (4) *Lord Advocate v. Jaffrey*, [1921] 1 A.C. 146; 89 L.J.P.C. 209; 124 L.T. 129; 11 Digest 333, 221.
- (5) *Salvesen (or Von Lorang) v. Austrian Property Administrator*, [1927] A.C. 641; 96 L.J.P.C. 105; 137 L.T. 571; Digest Supp.
- (6) *Thornton v. Thornton*, (1886), 11 P.D. 176; 55 L.J.P. 40; 54 L.T. 774; 11 Digest 478, 1321.
- (7) *Von Eckhardstein (Baroness) v. Von Eckhardstein (Baron)*, (1907), 23 T.L.R. 539, 593; 27 Digest, Replacement, 477, 4138.
- (8) *St. Pierre v. South American Stores (Gath & Chaves), Ltd.*, [1936] 1 K.B. 382; 105 L.J.K.B. 436; 154 L.T. 546; Digest Supp.
- (9) *Re Norton's Settlement*, [1908] 1 Ch. 471; 77 L.J.Ch. 312; 99 L.T. 257; 11 Digest 477, 1312.
- (10) *Egbert v. Short*, [1907] 2 Ch. 205; 76 L.J.Ch. 520; 97 L.T. 90; 11 Digest 477, 1311.
- (11) *Cohen v. Rothfield*, [1919] 1 K.B. 410; 88 L.J.K.B. 468; 120 L.T. 434; 11 Digest 478, 1315.
- (12) *The Janera*, [1928] P. 55; 97 L.J.P. 58; 138 L.T. 557; Digest Supp.

(13) *The London*, [1931] P. 14; 100 L.J.P. 57; 144 L.T. 375; Digest Supp.

APPEAL by the husband against an order of Mr. Registrar TOWNLEY MILLERS dated Feb. 19, 1953.

The husband was born in Scotland in 1906 and in 1937 he went to live in South Africa where he had resided ever since. In 1941 the parties were married in India, and in 1944 they separated. In 1946 the wife went through a form of marriage with one Sealey, and in that year she gave birth to a child. On A Nov. 28, 1952, the wife filed a petition in England for the dissolution of her marriage on the ground of the husband's desertion, which, she alleged, had occurred in November, 1944. For the purpose of s. 18 (1) (b) of the Matrimonial Causes Act, 1950, the wife stated in the petition that she had been resident for three years within the jurisdiction, and that the husband was not domiciled in the United Kingdom, the Channel Islands, or the Isle of Man. The wife B prayed for the exercise of the discretion of the court in her favour. On Jan. 19, 1953, the husband by his solicitors entered a conditional appearance under protest that the court had no jurisdiction, and on Jan. 30, 1953, by his solicitors, he issued a summons under the Matrimonial Causes Rules, 1950, r. 14 (2), for directions as to the determination of the question arising by reason of such appearance. On Feb. 19, 1953, Mr. Registrar TOWNLEY MILLERS dismissed C the summons and gave leave to the husband to amend the appearance to a general appearance. On Feb. 25, 1953, notice of appeal from that order was given. On Mar. 5, 1953, the appeal came before DAVIES, J., in chambers, when counsel for the husband asked leave to amend the summons dated Jan. 30, 1953, so as to apply for a stay of the wife's petition, and DAVIES, J., adjourned the matter into court for further argument. On Mar. 9, 1953, the husband D obtained leave of the South African court, which had been on vacation from Dec. 18, 1952, until Mar. 2, 1953, to issue proceedings for divorce in the Supreme Court of South Africa on the ground of the wife's adultery with Sealey, the husband alleging that the child born to the wife in 1946 was the offspring of her bigamous union with Sealey. On Mar. 13, 1953, an edictal citation (the equivalent of service out of the jurisdiction) was issued and on Mar. 19 it was E served on the wife.

Tolstoy for the husband.

Summerfield for the wife.

DAVIES, J.: This appeal from an order of Mr. Registrar TOWNLEY MILLERS came before me in chambers on Mar. 5, 1953, when I adjourned it F into open court for further argument. Counsel for the husband has conceded that the appearance under protest which was entered on behalf of the husband was completely misconceived, for it is impossible to argue that this court has no jurisdiction if the wife can prove (as it appears that she can prove) that she has been resident in this country for the three years prior to the filing of the petition and that the husband is not domiciled within what I may call G the prohibited territories. Consequently, the application for directions under r. 14 (2) of the Matrimonial Causes Rules, 1950 (S.I., 1950, No. 1940) was also misconceived, and counsel made it plain that he wished his appeal to be considered as an application for a stay of the wife's petition. The actual form of the application for a stay was not before me when the matter was in chambers, but counsel has handed in the form of order that he is now seeking in the form H of a draft amendment of the summons before Mr. Registrar TOWNLEY MILLERS. In that form the summons is an application calling on the wife

"to show cause why an order should not be made that all further proceedings in this suit should be stayed pending the trial and determination of the action for divorce instituted by the [husband] against the [wife] in the Supreme Court of South Africa and that either party be at liberty to apply in the event of the said action in the Supreme Court of South

Africa not being proceeded with with due expedition or at any time after the conclusion of such action."

Counsel for the wife has not objected to the proceedings being amended in that form provided always that he is adequately protected with regard to costs, and, accordingly, I give leave to amend the summons in the manner asked by counsel for the husband. From its wording the ground of the application for a stay is at once apparent. In short, it is this: "I, the husband, am domiciled in South Africa. Therefore you, the wife, are domiciled in South Africa as well, and by the law of England and that of South Africa the proper court to decree a dissolution of this marriage, if it is to be dissolved, is the South African court."

The facts alleged by the husband in support of the application—and about them it would appear that there is not much dispute—are as follows. He was born in Scotland in 1906. After various travels in 1937 he went to Durban, Natal, South Africa, where he has lived ever since, and he says that in 1937 he acquired a domicile of choice in South Africa. The marriage between the parties took place in April, 1941, in India. The husband alleges that after the separation between them in 1944 the wife, in 1946, went through a form of marriage with a man called Sealey, and that a child born in 1946 is the offspring of the wife's bigamous union with Sealey. The husband stated that he was commencing proceedings for divorce in the Supreme Court of South Africa on the ground of the wife's adultery with Sealey, and that on Mar. 9, 1953, his application for leave to sue the wife by what is called in the South African court edictal citation, which is equivalent to service out of the jurisdiction in our court, would be heard, and that it was impossible for it to be heard before that date as the long vacation in the South African court lasts apparently from Dec. 18 until Mar. 2. At any rate, evidence has been put in before me today to show that on Mar. 9 leave was given to issue proceedings in South Africa, that the edictal citation was issued on Mar. 13, and that it was served on the wife on Mar. 19. Proceedings have, therefore, been commenced in the South African court by the husband for a decree of divorce on the ground of adultery and for alternative relief, and have been served upon the wife. The husband says that in July, 1952, he instructed English solicitors to make inquiries on his behalf, but was unable to obtain any evidence. He says that on Oct. 10, 1952, these solicitors told the wife's solicitors that he would be taking proceedings for divorce if he could get evidence, and he says that his present solicitors were instructed in December, 1952, but did not get the birth certificate of the child who is alleged to be the offspring of the adulterous and bigamous union until Feb. 20, 1953. The husband says that he understands that Sealey obtained in this court a decree of nullity of his marriage to the petitioner on the ground that it was bigamous which was made absolute on Aug. 8, 1952, and that Sealey is now serving with the army in Korea.

On the other hand, in a further affidavit filed on behalf of the wife, which has been before me today, there is exhibited a letter written by solicitors who were acting for Sealey to the solicitors acting for the wife in the present case which reads as follows:

"We are in communication with our client, the above Mr. Sealey, in relation to various proceedings he proposes to take. On making inquiry we have received information which appears to show that our client and your client, although having gone through a ceremony of marriage, are not married owing to your client having contracted a previous marriage in the Roman Catholic Church in Lower Circular Road, Calcutta, on or about Apr. 21, 1941, with Jack Callan, and, owing to the fact that when your client went through the ceremony of marriage with Mr. Sealey Mr. Callan was alive, the previous marriage, therefore, then subsisted . . . In order to remove any doubt about the matter our client nevertheless desires

to bring an action for a declaration and we shall be obliged if you will first of all let us know your client's present name and address so that she can be served with these proceedings when they are ready, and if you could by any chance let us have a copy of the marriage certificate we should be much obliged."

A From the evidence filed on behalf of the husband it appears that a divorce may be obtained in the courts in Natal on the ground of desertion for eighteen months, and, according to the husband's case now, quite apart from his allegations of adultery against his wife, she has deserted and had deserted him for a period of a great deal longer than eighteen months. I should add two other matters in the evidence. There is on behalf of the husband evidence of South African law that any decree granted by this court in the exercise of its jurisdiction under s. 18 (1) (b) of the Matrimonial Causes Act, 1950, would not be recognised in the South African courts where the sole test of jurisdiction is domicile, except for the jurisdiction given by the Matrimonial Causes Jurisdiction Act, 1945, and similar legislation. There is also evidence before me that there is one essential difference between the powers of the Supreme Court of South Africa in the exercise of its jurisdiction in divorce and this court in that the South African court has no power to grant maintenance to a wife save by consent. I do not have to decide whether that is right or wrong, but there is sworn evidence to that effect and it may be accurate.

Counsel for the husband has put before me a number of powerful considerations in support of his application for a stay. He says, first, that any decree obtained by the wife in this court would only be valid here and would not be valid in South Africa. On the evidence that appears to be right. Secondly, he says that, if the husband cares to come over, as, indeed, by his counsel and solicitor he has to the present limited extent come over, to take part in the proceedings in this court, he can only defend himself and cannot counter attack, that is to say, he can succeed, if his case is accepted, in defeating the wife's petition for dissolution of marriage, but he cannot himself in this court obtain a decree of dissolution. It is not necessary, I think, for me to decide that interesting question under s. 18 (1) (b). Thirdly, says counsel, whatever happens in this court it would be necessary for the husband to take proceedings in South Africa to put an end to the marriage, that is to say, that if, contrary to the husband's contention, the wife is right on the merits and entitled to obtain, and were to obtain, a decree here, since that decree would be invalid in South Africa, the husband would have to take separate proceedings in the South African court to obtain a decree that would be valid in South Africa or anywhere else outside England and would enable him to marry again. Counsel proceeds, fourthly, to say that it is undesirable and contrary to public policy that there should be two suits proceeding simultaneously, because there might be what he calls an undesirable race between the parties to expedite the hearing and determination of the respective suits. For, as is pointed out, I think rightly, on the authority of *Boettcher v. Boettcher* (1), if, in fact, the South African case were to come on first and a decree were to be pronounced therein, this court would not act any further under s. 18 (1) (b) of the Act of 1950, a competent court having already dissolved the marriage. Counsel argues, and he has referred me to a number of well known cases in support of the contention, that by the law of this country the court of the domicile of the parties is the proper and competent court to dissolve a marriage, and that it is undesirable from every point of view that different courts should pronounce on these matters of status with the result that a party may be married in one country and unmarried in another.

The cases cited were *Le Mesurier v. Le Mesurier* (2) where LORD WATSON, in delivering the opinion of the Judicial Committee cited ([1895] A.C. 540)

with complete approval the views that had been expressed by LORD PENZANCE (L.R. 2 P. & D. 442) in *Wilson v. Wilson* (3), as follows:

“ It is the strong inclination of my own opinion that the only fair and satisfactory rule to adopt on this matter of jurisdiction is to insist upon the parties in all cases referring their matrimonial differences to the courts of the country in which they are domiciled. Different communities have different views and laws respecting matrimonial obligations, and a different estimate of the causes which should justify divorce. It is both just and reasonable, therefore, that the differences of married people should be adjusted in accordance with the laws of the community to which they belong, and dealt with by the tribunals which alone can administer those laws. An honest adherence to this principle, moreover, will preclude the scandal which arises when a man and woman are held to be man and wife in one country and strangers in another .”

To the same effect are the other cases, *Lord Advocate v. Jaffrey* (4)—in particular, the passage at [1921] 1 A.C. 152—and *Salvesen (or Von Lorang) v. Austrian Property Administrator* (5) ([1927] A.C. 653, 654). Counsel for the husband does not argue on the strength of those cases, and he could not argue, that this court has no jurisdiction to entertain the wife's petition. What he says is that, in deciding whether or not, in my discretion, in so far as it is a matter of discretion, whether to allow the wife's suit to proceed under the special jurisdiction provided by s. 18 (1) (b) of the Act of 1950, I ought to have regard to the desirability from the public point of view, the international point of view, and the general principle consistently followed by our courts, as well as by the courts of other countries, of regarding the court of domicile as the proper court, and, therefore, other things being equal, of preferring it to any other special jurisdiction. Counsel also refers—and it is an attractive point—to the provisions of r. 4 (1) (f) (ii) of the Matrimonial Causes Rules, 1950, which provides that in the case of such a petition as the present one the wife in her petition must state *inter alia*:

“ whether to the knowledge of the petitioner proceedings for dissolution or nullity of the marriage or judicial separation or restitution of conjugal rights, or for other relief in respect of the marriage, are pending in any other country and, if so, the nature of those proceedings.”

That, it is said, suggests that, if the court is apprised that there is some other court which is, to use the widest words, dealing with the marriage, and if it finds that that other court is the court of the domicile, there would be at any rate a tendency on the part of the English court not to allow the suit here to proceed, but to stay it until the other court has heard the matter. Finally, the obvious point is taken that, if two suits are to go on, the very greatest expense and inconvenience will be caused to everyone concerned, and, possibly, more particularly to the husband. In the light of all those considerations the court is asked to exercise the jurisdiction, which, in my opinion, it undoubtedly has, to stay these proceedings, not on the ground that the petition is frivolous or vexatious, but on the ground that there is a suit proceeding in another court which is the convenient court.

Counsel for the wife, on the other hand, says, first, that I have no jurisdiction to make the order prayed for. By s. 1 of the Matrimonial Causes Act, 1950, a petition for divorce may be presented on the ground of desertion; s. 18 gives this special jurisdiction; and when the petition has been presented, it is provided by s. 4 (1) that it shall be the duty of the court to inquire into the facts alleged, and by s. 4 (2):

“ If the court is satisfied on the evidence that—(a) the case for the petition has been proved . . . the court shall pronounce a decree of divorce . . .”

Counsel says there is an inherent right in a spouse to present a petition, and, if the spouse exercises that right, the court is under a duty, if the statutory conditions are satisfied, to pronounce a decree and cannot interfere whether by staying the suit or otherwise. Various authorities have been cited. Suffice it to say that, in my opinion, those general words in the statute do not in any way entrench on the inherent power of the court to govern its own proceedings, a power which is preserved by proviso (a) to s. 41 of the Supreme Court of Judicature (Consolidation) Act, 1925. I say no more about that contention. But it is agreed, and there is, in my judgment, very much more force in this point, that by the statutory provisions to which I have just referred the wife is entitled to bring a suit in this country and there may well be advantages to her in bringing the suit in this country as opposed to defending a suit in South Africa. Indeed, the evidence, to which I have already referred, which has been filed this morning suggests one advantage at least, namely, that in this country the wife may be able to obtain an order for maintenance, whereas in South Africa, as the evidence before me stands, she has no such right. Also, says counsel, there has been here great delay on the part of the husband. The husband was in communication with Mr. Sealey's solicitors before June, 1952, and the affidavit to which I have already referred shows that he was in communication with them in May, 1950. An affidavit—I think this was a matter of statement by counsel and is not deposed to in any affidavit before me—by the husband was used as evidence in Mr. Sealey's nullity petition. Therefore, it is said, the husband, if he had been minded to take proceedings in South Africa, long ago had material on which he could have proceeded on the ground of adultery, and, quite apart from that, if it be the fact that his wife deserted him in 1944 he could have taken steps eighteen months thereafter. Counsel also says that it is just as unfair to the wife to ask her to go to South Africa to defend the husband's petition as it may be unfair to the husband to ask him to come here to defend his wife's petition, and that the expense is prohibitive to the wife.

Those are the facts. What is the law? In opening this case to me counsel for the husband cited three authorities. The first is *Thornton v. Thornton* (6). In that case the petitioner in England was the wife of an officer in the Indian army. She came back from India to England with his consent, and two months afterwards the husband commenced in the Indian court a suit for dissolution of marriage on the ground of adultery. The wife, having been served with the petition in this country, two days later as a counterblast commenced a suit for restitution and managed to serve the husband in this country when he was on leave. There was an application on behalf of the husband to stay the wife's suit until after the determination of the Indian proceedings. It is not uninteresting to look at the last passage in the argument of counsel for the husband, which has some similarity to the argument of counsel for the husband in the present case:

"The wife could go to India, her husband would have to pay the expenses . . . Justice cannot be fully done here, for a divorce cannot be obtained in the present English suit. It would be oppression to be obliged to have the issue of adultery tried here and then over again in India. The question is one of convenience. In one case the wife would go to India, having her expenses paid; in the other, the husband would have to contest the case twice over."

Mutatis mutandis there is great similarity between that argument and the argument for the husband in the present case. COTTON, L.J., having stated the facts, said (11 P.D. 179):

" . . . the husband asks that, as his defence to the suit for restitution of conjugal rights is the adultery of his wife, which is his ground of action

in India, the proceedings in England on the petition of the wife should be stayed until the question of adultery has been decided, not only as against her, but as against the co-respondent in that suit in India. Undoubtedly there would be certain advantages in taking that course. A trial in India would be effectual, not only as against the wife, but as against the co-respondent; the case would be tried in a place where all the witnesses except the wife are now resident. And certainly if we could avoid it we should not wish to allow the husband to be put to the expense of proving the adultery of the wife in England as well as in India, especially where the witnesses are in India."

I think his next words are very important and apply with force to the present case (*ibid.*, 180):

"But what we have to consider is, whether we can deprive the wife of her right to have the questions which arise in a suit duly instituted by her in an English court having jurisdiction over the case, decided in England, and compel her to have that tried somewhere else. I think that it would not be right for us to do so. She says: 'There is some evidence by the husband that I made to him a confession of adultery. I deny that in fact I had committed adultery, and I wish to have that question tried. I wish to be able, without going to India, to give in court my explanation of the circumstances relied upon by my husband, and to defend myself by giving evidence that I never have in fact committed adultery'. She wishes (and her wish is not unnatural, nor do I think it can be said to be unreasonable) to give her evidence in England rather than go over to India in order to give it there. I think that, notwithstanding the inconvenience and expense to which the husband must be put if both actions are allowed to go on, we ought not to prevent the wife from going into this question here, nor put her upon the terms of her action being stayed until the action in India is decided. The appeal must therefore fail."

BOWEN, L.J.'s judgment is to the same effect, and he says (*ibid.*):

"I do not say that we could not do so [that is, stay the suit] if we saw clearly that the ends of justice required it—if we saw clearly that it would be oppression or waste or vexation for her to proceed with her suit; but I think we ought not to interfere in such a way unless it is very clear that we could not do any harm by the interference, and I do not think the case has been made clear to us here to that extent."

And FRY, L.J., agreed. I think that is a very strong authority for the wife's contention in this case. It is unnecessary for me to add that there are many authorities for the proposition that the power of the court to stay proceedings in such circumstances is a power that has to be exercised with very great caution.

That case was cited, as, indeed, was the case to which I am about to refer, by counsel for the husband in order to distinguish it. He points out that that case was a suit for a restitution order and that *Baroness Von Eckhardstein v. Baron Von Eckhardstein* (7) was a suit for judicial separation. It is contended that in that respect they are to be distinguished from the present case, which is a suit for dissolution, and that, whereas the court would be chary of staying proceedings which are derived from the ecclesiastical jurisdiction in order to protect wives, here we are concerned with a question of status which has to be decided as against all the world, and, therefore, the principle to be applied is quite different. I find it difficult to accept any such distinction as explaining the two cases cited. In *Baroness Von Eckhardstein v. Baron Von Eckhardstein* (7) a wife brought a suit for judicial separation on the ground of her husband's cruelty and adultery in this country. Their domicile was German, but their residence was in England. After the wife filed her petition for judicial separation, the husband went to Germany and took proceedings for dissolution on

what appear to be somewhat remarkable grounds, namely, that she had disobeyed him in refusing to dismiss her doctor. BARGRAVE DEANE, J., dismissed an application by the husband to stay the suit in this court. He said that (23 T.L.R. 541):

A "It was clear that the wife was entitled to bring her suit for judicial separation. Why, then, was it asked, should she be deprived of the right to pursue it? The answer made was that if she did it was a waste of time and money, and was, moreover, making quite an unnecessary scandal if, when it was concluded, the husband succeeded in obtaining a divorce."

B That, again, is an example of an application to stay in somewhat similar circumstances, according to counsel for the husband, with the essential difference that that was an attempt to stay, not a suit for dissolution in this country, but a suit for judicial separation.

The third case which counsel cited is *St. Pierre v. South American Stores (Gath & Chaves), Ltd.* (8), where the principles on which the power to stay are exercised are summed up by SCOTT, L.J., who says ([1936] 1 K.B. 398):

C "The true rule about a stay under s. 41, so far as relevant to this case, may I think be stated thus: (1) A mere balance of convenience is not a sufficient ground for depriving a plaintiff of the advantages of prosecuting his action in an English court if it is otherwise properly brought. The right of access to the King's court must not be lightly refused. (2) In order to justify a stay two conditions must be satisfied, one positive and the other negative: (a) the defendant must satisfy the court that the continuance of the action would work an injustice because it would be oppressive or vexatious to him or would be an abuse of the process of the court in some other way; and (b) the stay must not cause an injustice to the plaintiff. On both the burden of proof is on the defendant."

D I think there might well be added to those authorities *Re Norton's Settlement* (9), in which there are a great many relevant passages of which, perhaps, E I may cite two. First of all VAUGHAN WILLIAMS, L.J., says ([1908] 1 Ch. 479):

F "In my opinion it must be proved to the satisfaction of the court that either the expense or the difficulties of trial in this country are so great that injustice will be done—in this sense, that it will be very difficult, or practically impossible, for the litigant who is applying for the stay to get justice in this country. Speaking generally, one may say that the litigant must shew that some injustice will be done to him."

I would also quote from the last words of the judgment of FARWELL, L.J., who cites (*ibid.*, 484) with approval the judgment of WARRINGTON, J., in *Egbert v. Short* (10) ([1907] 2 Ch. 214):

G "On the whole the conclusion at which I have arrived is that this action is brought in the tribunal in which it has been brought not bona fide for the purpose of obtaining justice, but for the purpose of harassing and annoying the defendant, and of obtaining something to which the plaintiff may not in justice be entitled."

That is an example of the kind of case where, of course, the court would not hesitate to act.

H The only other authority which I think need be cited of the many available is *Cohen v. Rothfield* (11), where an injunction was sought in this court to restrain a litigant from proceeding in another jurisdiction. SCRUTTON, L.J., said ([1919] 1 K.B. 415):

"It is obvious, for instance, that an action in South Africa, where the Dutch procedure prevails, in Mauritius or Quebec, where French procedure exists, in Malta with its peculiar law, or in Scotland with its Roman procedure, may produce quite different results from an English action.

It appears to me that unless the applicant satisfies the court that no advantage can be gained by the defendant by proceeding with the action in which he is plaintiff in another part of the King's dominions, the court should not stop him from proceeding with the only proceedings which he, as plaintiff, can control. The principle has been repeatedly acted upon."

If I may apply that principle in the converse way, it seems to me that there is here evidence of at least one advantage to the wife in proceeding in this court and that there would have to be a much stronger case than the present one to satisfy the court that she is not entitled to seek some legitimate advantage by proceeding here and to justify the making of an order preventing her from going on with the proceedings in this court which she has initiated and can control.

The only other authorities to which any reference need be made, I think, are two Admiralty cases, which, of course, are not quite on all fours, but the principle, I think, is the same. The first is *The Janera* (12), where there had been a collision in the Red Sea and the owners of one ship sued the other ship in the Egyptian court. The defendants in the Egyptian court thereafter commenced an action in the English court against the plaintiffs in the Egyptian court, and I will cite one sentence ([1928] P. 57) from the judgment of HILL, J.:

"It seems to me quite clear that the court ought not to stay a plaintiff in the courts of this country on the ground that he happens to be a defendant elsewhere."

If that principle can be applied to the present case, it would seem that the courts of this country ought not to stay a petitioner here on the ground that she happens to be a respondent elsewhere. To the same effect is a decision of LANGTON, J., in *The London* (13), where, in very similar circumstances, an Admiralty action was commenced in Scotland and thereafter the defendant in the Scottish court commenced an action in the English court. It is sufficient, I think, to read the headnote:

"A plaintiff's action will not be stayed in the courts of this country, as being prima facie vexatious, merely because the plaintiff is defendant in an action commenced in Scotland in respect of the same subject-matter. It is a question for the discretion of the court on the facts of each case."

In my judgment, on the authorities it requires a very strong case to persuade this court to prevent a party from proceeding, whether it be with an action at common law or a petition in this court, when this court has beyond question jurisdiction in the matter, on the ground that the defendant or the respondent in this court has either previously, as in some of the cases, or subsequently, as in the present case, started what for convenience I may call a cross-action or cross-petition in a foreign jurisdiction. In view of all the circumstances in this case, in view of the undoubted possibility that the wife may be able to derive advantages from exercising the right which she has to proceed here, in view of the fact to which I cannot shut my eyes that there has been at least some delay by the husband in setting the machinery of the law moving in South Africa when he had ground for thinking that he had a cause for complaint against his wife, I am not satisfied that the husband has here made out his case for a stay. I, accordingly, dismiss the appeal from the decision of the learned registrar on the summons in its amended form, with costs here and below.

Appeal dismissed.

Solicitors: *George & George* (for the husband); *Thompson, Quarrell & Megaw* (for the wife).

[Reported by A. T. HOOLAHAN, Esq., Barrister-at-Law.]

MORNINGTON PERMANENT BUILDING SOCIETY v. KENWAY AND OTHERS.

[CHANCERY DIVISION (Vaisey, J.), March 3, 30, 1953.]

Land Registration—Overriding interest—Occupation of dwelling-house—Letting by mortgagor before mortgage—Exclusion in mortgage of mortgagor's power to lease—Land Registration Act, 1925 (c. 21), s. 70 (1) (g).

A On Feb. 9, 1949, leasehold property, being registered land, was sold to the first defendant who, on the same date, executed a mortgage and further charge in favour of the plaintiffs, charging the premises with the payment of sums of £1,500 and £110. On Feb. 14, 1949, the purchase and the mortgage and further charge were registered under the Land Registration Act, 1925. Under the terms of the mortgage the mortgagor's powers of leasing under s. 99 of the Law of Property Act, 1925, were declared inapplicable to the premises. On Feb. 4, 1949, A. and J., at the request of the first defendant, had gone into occupation of the upper and lower flats respectively in the premises and thereupon the first defendant purported to let the said flats to them. On the hearing of a summons for possession,

C HELD: the fact that A. and J. were in actual occupation of the premises gave them an overriding interest under s. 70 (1) (g) of the Land Registration Act, 1925, and the rights of the plaintiffs were, therefore, subject to those interests.

D *Woolwich Equitable Building Society v. Marshall* ([1951] 2 All E.R. 769), applied.

AS TO LIABILITY OF REGISTERED LAND TO OVERRIDING INTERESTS, see HALSBURY, Hailsham Edn., Vol. 19, pp. 436-439, paras. 884-888.

Cases referred to:

- (1) *Coventry Permanent Economic Building Society v. Jones*, [1951] 1 All E.R. 901; 2nd Digest Supp.
- E (2) *Re Connolly Brothers, Ltd. (No. 2)*, [1912] 2 Ch. 25; 81 L.J.Ch. 517; 106 L.T. 738; 10 Digest 770, 4821.
- (3) *Woolwich Equitable Building Society v. Marshall*, [1951] 2 All E.R. 769; [1952] Ch. 1; 2nd Digest Supp.
- (4) *Hunt v. Luck*, [1901] 1 Ch. 45; 70 L.J.Ch. 30; 83 L.T. 479; *affd.* C.A., [1902] 1 Ch. 428; 71 L.J.Ch. 239; 86 L.T. 68; 35 Digest 469, 2044.
- F (5) *Universal Permanent Building Society v. Cooke*, [1951] 2 All E.R. 893; [1952] Ch. 95; 2nd Digest Supp.
- (6) *City Permanent Building Society v. Miller*, [1952] 2 All E.R. 621; [1952] Ch. 840.

ADJOURNED SUMMONS for the determination of the following questions:
 G (a) whether the defendants should deliver to the plaintiffs possession of the land comprised in a mortgage and a further charge each dated Feb. 9, 1949, that is to say, No. 2 White Hart Lane, Wood Green, Middlesex, registered at H.M. Land Registry; County; Middlesex; Parish, Wood Green, Title No. P. 135709, being entries No. 4 and No. 5 in the Charges Register; (b) whether, on the defendants paying to the plaintiffs the moneys remaining due to the plaintiffs on the security of the said mortgage, the plaintiffs should re-deliver to the defendants possession of the property subject to the said mortgage and release to the defendants the security constituted thereby.

H J. L. Arnold for the plaintiffs.

Senken for the defendants.

Cur. adv. vult.

Mar. 30. VAISEY, J., read the following judgment. In this action the plaintiffs, Mornington Permanent Building Society, as mortgagees, are claiming

possession of a house, No. 2 White Hart Lane, Wood Green, Middlesex. The defendants are Sydney Henry Wilfred Kenway, who is the mortgagor, and Henry George Anderson and Kenneth William Johnstone, who claim to be tenants of parts of the property, that is to say, as regards Mr. Anderson, of the upper flat, and, as regards Mr. Johnstone, of the lower flat in the said house. Mr. Kenway has no defence to the plaintiffs' claim and did not appear at the trial, and, as against him, the action necessarily succeeds. The only question is whether the rights of Mr. Anderson and Mr. Johnstone under their respective tenancies are subject, or have priority, to the rights of the plaintiffs.

The property is registered land. It is held under a lease for ninety-nine years from June 25, 1933. It was transferred to Mr. Kenway by an instrument of transfer dated Feb. 9, 1949. By a mortgage and further charge, both dated Feb. 9, 1949, the property was charged with the payment to the plaintiffs of sums of £1,500 and £110, repayable by instalments with interest as therein mentioned. Mr. Kenway was registered as proprietor of the premises with a good leasehold title on Feb. 14, 1949, and the plaintiffs were registered as proprietors of the mortgage and further charge on the same date, Feb. 14, 1949. It has been proved that several of the said instalments due under the mortgage are unpaid and in arrear, and that a sum of £1,455 and upwards is due and owing to the plaintiffs on the security of the mortgage and further charge. Under the mortgage the powers of leasing conferred on mortgagors by s. 99 of the Law of Property Act, 1925, were declared to be inapplicable to the security, and Mr. Kenway thereby attained and became tenant to the plaintiffs of the premises at a monthly rent, with a proviso that the plaintiffs might at any time determine the tenancy without giving Mr. Kenway any notice to quit. By way of precaution, however, a notice to quit the premises within seven days was given by the plaintiffs to Mr. Kenway on Jan. 23, 1952. The plaintiffs' case against Mr. Kenway was, therefore, completely established.

Mr. Anderson's position is as follows. Having been a tenant of Mr. Kenway in other premises, on Feb. 4, 1949, at Mr. Kenway's request, he moved into two rooms and a kitchenette on the second floor of the premises, No. 2 White Hart Lane, which Mr. Kenway let or purported to let to him unfurnished as a separate dwelling, together with the right to use a bathroom and lavatory, at a weekly rent of £1 5s. including rates. He was given a rent book which is corroborative of the claim which he makes. He has deposed to the fact that he has been in possession under his tenancy from Feb. 4, 1949, to the present time, and he is, I suppose, plainly protected in his tenancy under the Rent and Mortgage Interest Restrictions Acts, 1920 to 1939. The position of Mr. Johnstone is exactly the same as that of Mr. Anderson. He moved into two rooms on the first floor and one room and a kitchen on the ground floor of No. 2 White Hart Lane with similar rights as to the use of a bathroom and lavatory, and this accommodation was let to him by Mr. Kenway at a weekly rental of £1 5s. He also took possession on Feb. 4, 1949. His rent book corroborates his claim and he is still in possession.

There have recently been several decisions in cases involving the rights and liabilities of mortgagees and tenants in circumstances similar to those which arise in the present case. The first of such cases is *Coventry Permanent Economic Building Society v. Jones* (1), in which HARMAN, J., held that the conveyance to the mortgagor and the mortgage to the mortgagees ought to be regarded as one transaction, with the result that there was no interval of time, however short, during which a so-called tenancy by estoppel became an actual tenancy. That case, however, is not really relevant to the present for the reason that the property there was not registered land, but I may observe that the decision seems to me to be consistent with, and, indeed, consequent on, *Re Connolly Brothers, Ltd.* (No. 2) (2), a decision of the Court of Appeal which would seem

to have been somewhat unaccountably overlooked in the recent authorities. I will read the headnote to the report of that case.

A "A company issued debentures creating a floating charge upon their
undertaking and all their property present and future, one of the conditions
of the debentures being that the company should not be at liberty to create
any other mortgage or charge in priority to the debentures. All the debentures
were duly registered under the Companies Act, 1900. The company
desiring to purchase certain property, which they had not the money to pay
for, borrowed £1,000 from O. upon terms that she should have a charge
upon the property so purchased. The company then bought the property
for £1,100 and paid a deposit of £150. Upon completion of the purchase
O. was present and gave her cheque for £1,000, which was paid into the
B company's banking account, the company paying the balance of the
purchase-money to the vendor in cash. The same solicitor acted for all
parties, and he took and retained the title deeds of the property on behalf
of O. A week later the company executed in favour of O. a memorandum
of equitable charge upon the property. The solicitor did not investigate
the title nor search the register of debentures on O.'s behalf. In an action
C to realise the debentures:—*Held*, that what the company acquired upon
the purchase was only the equity of redemption in the property subject
to the equitable charge of O., who was accordingly entitled to priority
over the debentures. Decision of WARRINGTON, J., affirmed."

The next case is *Woolwich Equitable Building Society v. Marshall* (3), which
seems to me to conclude the present case in favour of the tenants on the ground
D there stated by DANCKWERTS, J., namely, that the tenants were persons in
actual occupation of the property. It is a principle established in *Hunt v. Luck* (4) that a tenant's occupation of land affects a purchaser with notice
of all the tenant's rights. If the plaintiffs in the present case had taken the
trouble to inspect the property before parting with their money they would
have found the tenants in possession, and, as they omitted to take this
E precaution, their rights are, I think, overridden by virtue of s. 70 (1) (g) of
the Land Registration Act, 1925. *Universal Permanent Building Society v. Cooke* (5) was decided on a somewhat different point, and, finally, in *City
Permanent Building Society v. Miller* (6), the facts were materially different,
as the tenant did not go into possession until after the date of the mortgage,
and the claim was made under s. 70 (1) (k) and not, as here, under s. 70 (1) (g)
F of the Act of 1925.

It is alleged in the present case that Mr. Kenway has been guilty of a breach
of covenant by purporting to exercise his statutory powers under s. 99 of the
Law of Property Act, 1925, but this is, of course, a mistake, for he did not
purport to create any tenancy after he had granted the mortgage. Any claim
against him for creating the tenancies must rest on his covenants for title implied
G in the mortgage by his having demised the property as beneficial owner. For
these reasons I think that as against Mr. Anderson and Mr. Johnstone the
action fails and must be dismissed with costs.

Order accordingly.

Solicitors: *Walter Jennings & Son* (for the plaintiffs); *Malcolm Slowe & Co.*
(for the defendants).

[Reported by MISS PHILIPPA PRICE, Barrister-at-Law.]

KRUSE v. QUESTIER & CO., LTD.

[QUEEN'S BENCH DIVISION (Pilcher, J.), March 20, 1953.]

Arbitration—Dispute within scope of clause—Frustration of contract—Executory contract.

By a contract in writing, in the form of the London Corn Trade Association, Ltd., Iranian and Persian Gulf Feeding Stuffs, Contract, a buyer agreed to purchase from the sellers a quantity of Iranian barley. Due to an exceptionally dry season, the level of the rivers in Iraq fell so that it became impossible to transport the barley from the interior of the country to the port of shipment, with the result that the barley was not delivered within the times stated in the contract. The parties agreed by letters to extend the time of delivery, but the Iraqi government then banned the further export of barley. The sellers claimed that the contract was either frustrated, due to impossibility of performance, or cancelled, due to the Iraqi government's prohibition of the export of barley. In accordance with the terms of the contract the dispute was taken to arbitration, and an award was made in the buyer's favour. On the question whether the issue of frustration was one which it was proper for an arbitrator to entertain under the arbitration clause,

HELD: no distinction could properly be drawn between a case in which the contract was entirely executory and one in which it was partly executed, and, therefore, the issue was one which it was proper for the arbitrators to entertain and the award was binding on the sellers.

Heyman v. Darwins, Ltd. ([1942] 1 All E.R. 337), applied.

Hirji Mulji v. Cheong Yue S.S. Co., Ltd. ([1926] A.C. 497), not applied.

AS TO THE EFFECT OF FRUSTRATION OF A CONTRACT ON ARBITRATION CLAUSES, see HALSBURY, Hailsham Edn., 1952 Supp., Vol. 1, Arbitration, para. 1076.

Cases referred to:

(1) *Heyman v. Darwins, Ltd.*, [1942] 1 All E.R. 337; [1942] A.C. 356; 111 L.J.K.B. 241; 166 L.T. 306; 2nd Digest Supp.

(2) *Hirji Mulji v. Cheong Yue S.S. Co., Ltd.*, [1926] A.C. 497; 95 L.J.P.C. 121; 134 L.T. 737; 41 Digest 367, 2139.

(3) *Joseph Constantine S.S. Line, Ltd. v. Imperial Smelting Corp., Ltd.*, [1941] 2 All E.R. 165; [1942] A.C. 154; 110 L.J.K.B. 433; 165 L.T. 27; 12 Digest, Replacement, 436, 3333.

(4) *Leask v. Scott*, (1877), 2 Q.B.D. 376; 46 L.J.Q.B. 576; 36 L.T. 784; 30 Digest, Replacement, 224, 676.

(5) *Scott & Sons v. Del Sel*, 1923 S.C. (H.L.) 37; Digest Supp.

POINT OF LAW set down for decision under R.S.C., Ord. 34, r. 2.

By a contract in writing, dated July 10, 1951, the plaintiff, Sophus Kruse (carrying on business as P. Kruse), of Hamburg, agreed to buy, and the defendants, Questier & Co., Ltd., of London, agreed to sell, ten thousand metric tons of Iranian barley, shipment to be over two periods, namely, about five thousand tons between Sept. 15 and Oct. 15, 1951, and about five thousand tons between Oct. 15 and Nov. 15, 1951. The contract contained an arbitration clause. The barley had to be transported by river from the interior of Iraq to the port of shipment, and during August, 1951, the level of the rivers in Iraq fell to such an extent, due to an exceptionally dry season, that they became unnavigable by craft of even very light draught, with the result that the barley could not be transported to the port of shipment. By letters in August, September and October, 1951, the parties agreed that the time for shipment under the contract should be extended to include December, 1951, and January, 1952. In December, 1951, the Iraqi government prohibited all further exports of barley until March, 1952. No barley having been delivered, the buyer appointed an arbitrator under the terms of the contract, but the sellers failed to do so,

and did not attend the arbitration, an arbitrator being appointed on their behalf on the buyer's application. On Apr. 16, 1952, the umpire appointed by the arbitrators made an award by which he found that the sellers were in default and that there was due to the buyer £88,857 for non-fulfilment of the contract, with interest and costs. In an action begun by the buyer against the sellers to enforce the award, the sellers contended in their defence and counterclaim that the performance of the contract had become impossible and/or that the contract was frustrated not later than the end of August, 1951, and, alternatively, that the contract was cancelled by the Iraqi government's prohibition of the export of barley in December, 1951, and they relied on a clause in the contract which provided:

"Should the fulfilment of this contract be rendered impossible by prohibition of export . . . this contract, or any unfulfilled part thereof, to be cancelled."

On Mar. 16, 1953, the judge in chambers ordered that the following question of law arising in the action be heard and determined as a preliminary point of law:

"Whether, assuming that the said contract between the parties, dated July 10, 1951, is (i) frustrated as alleged in paras. 2 and 3 of the defence and counterclaim and/or (ii) varied or cancelled as alleged in paras. 4 and 5 of the defence and counterclaim, the said award dated Apr. 16, 1952, is binding on the [sellers]."

J. F. Donaldson for the buyer.

C. T. Bailhache for the sellers.

PILCHER, J., stated the facts and continued: The arbitration clause contained in the London Corn Trade Association, Ltd., Iraqi and Persian Gulf Feeding Stuffs, Contract, which was the form of contract used in this case, was that: "All disputes from time to time arising out of this contract", including any question of law appearing in the proceedings, should be submitted to arbitration in the manner thereafter prescribed. The buyer contends that the contract, having been made, subsisted, and that with it there continued to subsist the arbitration clause, and that one of the matters with which, under this form of arbitration clause, the arbitrators and umpire were empowered to deal was whether the contract had, in the events which had occurred, been frustrated or cancelled. I think it is common ground between the parties that, in a case of this kind, if the contract which contains the arbitration clause has been partly executed, the issue whether or not in any set of circumstances the contract has been frustrated or cancelled is one which it is proper for the arbitrators to determine. That particular point was decided in the well-known case of *Heyman v. Darwins, Ltd.* (1), but it is said by counsel for the sellers, and counsel for the buyer agrees, that there does not appear to be any reported case in which the point has arisen whether the issue of frustration or cancellation is one which it is proper for an arbitrator to entertain under the arbitration clause where the contract is wholly unexecuted, unless it be *Hirji Mulji v. Cheong Yue S.S. Co., Ltd.* (2).

In that case the respondents had agreed to charter their steamship to the appellants and place her at their disposal at Singapore on Mar. 1, 1917. Before that date arrived the vessel was requisitioned by the British government, and, consequently, the owners were unable to put their vessel at the charterers' disposal. When the ship was released in February, 1919, the charterers refused to take delivery of her, so that there was a contract which was wholly unexecuted. An arbitrator was appointed, and the owners were awarded damages for breach of contract. They brought an action on the award, and it was held that there had been a frustration of the charterparty which brought the whole contract to an end in 1917, that, the whole contract having gone, the submission to

arbitration also had gone, and, consequently, that the arbitrator had had no jurisdiction to make the award which he did. That was an opinion of the Privy Council, delivered by LORD SUMNER, and in the course of giving that opinion he said this, and I refer to these passages because they were stressed in argument by counsel for the sellers ([1926] A.C. 510):

"Though a party may exercise his right to treat the contract as at an end, as regards obligations *de futuro*, it remains alive for the purpose of vindicating rights already acquired under it on either side. So with frustration. Though the contract comes to an end on the happening of the event, rights and wrongs, which have already come into existence, remain, and the contract remains too, for the purpose of giving effect to them. No question of this sort, however, arises here. The contract was wholly executory. The ship was requisitioned before she was placed at the charterers' disposal; the performance of the charter never began, and the failure to begin it by tendering the ship at Singapore was excused in the owners' favour by the excepted restraints of princes. Under these circumstances, by the year 1919, when a dispute first arose, 'this charter' no longer existed. The dispute was not one, of which it could be predicated that it was one arising under 'this charter', since that had terminated by frustration a year before. An arbitration clause is not a phoenix, that can be raised again by one of the parties from the dead ashes of its former self."

I ought also, perhaps, to refer to a short passage which is in the following terms (*ibid.*, 502):

"That a person before whom a complaint is brought cannot invest himself with arbitral jurisdiction to decide it is plain. His authority depends on the existence of some submission to him by the parties of the subject-matter of the complaint. For this purpose a contract that has determined is in the same position as one that has never been concluded at all. It founds no jurisdiction."

It was on the *Hirji Mulji* case (2) that counsel for the sellers was, I think, compelled here to rely, because of a number of general observations made by their Lordships in *Heyman v. Darwins, Ltd.* (1), most, if not all, of which were obiter. I propose to refer as shortly as I can to those observations, because more than one of the noble Lords in *Heyman v. Darwins, Ltd.* (1) referred to the *Hirji Mulji* case (2), and pointed out that, while LORD SUMNER's views on this kind of topic are to be treated with the greatest respect, they were not prepared to assent to the general principle laid down in that case. They also pointed out that a decision of the Privy Council was not binding on their Lordships' House, nor, indeed, on a court of first instance. There can be little doubt that, while it was not necessary for their Lordships in *Heyman v. Darwins, Ltd.* (1) to deal with facts other than those which they had before them, if they had had to do so, they would have decided that case in favour of the appellants. I ought to say that *Heyman v. Darwins, Ltd.* (1) concerned an issue under a contract which was partly executed. Dealing with the general principles involved in this type of case, VISCOUNT SIMON, L.C., said ([1942] 1 All E.R. 343):

"If the dispute is as to whether the contract which contains the [arbitration] clause has ever been entered into at all, that issue cannot go to arbitration under the clause, for the party who denies that he has ever entered into the contract is thereby denying that he has ever joined in the submission. Similarly, if one party to the alleged contract is contending that it is void *ab initio* (because, for example, the making of such a contract is illegal), the arbitration clause cannot operate, for on this view the clause itself is also void. If, however, the parties are at one in asserting

that they entered into a binding contract, but a difference has arisen between them as to whether there has been a breach by one side or the other, or as to whether circumstances have arisen which have discharged one or both parties from further performance, such differences should be regarded as differences which have arisen 'in respect of,' or 'with regard to,' or 'under' the contract, and an arbitration clause which uses these, or similar, expressions, should be construed accordingly."

- A I pause here to repeat that the words in the arbitration clause with which I am concerned are "disputes from time to time arising out of this contract," which are of a similar character to those referred to in that passage by LORD SIMON. LORD SIMON continued:

- B "By the law of England (though not, as I understand, by the law of Scotland), such an arbitration clause would also confer authority to assess damages for breach, even though it does not confer upon the arbitral body express power to do so. I do not agree that an arbitration clause expressed in such terms as above ceases to have any possible application merely because the contract has 'come to an end,' as, for example, by frustration. In such cases it is the performance of the contract that has come to an end. The doctrine of discharge from liability by frustration has often been explained as flowing from the inference of an implied term, and, in giving my opinion on the occasion of the recent decision of this House in *Joseph Constantine S.S. Line, Ltd. v. Imperial Smelting Corpn., Ltd.* (3) ([1941] 2 All E.R. 171), I expressed the view that the most satisfactory basis upon which the doctrine can be put is that it depends on an implied term in the contract of the parties. If, therefore, when parties have entered into a contract, circumstances arise before the performance of the contract is completed which, in the view of one party, bring the contract to an end by frustration and therefore discharge both parties from further performance, but the other party does not agree, this is a difference about the applicability of the implied term, and is just as much within the arbitration clause as if it were a difference about an express term of the contract."

Then LORD SIMON said this (*ibid.*, 344):

- F "I can see no reason why an arbitration clause framed on the above lines should not equally apply, if the supervening event which is alleged by one side to have effected discharge by frustration occurs after the contract has been entered into, but before the time has come for anything to be done under the contract. The reasoning of LORD DUNEDIN applies equally to both cases. It is, in my opinion, fallacious to say that, because the contract has 'come to an end' before performance begins, the situation, so far as the arbitration clause is concerned, is the same as though the contract had never been made. In such cases, a binding contract was entered into, with a valid submission to arbitration contained in its arbitration clause, and, unless the language of the arbitration clause is such as to exclude its application until performance has begun, there seems no reason why the arbitrator's jurisdiction should not cover the one case as much as the other."
- G
- H I should also mention a passage of LORD SIMON's speech, where he dealt with *Hirji Mulji v. Cheong Yue S.S. Co., Ltd.* (2). Having set out shortly the facts of the case, he said (*ibid.*, 343):

"The judgment of their Lordships, delivered by LORD SUMNER, contains an elaborate and authoritative exposition of the nature of frustration, and a contrast between the operation of frustration, which is automatic, and the consequence of wrongful repudiation, which depends upon the choice of the other party. On this point, the judgment has always been

regarded as a pronouncement of the highest authority; but I confess to considerable difficulty in accepting the conclusion that the dispute whether such a requisition had frustrated the performance of the charterparty, or whether, on the other hand, the shipowner was entitled to damages for the charterers' refusal to take delivery of the ship when she was at length released, was not a 'dispute arising under this charter.' LORD SUMNER held that it was not, on the ground that the execution of the contract had not begun, and that the dispute first arose when 'this charter' no longer existed. A decision of the Judicial Committee is not binding on this House, nor, indeed, on the courts below: *Leask v. Scott* (4) (2 Q.B.D. 380); and while any opinion delivered by LORD SUMNER must command the respect due to that great master of the law, I think the judgment in the *Hirji Mulji* case (2), so far as the effect of frustration of contract upon an arbitration clause is concerned, must not be taken as having established a general rule. Ordinarily speaking, there seems no reason at all why a widely drawn arbitration clause should not embrace a dispute as to whether a party is discharged from future performance by frustration whether the time for performance has already arrived or not."

LORD MACMILLAN, dealing with *Hirji Mulji* (2), said (*ibid.*, 348):

"It remains to mention the special case of a contract which has been frustrated, in the technical sense which that word has now acquired. In the *Hirji Mulji* case (2), which I have already cited, it was held in the Privy Council that where a contract had been frustrated before performance had begun, in consequence of a government requisition, the contract had terminated as to all matters and disputes which had not already arisen and the arbitration clause had ceased to be operative. I do not propose to express any opinion as to the effect of frustration in the technical sense on arbitration clauses, as the matter has not been fully argued, but I should not like to be taken as accepting without further consideration some at least of the views expressed by LORD SUMNER on behalf of the Judicial Committee of the Privy Council in the case just quoted."

He concluded his speech by saying (*ibid.*):

"I have only to add that having had the advantage of reading in print the opinion of my noble and learned friend VISCOUNT SIMON, L.C., I desire to express my agreement with the general conclusions which he has reached."

Then LORD WRIGHT said this (*ibid.*, 352):

"As at present advised, I find it difficult to distinguish a dispute where there is a claim for damages and the defence set up is that the contract is frustrated from any other defence, or to understand why such a dispute should be outside a submission of disputes *under* the contract. It is no doubt less difficult to treat these questions as falling within a submission of disputes arising *out of* or *in relation to* a contract, but I do not think such differences in words should be decisive. It is certainly desirable, if possible, to have broad and simple rules in these matters. Frustration, if it occurs, no doubt puts an end to the contract for the future as much as does rescission after repudiation or any other whole breach, though in that case there is a claim for damages for the breach, while in respect of frustration there is no claim for damages. The dispute in all such cases where frustration is alleged is whether there has been frustration at all, and such a dispute would seem logically to arise 'under the contract', and to fall within the submission just as much as if the words had been 'arising out of it'."

LORD WRIGHT also agreed with the general conclusions summarised by the Lord Chancellor. Then LORD PORTER dealt with the matter as follows (*ibid.*, 357):

"Meanwhile, I think it essential to remember that the question whether

A a given dispute comes within the provisions of an arbitration clause or not primarily depends upon the terms of the clause itself. If two parties purport to enter into a contract and a dispute arises as to whether they have done so or not, or as to whether the alleged contract is binding upon them, I see no reason why they should not submit that dispute to arbitration. Equally, I see no reason why, if at the time when they purport to make the contract they foresee the possibility of such a dispute arising, they should not provide in the contract itself for the submission to arbitration of a dispute as to whether the contract ever bound them or continues to do so. They might, for instance, stipulate that, if a dispute should arise as to whether there had been such fraud, misrepresentation or concealment in the negotiations between them as to make a purported contract voidable, that dispute should be submitted to arbitration. It may require very clear language to effect this result, and it may be true to say that such a contract is really collateral to the agreement supposed to have been made, but I do not see why it should not be done. Indeed, the possibility of providing for such an arbitration and the difficulty of giving sufficiently precise expression to bring about the required result are both visualised by LORD SUMNER in *Hirji Mulji v. Cheong Yue S.S. Co., Ltd.* (2) . . .”,

and he cited a passage from the Privy Council. Later on in his speech, having dealt with the case of *Scott & Sons v. Del Sel* (5), he said (*ibid.*, 361):

D “So far as the case of *Hirji Mulji* (2), which is not binding, lays down a different principle, I do not think it should be followed, despite the authority which it undoubtedly possesses.”

There are other passages which I could have quoted from the speeches of the noble Lords in *Heyman v. Darwins, Ltd.* (1), but I am conscious of having, perhaps, said rather too much about that case.

E I have no doubt whatsoever that, unassisted by the observations of the noble Lords in *Heyman v. Darwins, Ltd.* (1), I should have concluded myself that, where you have a contract containing an arbitration clause and the contract is treated by the parties as a subsisting contract until a dispute arises whether or not, at some time after the contract was entered into, events have occurred which justify one or other party in contending that the contract has become impossible of performance and so frustrated, it is essentially a point F which, in the absence of specific agreement between the parties, would come under the ordinary form of arbitration clause, which provides that disputes under, or arising out of, the contract shall be referred to arbitration. That that is the case in contracts which are partly executed is clear on authority. Having had the advantage of considering the views expressed by the noble G Lords in *Heyman v. Darwins, Ltd.* (1) with regard to the position which would have obtained had the contract with which they were concerned been wholly executory, even though such views were not necessary for the decision of that case, I naturally regard them with the greatest possible respect, and they serve to confirm my own opinion that no distinction can properly be drawn where this point arises between a case in which the contract is entirely executory and a case in which the contract is partly executed. So far as the *Hirji Mulji* H case (2) is concerned, I would only say that, while the decision is not binding on me, I should have hesitated long before differing from any expression of opinion by LORD SUMNER had I not been fortified by the very clear views expressed by the noble Lords in *Heyman v. Darwins, Ltd.* (1). In the circumstances, however, I have no hesitation whatsoever in following the observations of their Lordships in *Heyman v. Darwins, Ltd.* (1), although obiter, rather than the decision in *Hirji Mulji v. Cheong Yue S.S. Co., Ltd.* (2), in so far as it is based on facts which are not distinguishable from the facts of the present case.

I, therefore, answer the first question that is put to me as follows: The award, in so far as it deals with frustration, is binding on the defendants.

There is a second point, with which I propose to deal very shortly, based on prohibition of export. There was a clause in the standard form of contract which provided as follows:

"Should the fulfilment of this contract be rendered impossible by prohibition of export . . . this contract, or any unfulfilled part thereof, to be cancelled."

On the assumption that, after the contract period of shipment had been prolonged, there was a prohibition of export, and after that prohibition came into force it was impossible for the sellers to export the barley in question, the sellers contend that they are absolved by that clause from making any shipment under the contract. It seems to me that it is impossible for the sellers to affirm the contract by relying on one of its clauses, and then, in the next breath, to say that the contract has been cancelled in such a fashion that it is not open to either party to invoke the arbitration clause. I do not propose to say any more about it than that. I am quite clear that the question whether or not there was here a prohibition was one which was proper to be dealt with by the arbitrator under the award.

Order accordingly.

Solicitors: *Thomas Cooper & Co.* (for the buyer); *Arthur Blackman, Hailey & Co.* (for the sellers).

[*Reported by G. A. KIDNER, Esq., Barrister-at-Law.*]

MARELA, LTD. v. MACHOROWSKI.

[COURT OF APPEAL (Denning, Morris and Romer, L.J.J.), March 23, 1953.]

Rent Restriction—Closing order—Dwelling-house subject to closing order made under Public Health (London) Act, 1936 (c. 50), sched. V, para. 8—Housing Act, 1936 (c. 51), s. 156 (1) (e).

The closing order referred to in s. 156 (1) (e) of the Housing Act, 1936, which provides that nothing in the Rent Restrictions Acts shall be deemed to prevent possession being obtained of any part of a building by any owner thereof in a case where a closing order is in force in respect thereof, is the closing order which a local authority is given power to make by s. 12 (1) of that Act in relation to a part of a building. A closing order made under para. 8 of sched. V to the Public Health (London) Act, 1936, in relation to the whole of a dwelling-house, is not a closing order within s. 156 (1) (e), and, therefore, a landlord was *held* not entitled to possession of a dwelling-house subject to the Rent Restrictions Acts merely on the ground that a closing order had been made in respect of the house in which it was comprised under para. 8 of sched. V to the Public Health (London) Act, 1936.

FOR THE HOUSING ACT, 1936, s. 156 (1) (e), see HALSBURY'S STATUTES, Second Edn., Vol. 11, p. 571; and FOR THE PUBLIC HEALTH (LONDON) ACT, 1936, sched. V, see *ibid.*, Vol. 15, pp. 1043-1049.

APPEAL from an order of His Honour JUDGE ENGELBACH, made at Shore-ditch County Court and dated Dec. 9, 1952.

Spears for the landlords.

Chavasse for the tenant.

DENNING, L.J.: This is a claim by Marela, Ltd. against Mrs. Machorowski for possession of rooms at the rear of the ground floor at 86, Brick Lane. The rooms were let by the landlords to the tenant at a rent of

12s. 3d. a week, and the question is whether she is protected by the Rent Restrictions Acts.

A On Apr. 2, 1952, justices found that it had been proved that a nuisance existed on the premises No. 86, Brick Lane, in that the roof was not weather-proof, the second floor front bedroom ceiling was damp, and the door leading to the roof was off its hinges and rain was coming in. On proof of those nuisances, the justices held that the premises were unfit for human habitation, and, in pursuance of the Public Health (London) Act, 1936, they prohibited the use of the dwelling-house for human habitation. That order was a closing order, and it is important to notice that it was made under sched. V to the Public Health (London) Act, 1936, in respect of the whole house. It is contended by the landlords that the effect of that closing order is to take the case outside the Rent Restrictions Acts. The Rent Acts prohibit an order for possession being made except in certain circumstances prescribed in sched. I to the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933. None of those circumstances exists here, but it is contended on behalf of the landlords that the application of s. 156 of the Housing Act, 1936, takes the case out of the Acts. Section 156 (1) provides that nothing in the Rent Acts shall prevent possession being obtained

C “(e) of any part of a building or underground room by any owner thereof in a case where a closing order is in force in respect thereof.”

The county court judge held that a closing order had been made in respect of this house, and that, therefore, s. 156 (1) (e) applied to take the case out of the operation of the Rent Acts.

D I find myself unable to agree with the judge. It is quite plain, to my mind, that s. 156 (1) (e) of the Act of 1936 refers only to closing orders which are made under s. 12 (1) of the same Act and does not apply to closing orders made under sched. V to the Public Health (London) Act, 1936. Section 156 (1) (e) refers to a closing order

E “of any part of a building or underground room”,

and so also does s. 12 of that Act; it does not refer to a closing order for a whole house. That is sufficient to determine this case. This closing order was not made in respect of part of a building or underground room under the Housing Act, 1936; it was made in respect of the whole dwelling-house under sched. V to the Public Health (London) Act, 1936. Counsel for the landlords sought to say that by analogy or necessity we ought to hold that a closing order under the Public Health (London) Act, 1936, also takes the case out of the operation of the Rent Acts. He argued that it is absurd that there should be a closing order preventing the use of the house and yet a tenant should still be allowed to occupy it. The answer to that argument is that a closing order under the Public Health (London) Act, 1936, is entirely different from a closing order under the Housing Act, 1936. A closing order under the Public Health (London) Act, 1936, is one of three means of enforcing a nuisance order. Paragraph 8 of sched. V says:

“A nuisance order may be an abatement order, a prohibition order or a closing order, or a combination of such orders.”

H A closing order under that paragraph is only one method of enforcing requirements as to repair, and it is an order made by the justices to ensure that the work is done. Once the work has been done and the house rendered fit for habitation, the closing order ceases. On the other hand, a closing order under the Housing Act, 1936, is made by the local authority, to ensure that the premises are not used. It is the counterpart of a demolition order. In cases where a whole house would be demolished, a part of a building will be closed, and it must not be used. The occupants have to move out and the local authority

then have to pay the cost of removal incurred by them. There is nothing in the Public Health (London) Act, 1936, providing for defraying the cost of removal. In my opinion, this matter can only be determined under the wording of the Acts of Parliament themselves. Section 156 (1) of the Housing Act, 1936, provides exceptions from the Rent Acts in respect of houses relating to which demolition orders or closing orders have been made under that Act, but not in respect of a closing order made in respect of the Public Health (London) Act, 1936. This appeal should be allowed. A

MORRIS, L.J.: I am entirely of the same opinion. It is common ground that the premises in question fall within the scope of the Rent Restrictions Acts, and there is nothing in those Acts under which the landlords are entitled to possession. In those circumstances, the landlords turn to s. 156 (1) (e), of the Housing Act, 1936, the words of which permit possession being obtained B

“of any part of a building or underground room by any owner thereof where a closing order is in force in respect thereof.”

I fully agree with my Lord that those words do not apply to the present case, but refer only to a closing order made under s. 12 of the Housing Act, 1936. In spite of the argument of counsel for the landlords it seems to me that, in the absence of some statutory exclusion of the Rent Acts, those Acts continue to apply and that the landlords are not entitled to possession in this case. It is also of consequence to point out that under sched. V to the Public Health (London) Act, 1936, para. 9, C

“A petty sessional court, if satisfied that a dwelling-house in respect of which a closing order is in force has been rendered fit for human habitation, may declare that it is so satisfied and revoke the closing order.” D

If the defects referred to in the closing order in the present case are remedied, there is no reason why the petty sessional court should not revoke the closing order. I agree that this appeal must be allowed.

ROMER, L.J.: I also agree. In my view, the only possible footing on which the landlords could succeed would be by their showing that the case comes within s. 156 (1) (e) of the Housing Act, 1936, and the facts, as I see them, show quite plainly that that paragraph has no application—first, because the closing order which was made was not made under the Housing Act, 1936, at all, but was made under a different statute, the Public Health (London) Act, 1936, and, secondly, because the closing order was made in relation to the whole of the premises No. 86, Brick Lane, whereas s. 156 (1) (e) of the Housing Act, 1936, by its very terms applies only to cases where a closing order is in force in respect of a part of a building. In the face of those two difficulties, it is impossible for the landlords to rely on s. 156 (1) (e), and, inasmuch as there is no other enactment which removes these premises from the general scope of the Rent Restrictions Acts, it necessarily follows that the tenant is entitled to the protection of those Acts, the landlords cannot succeed in their attempt to recover possession, and this appeal must be allowed. E

Appeal allowed.

Solicitors: *Sidney Nyman & Co.* (for the landlords); *Neil Maclean & Co.* (for the tenant). F

[*Reported by MISS PHILIPPA PRICE, Barrister-at-Law.*] G H

WALSH v. OATES.

[COURT OF APPEAL (Singleton, Denning and Romer, L.JJ.), March 24, 1953.]

Easement—Right of way—Way over soil later becoming highway—Order by quarter sessions stopping up highway—Effect on private right of way—Highway Act, 1835 (c. 50), s. 91.

A By an order of quarter sessions made under the Highway Act, 1835, s. 91, part of a public highway was stopped up. The plaintiff having claimed a private right of way over this part of the highway, in an action against the defendant for obstructing his said right,

B HELD: the order of quarter sessions was an order made against the public and extinguished the public right over the highway, but it did not affect a private right of way over the highway, and, therefore, the plaintiff was entitled to succeed on proof by him that before the way became a highway he had acquired a private right of way thereover.

Wells v. London, Tilbury & Southend Ry. Co. (1877) (5 Ch.D. 126) and *Allen v. Ormond* (1806) (8 East 4), applied.

R. v. Wallace (1879) (4 Q.B.D. 641), distinguished.

C FOR THE HIGHWAY ACT, 1835, ss. 84-91, see HALSBURY'S STATUTES, Second Edn., Vol. 11, pp. 91-99.

Cases referred to:

- (1) *Wells v. London, Tilbury & Southend Ry. Co.*, (1877), 5 Ch.D. 126; 37 L.T. 302; 41 J.P. 452; 19 Digest 94, 580.
 D (2) *Allen v. Ormond*, (1806), 8 East 4; 103 E.R. 245; 26 Digest 305, 363.
 (3) *R. v. Wallace*, (1879), 4 Q.B.D. 641; 40 L.T. 518; 43 J.P. 493; 26 Digest 482, 1938.

APPEAL by plaintiff from an order of His Honour JUDGE ARCHIBALD made at Halifax County Court and dated Jan. 16, 1953.

E The plaintiff was possessed of certain premises known as Whiskam Cottage, Miss Lister's Road, Halifax. In his statement of claim he alleged that Miss Lister's Road was a private road leading from Shibden Hall Road, Halifax, alongside his land and across the defendant's land to public highways on the other side. He further alleged that he and his predecessors in title to Whiskam Cottage had for forty years preceding the commencement of the action enjoyed as of right and without interruption the road known as Miss Lister's Road
 F for the purpose of passing and re-passing on foot and with horses and vehicles, and he claimed the right to do so as a legal easement of way under s. 2 of the Prescription Act, 1832. He also claimed the right of way as having been used by him and his predecessors in title from time immemorial, and by virtue of a grant by a deed made by all necessary parties. He alleged further that in or about August, 1949, the defendant by his servants or agents had com-
 G menced to excavate or destroy Miss Lister's Road for the purpose of getting fire-clay or other minerals and had continued so to do, thereby hindering and preventing him from exercising his right of way. He claimed (a) a declaration that he was entitled to his alleged right of way over so much of the road as formed part of or abutted on the defendant's land, (b) an injunction ordering the defendant to reinstate the road where it had been excavated or destroyed
 H by the defendant, and (c) an injunction restraining the defendant from excavating or destroying the road or obstructing or preventing the plaintiff from enjoyment of the road.

The defendant, in his defence, denied the existence of the plaintiff's alleged right of way and said that before an order made by Halifax Quarter Sessions on Jan. 7, 1943, the whole of the road was a public highway, but that by that order part of the road, including the whole of the defendant's section, was stopped up under s. 91 of the Highway Act, 1835.

The learned county court judge gave judgment for the defendant, holding that the order of quarter sessions had the effect of extinguishing the plaintiff's private right of way (assuming he ever had one) over the part of the road which was stopped up.

Whitworth for the plaintiff.

Rink and C. R. Dean for the defendant.

SINGLETON, L.J., stated the facts and continued: A writ in this action was issued on Dec. 19, 1949. After the pleadings had been delivered, there was an order dated Nov. 25, 1952, that the action be remitted to the Halifax County Court for trial, and the case came before His Honour JUDGE ARCHIBALD on Jan. 16, 1953. Counsel for the plaintiff referred the judge to certain authorities, and, while he was opening, both learned counsel agreed, as the judge's notes show, that, if the judge took the view that in law the plaintiff's rights over the highway were destroyed when it was closed by the order of quarter sessions, there must be judgment for the defendant. The learned judge considered the authorities, and gave judgment for the defendant. His decision was based on the supposition that the plaintiff could show that he had had a private right of way over Miss Lister's Road and that, at some time after he had acquired that private right of way, Miss Lister's Road had become a highway. It was submitted on behalf of the defendant that, notwithstanding the private right of way, the fact that an order was made by quarter sessions stopping up the highway resulted in the private right of way being extinguished. The order of quarter sessions was made under the Highway Act, 1835, the relevant sections being ss. 84 to 91. The procedure used to be well known at quarter sessions. If the documents were all in order and no one opposed the application, it was a simple matter. If there was opposition, or an appeal as it is called, there was a contest before a jury, and, if it was found that any person would be aggrieved by the order, the application failed. Notices had to be given and justices inspected the road and gave their certificate, and the final stage was the enrolment of that certificate.

The learned county court judge determined that that procedure, which had taken place in this case in 1943, was sufficient to extinguish any private right of way or any private easement which the plaintiff had over the road which became at some time Miss Lister's Road. The editors of *PRATT AND MACKENZIE ON THE LAW OF HIGHWAYS*, 19th ed., p. 16, put the position in this way:

"Where a private right of way already exists, and the public subsequently acquire a right of passage over the same course, the public must take subject to the private right; and a public right of footway may accordingly be limited by a pre-existing private right of carriageway . . . And if an Act of Parliament gives power to extinguish the public right, the private right will not be affected thereby, but will continue to subsist."

In support of that proposition, the learned editors cite *Wells v. London, Tilbury and Southend Ry. Co.* (1), and, in dealing with extinguishment and diversion of highways, point out (*ibid.*, p. 130):

"If any private rights of way existed over land before the dedication thereof to the public, they are not affected by the extinguishment of the public right."

In *Wells v. London, Tilbury and Southend Ry. Co.* (1) the plaintiffs had been entitled from 1855 to a carriageway to property of theirs over a railway by a level crossing. By an Act of Parliament obtained by the company in 1875, reciting that it was expedient that the rights of way in respect of certain footways which crossed the railway on the level should be extinguished, it was enacted that all rights of way in, over, or affecting the footways numbered 2, 4, 5, 6 and 7 on the deposited plans should be extinguished. No provision

for compensation was made. The roadway in question was numbered 5 on the deposited plans, and was thereon marked "roadway and footway", the other being marked simply "footway". It was held, affirming the decision of SIR RICHARD MALINS, V.-C., that on its true construction the Act did not interfere with private rights of way, but only with public rights of footway, and that an injunction restraining the railway company from obstructing the carriageway had been rightly granted. That case was decided under a private Act of Parliament and is, perhaps, not so useful for the purposes of this appeal as *Allen v. Ormond* (2) where it was said that one who has a grant of an occupation way may declare in case against the owner of the land over which the way leads for obstructing it, although it be proved that the public in general had used the way without denial for the last twelve years. The decision of the court is stated in this way (8 East 6):

"The court said, with respect to the first objection, that where a party has a certain special right of way granted to him, he may rest upon that title, and need not resort to a general right, which may possibly be disputed by conflicting evidence; especially in a case, like the present, of a public right of way growing out of an occupation way."

An order made by quarter sessions for stopping up a highway under the provisions of the Highway Act, 1835, s. 91, is an order made against the public. Section 91 provides that "the proceedings thereupon shall be binding and conclusive on all persons whomsoever". No one can dispute the proceedings, but, in my view, that does not mean that one who has a private right of way is thereby barred for all purposes from exercising that right of way. The order which is made is one for stopping up a highway and it destroys the public right of way.

The learned county court judge had cited to him *R. v. Wallace* (3), and, in particular, part of the judgment of SIR ALEXANDER COCKBURN, C.J. (4 Q.B.D. 644). I take one sentence:

"Upon reference to the different sections of the Act, there appears to be no foundation for this objection, for the simple reason that as soon as the diversion to which the certificate of the justices has reference is established, the old road ceases to be a highway, and the land reverts, unencumbered by any easement, to the original owners of the soil."

It seems to me that there the Lord Chief Justice was dealing with the public rights or easements to which the old portion of the road had been subject up to the making of the order, and was saying that thereafter that portion of the highway was unencumbered by any of those easements. He had not in mind the position which arises in the present case. I cannot see that on the bald statement of fact and admission made to the learned judge in this case it can be said that the plaintiff's case was destroyed merely by the fact that an order under the Highway Act, 1835, had been made stopping up this highway qua highway.

It remains to be decided whether or not the plaintiff can establish that at some time Miss Lister's Road was a private road and that before Miss Lister's Road became a highway some rights had accrued to him in respect of the way which later became Miss Lister's Road, and for the determination of those questions the case must go back to the learned county court judge.

DENNING, L.J.: It is clear law that there may be a private right of way and a public right of way existing along a road at the same time. When an order is made stopping up a highway under the Highway Act, 1835, that extinguishes the public right, but it does not affect the private right. This case must, therefore, go back for it to be determined whether there was or is such a private right.

ROMER, L.J.: The Highway Act, 1835, was concerned solely with the rights of the public in relation to the use of highways and was not concerned with private rights, and so I agree that this case should go back for hearing on the points mentioned.

Appeal allowed.

Solicitors: *Clutton, Moore & Lavington*, agents for *Ralph C. Yablon & Temple-Milnes*, Bradford (for the plaintiff); *Fielder, Jones & Ball*, agents for *W. H. Boocock & Son*, Halifax (for the defendant).

[*Reported by MISS PHILIPPA PRICE, Barrister-at-Law.*]

RILEY AND ANOTHER v. TROLL.

[MANCHESTER ASSIZES (Ormerod, J.), December 16, 1952.]

Sale of Land—Contract—Agreement to purchase "subject to formal contract to be prepared by the vendors' solicitors if the vendors shall so require."

By an agreement, dated Oct. 12, 1950, the purchaser agreed to purchase a house from the vendors. The agreement, which was on a printed form used regularly by the vendors, concluded with the words: "This agreement is subject to formal contract to be prepared by the vendors' solicitors if the vendors shall so require." No formal contract having been required by the vendors, the purchaser decided not to proceed with the transaction, and the vendors brought an action for damages for breach of the agreement.

HELD: the words, "if the vendors shall so require", related merely to the preparation of the formal contract by the vendors' solicitors and did not qualify the phrase, "This agreement is subject to formal contract", and, therefore, the transaction was subject to a formal contract being executed and no action would lie on the agreement.

AS TO AGREEMENTS CONTEMPLATING EXECUTION OF MORE FORMAL DOCUMENT, see HALSBURY, Hailsham Edn., Vol. 29, p. 237, para. 321; and FOR CASES, see DIGEST, Replacement Vol. 12, pp. 92-102, Nos. 521-583.

ACTION by the vendors for damages for alleged breach of a contract for the purchase of a house.

The agreement which was signed by the purchaser contained the following sentence: "This agreement is subject to formal contract to be prepared by the vendors' solicitors if the vendors shall so require". The vendors contended that the words, "if the vendors shall so require", related to the first part of the sentence and that, as they had made it clear that they required no formal contract, the agreement amounted to a binding contract between the parties. The purchaser contended that there was no binding contract as the words, "if the vendors shall so require", related only to the preparation of the contract by the vendors' solicitors.

B. H. Gerrard for the vendors.

H. C. Easton for the purchaser.

ORMEROD, J.: In this case the vendors, Harold Riley and Dorothy Riley, claim against the purchaser, Mrs. Isabella Troll, damages for alleged breach of contract relating to the sale of a house, No. 83, Walmersley Road, Bury. The facts are as follows. The purchaser wished to buy a house in Bury and in October, 1950, she called on a firm of estate agents, named Killen and Holker, who were the agents for the sale of 83, Walmersley Road. She discussed the purchase of this house and, eventually, was willing to purchase it for the sum of £1,180 on condition that certain fixtures and parts were included in the purchase price. On Oct. 12, 1950, the day on which that arrangement was made, she signed an agreement on a printed form which the vendors use regularly. In that printed agreement she agreed to purchase the property

for the price of £1,180, no deposit being paid. The agreement ended with the words:

“This agreement is subject to formal contract to be prepared by the vendors’ solicitors if the vendors shall so require.”

For reasons which are no longer material in this case, the purchaser decided not to proceed with the contract, and, in consequence, she has been sued for damages for the loss which the vendors have sustained as the result of incidental expenses. That damage amounts to £98 ls. 10d.

The defence is that the agreement was subject to formal contract and so is not enforceable. [HIS LORDSHIP referred to a further defence which was now abandoned, and continued:] The only question which I have to consider is the interpretation of the last sentence of the document signed by the purchaser. I think

it is well established law that, if the words of that sentence were merely: “This agreement is subject to formal contract”, or “subject to formal contract to be prepared by the vendors’ solicitors”, this action would not lie in the circumstances. Indeed, counsel for the vendors agreed that that was the position. His contention was that the words, “if the vendors shall so require”, related to the first part of the sentence, viz: “This agreement is subject to

formal contract”, and that, once the vendors had crystallised the position by making it clear that they did not require a formal contract, the document became a binding contract and action would lie on it. Counsel for the purchaser, on the other hand, submitted that the words “if the vendors shall so require”, related merely to the fact that a contract was to be prepared by the vendors’ solicitors, and he contended that the words could not have the effect of

qualifying the earlier part of the sentence, viz., “This agreement is subject to formal contract”. I am satisfied that, on their true construction, the words “if the vendors shall so require”, do not qualify the words, “This agreement is subject to formal contract”, and that they merely relate to the preparation of the formal contract by the vendors’ solicitors. In other words, they mean that, if the vendors require that contract to be prepared by their solicitors,

they have the right to insist on it. In my opinion, that is the right interpretation to be put on these words. The proviso, “This agreement is subject to formal contract”, is one which must be definitely and clearly qualified by the words which follow, if the qualification is to be effective. The concluding words of the sentence are capable of two reasonable interpretations, viz., (i) that they qualify the whole sentence, or (ii) that they relate merely to the preparation

of a contract by the vendors’ solicitors. The latter interpretation is, in my opinion, the correct one, and, even if this were not so, I think that in the circumstances, both interpretations being reasonable, the latter, being the interpretation put forward by the purchaser, must prevail.

Judgment for the purchaser.

Solicitors: *Woodcock & Sons*, Bury (for the vendors); *George Haworth & Chappell*, Ramsbottom, Lancashire (for the purchaser).

[*Reported by Miss M. D. CHORLTON, Barrister-at-Law.*]

R. v. PHILLIPS.

[COURT OF CRIMINAL APPEAL (Lord Goddard, C.J., Byrne and Parker, JJ.),
March 31, 1953.]

*Justices—Election by offender to go for trial at quarter sessions—Substitution
of new charge—Summary Jurisdiction Act, 1879 (c. 49), s. 17 (1).*

The appellant was charged before justices with making a false declaration under s. 9 (1) of the Vehicles (Excise) Act, 1949, when applying for a licence in respect of a motor vehicle, for which the maximum punishment on summary conviction was six months' imprisonment. He elected to go for trial under s. 17 (1) of the Summary Jurisdiction Act, 1879, and at quarter sessions he was charged with making a false declaration under s. 5 (b) of the Perjury Act, 1911, for which the maximum punishment was two years' imprisonment, and was convicted of that offence.

HELD: if a prisoner elects to go for trial before a jury under s. 17 (1) of the Summary Jurisdiction Act, 1879, another charge cannot be substituted at quarter sessions for the charge for which he was originally before the court of summary jurisdiction, and, therefore, the conviction must be quashed.

FOR THE SUMMARY JURISDICTION ACT, 1879, s. 17 (1), see HALSBURY'S STATUTES, Second Edn., Vol. 14, p. 857.

APPEAL against conviction.

The appellant was convicted on Jan. 7, 1953, at Buckinghamshire Quarter Sessions of various offences in bankruptcy and of an offence against s. 5 (b) of the Perjury Act, 1911, and was sentenced to sixteen months' imprisonment.

The appellant was not represented.

E. D. Lewis for the Crown.

LORD GODDARD, C.J., delivered the following judgment of the court. The appellant was convicted before Buckinghamshire Quarter Sessions of a variety of offences relating to bankruptcy and other matters. There was also a charge in the indictment that

"In a declaration made under s. 9 (1) of the Vehicles (Excise) Act, 1949, in connection with an application for a licence for a Standard Vanguard motor car, [he] wilfully made a statement false in a material particular, namely, that the said motor car had not been previously registered."

The statement of offence with regard to that charge was:

"Making a false declaration, contrary to s. 5 (b) of the Perjury Act, 1911."

When this case came before the court by way of application for leave to appeal, the appellant did not get leave to appeal against the convictions of the bankruptcy offences. There is no question about the propriety of those convictions, but the court gave leave to appeal against the conviction of making a false declaration.

Section 9 (1) of the Vehicles (Excise) Act, 1949, provides:

"... if any person in connection with an application for ... a licence [in respect of a motor vehicle under the Act] makes a declaration which to his knowledge is false or in any material respect misleading, he shall be liable on summary conviction to a penalty not exceeding £50 or to imprisonment for a term not exceeding six months."

The appellant was charged before a court of summary jurisdiction with an offence under this sub-section. As that offence, though stated to be a summary offence, carries with it a liability to imprisonment for more than three months, the appellant had a right under s. 17 (1) of the Summary

Jurisdiction Act, 1879, to elect to go for trial. He exercised that right, but when he came before quarter sessions he found that he was not charged with the offence for which he had elected to go for trial. Instead, he was charged with the offence under s. 5 (b) of the Perjury Act, 1911. That statute is, no doubt, wide enough to apply to people who have made false declarations, but that, of course, is an entirely different offence from that with which the appellant had been charged before the magistrates because it is under a different statute.

- A It may well be that the evidence to support the charge under the Perjury Act, 1911, would be the same as the evidence to support the charge under the Vehicles (Excise) Act, 1949, that is to say, if the excise authorities had originally charged the appellant when he was before the magistrates with an offence under the Perjury Act, the evidence which they would have had to lead would have been exactly the same as the evidence they would lead on a charge under s. 9 (1) of the Vehicles (Excise) Act, 1949. Under s. 2 (2), proviso (i), of the Administration of Justice (Miscellaneous Provisions) Act, 1933, an indictment can contain a count for an offence which is disclosed in the depositions, though there has not been any committal for that offence. The prosecution say that, as the depositions showed an offence under the Perjury Act, they were entitled, by reason of that provision, to put forward this charge although the appellant had been sent for trial for the offence under the Vehicles (Excise) Act. This court cannot approve of such a course being taken because, if we did, it would really be making the option which was given to the appellant by s. 17 (1) of the Summary Jurisdiction Act, 1879, something in the nature of a trap. Had he chosen to be dealt with by the magistrates, and been convicted by them, he could not afterwards have been prosecuted under s. 5 of the Perjury Act.
- D This court cannot approve of a charge being substituted for the charge on which the prisoner was originally before the magistrates in any case where quarter sessions only get jurisdiction by reason of the prisoner having exercised his option under s. 17 (1) of the Summary Jurisdiction Act, 1879. The conviction on this indictment is, therefore, quashed.

Conviction quashed.

- E Solicitors: *Horwood & James*, Aylesbury (for the Crown).

[*Reported by G. A. KIDNER, ESQ., Barrister-at-Law.*]

W. F. MARSHALL, LTD. v. BARNES AND FITZPATRICK
(a firm).

[QUEEN'S BENCH DIVISION (Pearson, J.), February 23, March 27, 1953.]

Legal Aid—Costs—Disallowance—Attendance of country solicitor at trial in London—Costs incurred on behalf of unsuccessful defendants in arranging payment of judgment debt—Legal Aid and Advice Act, 1949 (c. 51), s. 1 (5), sched. III, para. 4 (1)—R.S.C., Ord. 65, r. 27 (29).

In an action in the King's Bench Division judgment was given for the plaintiff for £100, with costs of the claim and counterclaim up to Jan. 19, 1951, on which date civil aid certificates had been granted to the defendants. Each certificate stated that the defendant to whom it was granted was entitled to legal aid in "defending an action for breach of contract now proceeding in the High Court of Justice, King's Bench Division, in an action intituled W. F. M., Ltd., plaintiffs, and B. and F. (a firm), and to counterclaim thereunder, and to the enforcement of any order made thereon". After judgment the usual order was made for the taxation of the defendants' costs as between solicitor and client under the Legal Aid and Advice Act, 1949, sched. III, para. 4 (1). After taxation the defendants' solicitors objected to the taxing master's decisions on two sets of items in their bill of costs. (i) The bill included an item of £3 3s. for the attendance of a representative of the defendants' country solicitors at the Royal Courts of Justice, London, on June 14, 1951. The case was not reached on that day, and for this the taxing master allowed a sum of 10s. as provided by R.S.C., Appendix N, item 170. For each day of the trial the country solicitors claimed £1 1s. for travelling expenses from Horley to London, and on these items the taxing master allowed nothing. (ii) After judgment arrangements were made as to how the judgment debt was to be paid and it was agreed that each defendant should pay £2 per month. The defendants' solicitors were concerned in arranging the method of payment and their bill included items incurred with regard to this matter on dates from three weeks to four months after judgment. The taxing master allowed nothing under this head. On a summons for review of taxation of these items,

HELD: as to (i) the rule that the costs of the attendance of a country solicitor on a trial in London will only be allowed in exceptional cases applies to a taxation as between solicitor and client under the Legal Aid and Advice Act, 1949, sched. III, para. 4 (1), with the qualification that a more generous attitude is to be adopted in deciding whether the case is exceptional; in the present case the objections did not suggest the existence of any exceptional features; and, therefore, the costs in question were incurred through over-caution and were not allowable.

Gibbs v. Gibbs ([1952] 1 All E.R. 942), applied.

As to (ii) the words in the defendants' civil aid certificates "and to the enforcement of any order made thereon" gave authority to the solicitors only in respect of any order made in favour of the defendants on the counterclaim or in respect of costs and could not be taken as referring to resisting an order made against the defendants; the work referred to in these disputed items was clearly dissociated from the work of defending the action or prosecuting the counterclaim and could not be regarded as steps incidental to the proceedings within s. 1 (5) of the Act of 1949; and, therefore, the costs in question were rightly disallowed.

FOR THE LEGAL AID AND ADVICE ACT, 1949, s. 1 (5), and sched. III, para. 4, see HALSBURY'S STATUTES, Second Edn., Vol. 18, pp. 534, 566; and FOR THE LEGAL AID (GENERAL) REGULATIONS, 1950, see HALSBURY'S STATUTORY INSTRUMENTS, Vol. 5, p. 202.

Cases referred to:

- (1) *Re Storer*, (1884), 26 Ch.D. 189; 53 L.J.Ch. 872; 50 L.T. 583; Digest, Practice, 526, 1915.
- (2) *The Soto*, [1893] P. 73; 62 L.J.P. 17; 69 L.T. 231; Digest, Practice, 525, 1911.
- (3) *Gibbs v. Gibbs*, [1952] 1 All E.R. 942; [1952] P. 332.
- (4) *Lyon v. Lyon*, [1952] 2 All E.R. 831; [1953] P. 1.
- (5) *McIver & Co., Ltd. v. Tate Steamers, Ltd.*, [1902] 2 K.B. 184; 71 L.J.K.B. 717; 87 L.T. 320; Digest, Practice, 948, 4879.
- (6) *Reed v. Gray*, [1952] 1 All E.R. 241; [1952] 1 Ch. 337.
- (7) *Re Ermen*, [1903] 2 Ch. 156; 72 L.J.Ch. 492; 88 L.T. 353; Digest, Practice, 947, 4873.
- (8) *Perry & Co., Ltd. v. Hessin (T.) & Co.*, (1913), 108 L.T. 332; 30 R.P.C. 193; Digest, Practice, 957, 4972.
- (9) *De La Pole (Lady) v. Dick*, (1885), 29 Ch.D. 351; 54 L.J.Ch. 940; 52 L.T. 457; Digest, Practice, 961, 4993.
- (10) *Bagley v. Maple & Co., Ltd.*, (1911), 27 T.L.R. 284; Digest, Practice, 962, 4996.

C SUMMONS for review of taxation of costs.

Shields for the applicants.

Colin Duncan as amicus curiae.

Cur. adv. vult.

D Mar. 27. PEARSON, J., read the following judgment. This is a summons for review of a taxation, adjourned into court because it appeared to involve questions of principle which might be of general application. It must, however, be decided on the facts of the particular case as revealed by the documents which were before the taxing master. The defendants object to the taxing master's disallowance of certain items in the bill of costs. After full consideration I have come to the conclusion that the decisions of the learned taxing master must be upheld, for the reasons which I shall now proceed to give.

E The action was tried in the King's Bench Division of the High Court of Justice on June 15, 18, 19, 20 and 21, 1951, and on June 21, 1951, judgment was given for the plaintiff on the claim for the sum of £100 and also on the counterclaim, with costs of claim and counterclaim up to Jan. 19, 1951, which was the date of the legal aid certificates granted to the defendants. There was liberty to F apply in chambers as to the defendants' liability for costs from the date of the legal aid certificates, but so far as appears no such application was made. The usual order was made for taxation of the defendants' costs as between solicitor and client in accordance with sched. III to the Legal Aid and Advice Act, 1949, to which I will refer as "the Act".

G There are two quite distinct sets of items of costs to be considered. The first set of items relates to the attendance of the country solicitor for the purposes of the trial in London. The first item is:

"1951. June 14. Attending Royal Courts of Justice, London, with counsel when case not reached."

The amount claimed in the bill of costs is £3 3s., and the amount allowed is 10s.

H The reasons for the objections are as follows:

"(i) The case was in the list for hearing at 10.30 a.m. on this date and it was necessary for the defendants' solicitor to travel from Horley to be at court with counsel at that time. The case was not reached and at about 3 p.m. the parties were released for the day. (ii) The sum of 10s. is totally inadequate for the attendance of a principal of a firm of solicitors at court for the period mentioned above. (iii) This is a permitted item which should be allowed upon a taxation on a solicitor and client basis."

The remaining items of this first set are: "Paid travelling expenses from Horley" on June 14, and on each day of the trial. For each day the amount claimed in the bill of costs is £1 ls. and nothing is allowed. The reasons for objections in relation to each of these items are as follows:

"(i) It is submitted that this is a proper charge for expenses of the defendants' solicitor to attend hearing in London. (ii) This is a permitted item which should be allowed upon a taxation on a solicitor and client basis."

The taxing master's answers to the defendants' objections relating to the first set of items are as follows:

"1—There was, in my view, no necessity for the country solicitor to attend court. I have considered the allowance which should be made and see no reason to increase the sum of 10s. provided by item 170 of Appendix N to the Rules of the Supreme Court, which apply as well between solicitor and client as between party and party. 2 to 7 (inclusive)—These costs are taxed in accordance with sched. III to the Legal Aid and Advice Act, 1949, as between solicitor and client out of a common fund. The attendance of a country solicitor at the trial will only be allowed in very special circumstances (see Master's Practice Note No. 15, ANNUAL PRACTICE, p. 2825). While this applies in its strictest sense as between party and party it would seem right according to the dictum of PEARSON, J., in *Re Storer* (1) (26 Ch.D. 190) that the taxing master should satisfy himself that the attendance of the country solicitor was necessary. I have carefully considered the facts of this case and allowed, as between solicitor and client, an extra conference with counsel shortly before trial which the clients attended. In my view, the presence of the country solicitor at the trial was not necessary. These costs have been incurred through over-caution and could only be allowed as between solicitor and own client: Ord. 65, r. 27 (29)."

The reasons given in the taxing master's answers were criticised in two respects: (i) It was pointed out that the judgment of PEARSON, J., in *Re Storer* (1), does not contain any dictum expressly to the effect that the taxing master should satisfy himself that the attendance of the country solicitor was necessary. The judgment, however, does tend in that direction, and the word "necessary" is the word used in another case, namely, *The Soto* (2) ([1893] P. 75, 76, 78). (ii) It was pointed out that Ord. 65, r. 27 (29), should have been applied in its entirety, and it should have been considered not only whether the expense of the attendance of the country solicitor was "necessary", but also whether it was "proper".

In order to ascertain whether there was any error in the taxing master's decision on the objections relating to these items, it is necessary to set out the most relevant provisions and refer to some of the decided cases. Paragraph 4 (1) of sched. III to the Act provides, so far as material, as follows:

"... costs shall be taxed for the purposes of this schedule according to the ordinary rules applicable on a taxation as between solicitor and client where the costs are to be paid out of a common fund in which the client and others are interested."

The meaning and effect of this provision were considered, and the relevant authorities were reviewed, by HAVERS, J., in *Gibbs v. Gibbs* (3). In that case the decree nisi contained a direction that the costs of the petitioner be taxed as between solicitor and client in accordance with the provisions of sched. III to the Act. The learned judge said ([1952] 1 All E.R. 959):

"The question . . . which I have to decide, is the principle which the learned registrar ought to adopt in taxing a solicitor's bill of costs, having

regard to R.S.C., Ord. 65, r. 27 (29), and to sched. III to the Act and bearing in mind the various authorities which I have already cited. In my view, the principle which the taxing master ought to adopt is as follows: (i) Under the order for taxation it is the duty of the taxing master on a taxation as between party and party to adopt as his normal standard the direction in R.S.C., Ord. 65, r. 27 (29). (ii) At the same time he should make more generous allowances than he would on a taxation as between party and party. In making more generous allowances the taxing master, in my judgment, is permitted, not only to allow items which can be properly included on a party and party taxation at a higher figure than that at which they would be allowed on a party and party taxation, but also to allow additional items which would not be allowed on a taxation as between party and party. The taxing master has, of course, a very wide discretion. (iii) The order in my judgment cannot be construed as an order for taxation as between solicitor and own client."

That passage under heads (i) and (ii) was cited with approval by BIRKETT, L.J., in *Lyon v. Lyon* (4) ([1952] 2 All E.R. 835). Order 65, r. 27 (29) provides that:

"On every taxation the taxing master shall allow all such costs, charges and expenses, as shall appear to him to have been necessary or proper for the attainment of justice or for the defending the rights of any party, but save as against the party who incurred the same no costs shall be allowed which appear to the taxing master to have been incurred or increased through over-caution, negligence or mistake or by payment of special fees to counsel or special charges or expenses to witnesses or other persons, or by other unusual expenses."

The present form of reg. (29) was introduced by amendment in January, 1902: *McIver & Co., Ltd. v. Tate Steamers, Ltd.* (5); and, therefore, any principles laid down in previously decided cases should be regarded with caution unless confirmed in cases decided after that amendment was made. The proper construction of reg. (29) has been explained in a passage, with which I respectfully agree, in the judgment of ROXBURGH, J., in *Reed v. Gray* (6), where he said ([1952] 1 Ch. 353):

"... the proper test which the taxing master ought to have applied to that item was sub-r. (29). He ought, first of all, to have considered whether it was necessary or proper, and, if he arrived at the conclusion that it was neither necessary nor proper, then, of course, he was right in disallowing it and that would have been an end of the matter. But if he came to the conclusion that it was proper, then he had to consider whether it was a charge excluded by the latter part of the rule and, if he came to the conclusion that it was not, then he ought to have allowed something and I say not what."

The fees set out in Appendix N to the Rules of the Supreme Court are referred to in Ord. 65, rr. 8, 9 and 10. The taxing master may in certain circumstances allow fees on the higher scale set out in Appendix N, and has a further discretion under r. 27 (29) to allow higher fees than those prescribed by Appendix N: *McIver & Co., Ltd. v. Tate Steamers, Ltd.* (5), and *Re Ermen* (7). The practice notes of the taxing masters made under Ord. 65, r. 27 (37), are set out in the ANNUAL PRACTICE, 1952, at p. 2831 onwards. On p. 2833 in Note 15 it is stated that the attendance

"of country solicitor at trial or on taxation will only be allowed under very special circumstances, and in that case no allowance whatever will be made for the London agent's attendance."

That note can be taken as defining the practice which as a general rule will be followed by the masters on taxations (*Re Ermen* (7)), and it is also supported by decided cases, one of which is after the amendment of Ord. 65,

r. 27 (29) in the year 1902. In *The Soto* (2) GORELL BARNES, J., after referring to previous cases, said ([1893] P. 75):

"The result of these cases appears to me to be, that the allowance for the attendance of the country solicitor at the hearing in London is within the discretion of the taxing officer, and that, although as a general rule no allowance will be made, yet, such an allowance may be made in exceptional cases, where it is necessary that the solicitor who has had the conduct of the case from the commencement, and is acquainted with all the facts, should be present at the trial."

A

In *Perry & Co., Ltd. v. T. Hessin & Co.* (8) EVE, J., said (108 L.T. 335):

"The master had to deal with the objection as it stands, and he begins his answer by stating the general rule quite correctly: 'It is only in very exceptional cases that the country solicitor is allowed to attend the trial'."

B

In my judgment, the principle, or rule of practice, that the costs of the attendance of a country solicitor on a trial in London are as a general rule to be disallowed and are only to be allowed in exceptional cases is applicable on a taxation under sched. III to the Act, with the qualification that a more generous attitude is to be adopted in deciding whether the case is exceptional. In the present case the objections do not state or suggest any exceptional features whatsoever. Therefore, the general rule governs the situation, and the costs in question were rightly disallowed by the taxing master and there were no materials before him to justify allowance of those costs. There is the further point that the taxing master found that the costs were incurred through over-caution. As no exceptional features were shown, that finding, in my judgment, cannot be eliminated and is in itself a sufficient basis for disallowance.

C

D

The second set of disputed items relates to the making and carrying out of arrangements for the payment by each of the defendants of instalments on account of the judgment debt, including costs. The first of these items is dated nearly three weeks, and the last of them nearly four months, after the date of the judgment in the action. As the judgment debt was £100 and costs and each of the defendants agreed to pay only £2 per month, and the defendants' solicitors were, after the agreement had been made, collecting the money from the defendants and forwarding it to the plaintiffs' solicitors, the incurring of such costs might have continued for several years. The first of these items is:

E

F

"1951. July 11. Attending defendants to the method of payment of the judgment debt and costs. They agreed to consider matter."

The amount claimed in the bill of costs is 6s. 8d. and nothing is allowed. The reasons for objections are as follows:

"(i) After the hearing of this case the question of payment by the defendants of the judgment debt and costs was discussed at court with the plaintiffs' solicitors. It was then agreed that the defendants would consider their position with a view to making an offer. The defendants were by this time about to dissolve this partnership. (ii) It was, therefore, necessary to see the defendants to obtain their instructions upon this aspect of the case. (iii) This is a proper and permitted item which should be allowed on a solicitor and client taxation. (iv) It is submitted that this item is covered by the legal aid certificates granted by the Law Society and it was necessary to do this work for the proper conduct of the matter. (v) At this time it was most essential to the defendants to have the assistance of a solicitor to deal with the payment of the judgment debt and costs which had been awarded against them."

G

H

The other items are for letters and attendances for the purposes which I have

stated, and the reasons for objections are the same with the addition in relation to the second of the items of a statement that:

"By this date (July 31, 1951) the plaintiffs' solicitors were pressing for satisfactory arrangements to be made for payment within seven days."

All these items are disallowed.

The taxing master's answers to these objections are as follows:

- A "The civil aid certificate was granted for 'defending an action . . .'. In my view, unlike a plaintiff's certificate which normally is to prosecute an action and to enforce any judgment, the solicitor's authority ends when the action has been defended, judgment given, and completed if necessary by the taxation of costs. Costs incurred as in this case in negotiating the method of payment of the judgment debt are not costs of defending the action and are not covered by the civil aid certificate."
- B The civil aid certificate issued in favour of the defendant, Barnes, on Jan. 19, 1951, certified that he was entitled in accordance with the Act and the regulations and scheme made thereunder to legal aid as defendant in connection with the following proceedings:
- C "Defending an action for breach of contract now proceeding in the High Court of Justice, King's Bench Division, in an action intituled W. F. Marshall, Ltd., plaintiffs and Barnes and Fitzpatrick (a firm) and to counterclaim thereunder, and to the enforcement of any order made thereon."
- D A civil aid certificate was issued on the same day, and with the same wording as set out above, in favour of the defendant, Fitzpatrick.
The words
"and to the enforcement of any order made thereon",
which are not in proper grammatical relation with the preceding words, must, in my view, agreeing with that put forward by counsel appearing as amicus curiae, be taken by reason of the provisions of the Act and regulations as referring to the enforcement of any order made in favour of the defendants on the counterclaim and to the enforcement of any order made in favour of the defendants in respect of costs, and cannot be taken as referring to resisting on behalf of the defendants the enforcement of an order made against the defendants. So far as is material for the present purpose each of these certificates was for legal aid in connection with defending the action and prosecuting the counterclaim.
- F It was contended that the taxing master's answers were open to criticism in two respects. In the first place it was contended that the solicitor's authority does not end when the action has been defended, judgment given, and completed if necessary by the taxation of costs, but continues until the
- G certificate is discharged or revoked and normally the certificate is not discharged until, under reg. 11 (2) (c) of the Legal Aid (General) Regulations, 1950 (S.I., 1950, No. 1359), the appropriate area committee are satisfied, after considering any report of the assisted person's solicitor, that the proceedings to which the certificate relates have been disposed of, and they give the discharge. In connection with this contention, and to show that the authority is not
- H terminated by the giving of judgment in the action, reference was made to s. 1 (5) and s. 1 (7) of the Act and to Ord. 7, r. 2 (1), of the Rules of the Supreme Court and to *Lady De La Pole v. Dick* (9), *Bagley v. Maple & Co., Ltd.* (10), and HALSBURY'S LAWS OF ENGLAND, Hailsham ed., vol. 31, pp. 97 and 110. Secondly, it was contended that under s. 1 (5) of the Act and the certificates given in this case the taxing master should have considered, not only the question whether the costs claimed were costs of defending the action, but also the question whether they were incidental to defending the action.

These contentions are formally correct, but I have to consider whether they are sufficient to invalidate the decision on the facts of this case. Section 1 of the Act provides as follows:

" . . . (5) Legal aid shall consist of representation, on the terms provided for by this Part of this Act, by a solicitor and so far as necessary by counsel (including all such assistance as is usually given by solicitor or counsel in the steps preliminary or incidental to any proceedings or in arriving at or giving effect to a compromise to avoid or bring to an end any proceedings) . . . (7) Save as expressly provided by this Part of this Act or by regulations made thereunder,—(a) the fact that the services of counsel or a solicitor are given by way of legal aid shall not affect the relationship between or rights of counsel, solicitor and client or any privilege arising out of such relationship; and (b) the rights conferred by this Part of this Act on a person receiving legal aid shall not affect the rights or liabilities of other parties to the proceedings or the principles on which the discretion of any court or tribunal is normally exercised."

Regulation 5 of the Legal Aid (General) Regulations, 1950, made under s. 12 of the Act, provides by paras. (1) and (2) as follows:

" (1) A certificate may be issued in respect of the whole or a part of—
(a) proceedings in a court of first instance; or (b) proceedings in an appellate court. No certificate shall relate to proceedings (other than interlocutory appeals) both in a court of first instance and in an appellate court. (2) A certificate shall not relate to more than one action, cause or matter, but may include proceedings for the enforcement of any such order or agreement as is referred to in para. (3) of reg. 16."

Regulation 16 (3) refers to an order or agreement providing for the recovery or preservation of property for the benefit of an assisted person, and to an order or agreement for the payment of costs to an assisted person. It does not refer to any order or agreement for the recovery of property from an assisted person or for the payment of costs by an assisted person.

The extent of the authority of a solicitor acting under the Act must depend not only on the duration, but also on the scope, of his retainer, which is limited by reg. 5, in the case of a certificate for defending an action, to proceedings in the court of first instance. Therefore, the provisions of R.S.C., Ord. 7, r. 2 (1), under which the authority of a solicitor normally continues

" . . . till the final conclusion of the cause or matter, whether in the High Court or the Court of Appeal",

cannot be relied on as defining the extent of the authority of a solicitor acting under the Act. Equally, the decisions as to the authority of a solicitor retained in an action must be applied subject to the special provisions of the Act and regulations. Also questions as to the extent of a solicitor's authority may arise in different connections, and I do not think it should necessarily be assumed that the extent of his authority for the purpose of being served with documents is in all respects the same as the extent of his authority to incur costs recoverable from the legal aid fund. That is a point which may have to be determined in other cases.

The question here arises under s. 1 (5) of the Act, and the proposition on behalf of the defendants must be that the work referred to in the disputed items ought to have been regarded as incidental to defending the action. On the facts of this case, to which I have referred above, that seems to me an untenable proposition. The judgment put an end to the action and created a new situation in which the defendants owed a debt to the plaintiffs and had to make and carry out arrangements for paying it. It may be, though I am not expressing any opinion on this point because it does not arise in the present case, that a

discussion taking place immediately or very soon after the giving of the judgment and relating to the payment of the judgment debt might be regarded as reasonably incidental to defending the action, on the ground that such assistance is normally given and arises naturally as a pendant of and substantially in association with the assistance given in the action itself. The taxing master has a wide discretion, and the allowance of a charge in respect of such a discussion may or may not be within his discretion. But the work done in the present case was clearly dissociated from the work of defending the action and was concerned solely with the new situation in which the defendants were debtors to the plaintiffs, and was, therefore, not incidental to defending the action.

It was suggested, however, that the natural meaning of the word "incidental" is enlarged by its context in s. 1 (5) of the Act, where the wording is

"including all such assistance as is usually given by solicitor or counsel in the steps preliminary or incidental to any proceedings or in arriving at or giving effect to a compromise to avoid or bring to an end any proceedings."

The suggestion was that "the steps preliminary or incidental to any proceedings" are parallel to "arriving at or giving effect to a compromise to avoid or bring to an end any proceedings", and that, just as giving effect to a compromise includes making and carrying out arrangements for the payment of the sum agreed on, so steps incidental to the proceedings should be held to include making and carrying out arrangements for the payment of the sum adjudged. This is an attractive contention, but, in my view, the parallelism is incomplete and the suggested result does not follow. I understand "compromise" to mean an agreement to settle an action or threatened action. It may be an agreement to apply for a consent judgment, and effect is given to it by applying for and obtaining the consent judgment. Or it may be an agreement that the dispute shall be settled on certain terms and that application shall be made for an order that the action be stayed with liberty to apply and such order is applied for and made: in that case the action merely becomes dormant, and the stay may be removed if the terms are not carried out. Or it may be an agreement to avoid a threatened action, and, if the agreement is not carried out, the action may still be brought. The parties have not reached finality or fully disposed of the proceedings or intended proceedings when they make their compromise agreement: further steps are required to effectuate the compromise and to give it finality. On the other hand, a judgment has finality, fully and effectively terminating the action. I am not seeking to decide what costs may be charged in the case of a compromise, but only to point out the difference of principle between a compromise agreement and a judgment, because that difference invalidates the suggested parallelism. It is natural that in the case of a compromise the chargeable costs should include the costs of giving effect to the compromise agreement as well as the costs of arriving at it. But it does not follow that the costs incidental to defending an action include the costs of subsequent arrangements for payment of the judgment debt. The provisions of reg. 5 (2) and of the certificates in this case, expressly including proceedings for the enforcement of any order in favour of the assisted person, tend by implication to exclude arrangements for complying with or postponing the enforcement of any order made against the assisted person.

There is also to be considered s. 1 (6) of the Act, which provides that:

"A person shall not be given legal aid in connection with any proceedings unless he shows that he has reasonable grounds for taking, defending or being a party thereto, and may also be refused legal aid if it appears unreasonable that he should receive it in the particular circumstances of the case."

Regulation 3 (3) was made for the purposes of this sub-section. In deciding whether it is reasonable that the applicant should receive legal aid in the particular circumstances of the case, the probable costs of the proceedings must be one of the factors to be taken into account by the committee, and such costs would be incalculable if they might include the costs of making and carrying out arrangements for the payment of the judgment debt over a period of months or even years after the date of the judgment. For the reasons which I have given I affirm the decisions of the taxing master, and the defendants' application fails.

Summons dismissed.

Solicitors: *Lewis, Holman & Lawrence*, agents for *Ross & Son*, Horley, Surrey (for the applicant); *T. G. Lund* (for the Law Society).

[*Reported by* MICHAEL MALONEY, Esq., *Barrister-at-Law.*]

THE ALBION.

THOMAS STONE SHIPPING, LTD. v. THE ADMIRALTY AND OTHERS.

[COURT OF APPEAL (Somervell, Jenkins and Hodson, L.JJ., assisted by Nautical Assessors), December 1, 2, 3, 4, 5, 8, 9, 10, 11, 1952, March 13, 1953.]

Shipping—Collision—Lights—"Vessel from any accident not under command"—*"Accident"*—Vessel towed and tugs under command—Standard of lighting—Regulations for Preventing Collisions at Sea (*Sea Regulations*, 1910 (S.R. & O., 1910, No. 1113)), art. 4 (a), art. 29—*Merchant Shipping Act*, 1894 (c. 60), s. 419 (1).

On Oct. 18, 1949, off the north-east coast of England, the collier s.s. *Maystone* sank as the result of a collision with the uncompleted aircraft carrier *Albion*, which was being towed by three tugs on a course N.W. $\frac{1}{2}$ N. magnetic, from the Tyne to Rosyth. The *Albion* was a mere hulk without power or steering capacity and she was in charge of a skeleton crew. She carried oil lamps for use as "not under command" lights if necessary, but these were not, in fact, used. At the time of the collision the night was very dark and the wind which was of gale force was from the southward. It was found that the force of the wind caused the *Albion* to lie about N.E., i.e., athwart the course of the tugs and the course of the *Maystone* which was approaching the tugs on an opposite course. It was found further that the port light of the *Albion* was defective and thus to all intents and purposes invisible to the approaching *Maystone*, which struck her on the port side approximately at right angles seventy feet from her stern.

HELD: (i) the fact that tugs which were in command were attached to a vessel in tow was not necessarily enough to prevent the tow herself from being out of command within art. 4 of the Regulations for Preventing Collisions at Sea; but

(ii) art. 4 was inapplicable in this case since the circumstances did not constitute an "accident" within the meaning of that article, and, therefore, it was not compulsory for the *Albion* to carry "not under command" lights.

(iii) notwithstanding the provisions of s. 419 (1) of the Merchant Shipping Act, 1894, under the provisions of art. 29 of the regulations, which indicated the standard of care to be observed, the *Albion* should have carried some additional lights as a warning to other shipping, which could properly have been "not under command" lights or any other deck illumination.

FOR THE MERCHANT SHIPPING ACT, 1894, s. 419 (1), see HALSBURY'S STATUTES, Second Edn., Vol. 23, p. 614; and for THE REGULATIONS FOR

PREVENTING COLLISIONS AT SEA (SEA REGULATIONS, 1910), art. 4 (a), and art. 29, see HALSBURY, Hailsham Edn., Vol. 30, pp. 691 and 792.

Case referred to:

(1) *S.S. Mendip Range v. Radcliffe*, [1921] 1 A.C. 556; 90 L.J.P. 209; 124 L.T. 706; 41 Digest 718, 5555.

APPEALS by the second and third defendants from orders of WILLMER, J., dated Dec. 20, 1951, Jan. 28 and May 15, 1952.

A On Oct. 18, 1949, off the north-east coast of England and in the early hours of the morning there occurred a collision between the s.s. Maystone, owned by the plaintiffs, Thomas Stone Shipping, Ltd., and the uncompleted aircraft carrier Albion, owned by the Admiralty, the first defendants, in consequence whereof the Maystone sank with the loss of all but four hands. She was a collier of 2,025 tons gross, 280 feet in length, and forty feet in beam, and at the time of the collision she was bound from Methil to the Thames laden with a cargo of coal. The Albion, which was being built by the second defendants, Swan, Hunter, & Wigham Richardson, Ltd., was a mere hulk without power or steering capacity, her helm being fixed amidships. She was 732 feet in length and ninety feet in beam and was in charge of a skeleton crew consisting of a master, an officer, and fourteen riggers, supplied by the fourth defendants, Captain Frank McNulty & Sons. She was being towed by three tugs and was bound from the Tyne to Rosyth to enter dry dock. The three tugs, the Hendon, George V, and Beamish, were all owned by France, Fenwick & Tyne and Wear Co., Ltd., the third defendants.

D None of the survivors of the Maystone was on watch at the time of the collision which took place at about 5 a.m. about five miles bearing about N. by E. magnetic from the Longstone lighthouse. The weather was clear, but overcast and very dark; the wind was at gale force from the southward or a point east of southward; the tide was setting to the northward. The Maystone was exhibiting two mast head lights and the regulation side lights. The tugs were exhibiting, in addition to the usual stern and side lights, in the case of one tug, the normal two towing lights, and, in the case of the other two tugs, three towing lights. The latter combination of lights was adopted as an indication that the tow was abnormally long. The vessels came into collision approximately at right angles, the stem of the Maystone striking the port side of the Albion about seventy feet from her stern. At the time of the collision the tugs were towing on a course of N.W. $\frac{1}{2}$ N. magnetic, all disposed ahead of the Albion about one hundred feet apart, the Hendon being the port side tug, the George V the centre tug, and the Beamish the starboardside tug. They were all towing with a scope of hawser of 170 to 175 fathoms. The speed of the flotilla was about two knots. The Maystone was on an opposite course to the flotilla approaching it more or less end on and she was seen from a very considerable distance approaching from the north. The Maystone passed the tugs safely and after colliding with the Albion fell alongside the after end of the latter; her port side to the port side of the Albion. The mast of the Maystone was carried away, and her bridge structure was damaged on the port side while the two vessels lay alongside unable to get clear of each other. The master of the Albion ordered the tugs to tow the head of the vessel to westwards, and, this manoeuvre being unsuccessful, he ordered them to tow the Albion to eastward. The Maystone tried to free herself by moving her engines slow ahead with the wheel hard astarboard, but was brought up sharply and shortly afterwards sank.

H From the facts in dispute between the parties the court found, inter alia, (i) that the force of the southerly gale would tend to make the Albion lie athwart the wind so that being towed in a N.W. direction she might lie about N.E., i.e., directly athwart the Maystone's course, thus enabling the Maystone, which it was calculated had passed the port side tug by a distance of about

seven hundred feet, to strike the Albion at approximately right angles, seventy feet from her stern; (ii) that the port light of the Albion was defective and to all intents and purposes invisible to the approaching Maystone. The Albion carried oil lamps for use as "not under command" lights, but they were not used.

WILLMER, J., held that the collision was caused by the negligence of the second defendants, at whose instigation the voyage of the Albion was being undertaken, and also of the third defendants. He gave judgment for the plaintiffs against the second and third defendants apportioning the blame equally between them. He dismissed the claim by the plaintiffs against the Admiralty and against the fourth defendants. The second and third defendants appealed.

Cur. adv. vult.

Naisby, Q.C., J. B. Hewson and Darling for the plaintiffs.

Adams, Q.C., and Porges, Q.C., for the Admiralty.

Nelson, Q.C., and Hene for the second defendants.

Carpmael, Q.C., and Boyes for the third defendants.

Mar. 13. HODSON, L.J., read a judgment of the court in which he said: The position is that, since the Albion belonged to the Crown the Regulations for Preventing Collisions at Sea did not apply to her (see Merchant Shipping Act, 1894, s. 741), and in her then state, not being commissioned, the Queen's Regulations did not apply. The collision regulations should, however, we think, be taken to contain, not statutory duties applicable in her case, but a standard of care to which those in charge of her should conform.

The Albion carried oil lamps for use as "not under command" lights, if necessary. These were not used. It is said that art. 4 of the regulations is inapplicable as a standard of care because, if the Albion was "not under command", it was not through any accident. Article 4 (a) provides:

"A vessel which from any accident is not under command shall carry at the same height as the white light mentioned in art. 2 (a), where they can best be seen, and, if a steam vessel, in lieu of that light, two red lights, in a vertical line one over the other, not less than six feet apart, and of such a character as to be visible all round the horizon at a distance of at least two miles . . ."

The learned judge found that this article was applicable in that the onset of the gale was an accident. We find a difficulty about this. We are disposed to accept the view that the circumstances in which the Albion came to be towing in the way she did could not properly be described as due to an accident. She was without motive power or steering capacity and the natural consequence of the wind was to cause her to tow in a manner which caused her to extend her length far off the course of the tugs instead of following behind them in the way approaching shipping might expect her to do. There was no moment of time in which it could be said that she suffered an accident. Was she under command? It is said that since she was being towed and the tugs were under command, she must be treated as one unit with them and under command. Reliance was placed on a decision of BARGRAVE DEANE, J., reported in "The Times" of May 23, 1913, in which he held that the article did not apply to a steamer in tow which was able to steer and had motive power since she and the vessel towing her must be considered as one. Although the proposition contended for is generally sound, we do not think the fact that tugs which are in command are attached to a vessel in tow is necessarily enough to prevent the tow herself from being out of command. This was a case of a big unwieldy craft high out of the water, incapable of steering, making big yaws and exceptionally subject to the force of the wind. The towing lights would give warning of a long tow which would not necessarily be following

her tugs in a straight course, but would not be sufficient warning of an object behaving in the dangerous manner in which the Albion was behaving. Accordingly, she appears to come within the principle enunciated by VISCOUNT FINLAY in the *S.S. Mendip Range v. Radcliffe* (1) ([1921] 1 A.C. 571):

“If a vessel is in such a condition owing to an accident that she can only get out of the way of another after great and unusual delay, I think she must be considered as ‘not under command’ for the purpose of art 4.”

A This language, apart from the words “owing to an accident” is, we think, applicable here, and our assessors, like the Elder Brethren in the court below, entertain no doubt but that as seamen they would have regarded the Albion as “not under command” and have ordered the exhibition of the appropriate lights.

B Since art. 4 is not applicable where there has been no accident, the lights would be exhibited by taking art. 29 as indicating the standard of care.

“Nothing in these rules shall exonerate any vessel, or the owner, or master, or crew thereof, from the consequence of any neglect to carry lights or signals, or of any neglect to keep a proper look-out, or of the neglect of any precaution which may be required by the ordinary practice of seamen, or by the special circumstances of the case.”

C The language of this article is, we think, wide enough to cover such a situation as this notwithstanding the language of s. 419 (1) of the Merchant Shipping Act, 1894, which reads:

“All owners and masters of ships shall obey the collision regulations, and shall not carry or exhibit any other lights, or use any other fog signals, than such as are required by those regulations.”

D This obviously does not mean that no lights other than navigation lights can be displayed on the deck or be visible through the port holes of a ship. It would be a very odd construction if such lights could be displayed, for example, for purposes of amusement, but not for purposes of safety. The proper construction, we think, is that for the purposes covered by the regulations the lights as prescribed must be used and no others. On this view, it does not prohibit lights required for safety by reason of the application of the general provisions of art. 29. We are not seeking to lay down, however, that the application of art. 29 necessitated the exhibition of “not under command” lights as such. Any practicable form of deck illumination visible to oncoming traffic would have satisfied the article. We would, accordingly, respectfully disagree with the learned judge in rejecting the contention of the plaintiffs that such a step should have been taken in the special circumstances notwithstanding the language of s. 419 of the Merchant Shipping Act, 1894.

E His LORDSHIP considered the apportionment of blame and said that, taking all the facts together and bearing in mind, so far as planning was concerned, that the control was in the hands of the second defendants according to the terms of their contract with the third defendants, the court would apportion the blame as two-thirds to the second defendants and one-third to the third defendants.

G Solicitors: *Holman, Fenwick & Willan* (for the plaintiffs); *Treasury Solicitor* (for the first defendants); *Bentleys, Stokes & Lowless*, agents for *Wm. Mark Pybus & Sons*, Newcastle-upon-Tyne (for the second defendants); *Middleton, Lewis & Co.*, agents for *Middleton & Co.*, Sunderland (for the third defendants).

H [Reported by MISS PHILIPPA PRICE, Barrister-at-Law.]

Re WALSH (*deceased*). WALSH *v.* WALSH AND OTHERS.

[CHANCERY DIVISION (Vaisey, J.), February 20, 1953.]

Will—Gift of “all my furniture and movables . . . not consisting of mortgages shares bonds or securities”—“Movables”—*Exclusion of sums of money.*

By his will a testator gave to his children certain personal chattels which he later referred to as “the above-mentioned movables”. He then declared: “I give to my wife Phyllis a legacy of £200 free of legacy duty. All the remainder of my furniture and movables not hereby specifically disposed of not consisting of mortgages shares bonds or securities of any kind I give to my wife absolutely subject only to the condition that if she should sell anything whatever left to her by this clause, the proceeds of such sale shall immediately pass to and vest in my executors and trustees and form part of my residuary estate. The residue of my real and personal estate I give to my trustees . . .” on trust to pay the income thereof to the widow during her lifetime, and, subject thereto, on trust for his children.

HELD: the exception contained in the words “not consisting of mortgages shares bonds or securities of any kind” did not extend the significance of the word “movables” so as to include anything beyond movable chattels, and, therefore, the gift to the widow did not include such items as money standing to the credit of the testator’s bank account at the time of his death, money payable under an insurance policy, or other sums due to him at his death.

Cases referred to:

- (1) *Steignes v. Steignes*, (1730), Mos. 296; 25 E.R. 403; 44 Digest 591, 4152.
- (2) *Hotham v. Sutton*, (1808), 15 Ves. 319; 33 E.R. 774; 44 Digest 723, 5740.

ADJOURNED SUMMONS to determine whether on the true construction of the will of Sir Cecil Walsh, deceased, the plaintiff, his widow, was, under the gift of the residue of the testator’s “movables”, entitled to (i) a sum of cash standing to the credit of the testator’s account at the Midland Bank; (ii) the testator’s insurance policy and a sum of cash payable thereunder; (iii) a sum in respect of the testator’s pension; (iv) accrued income on certain shares and bonds; (v) income accrued under a trust created in the testator’s favour; (vi) a sum of cash paid by the War Damage Commission in respect of damages to the testator’s house; and (vii) any sums due to the testator at his death in respect of returned income tax, director’s fees, or any other account. The widow was one of the executors and trustees of the will, a son of the testator being the other executor and trustee.

Rink for the widow (plaintiff).*Richmount* for the testator’s children and grandchildren (defendants).

VAISEY, J.: This summons is taken out to obtain the decision of the court on the interpretation of the will of the late Sir Cecil Henry Walsh, who was born in 1869 and called to the Bar by Gray’s Inn in 1895. He became a leading counsel in 1913, and in 1915 he was appointed to be judge of the High Court of Allahabad and held that position until 1928 when he retired and returned to this country. He did not resume practice at the Bar although his widow says that he continued to take a keen interest in legal matters involving questions of Indian law. She further tells me that he made his will, which it now falls to me to construe, without legal assistance. He died on Nov. 24, 1946. The will, dated Feb. 15, 1939, and a codicil thereto, dated May 14, 1945, were proved by the executors, who are the widow (the testator’s third wife) and Dennis Cecil Whittington Walsh, the testator’s elder son, on Apr. 14, 1947, and the estate was sworn at about £7,000 or a little more. By his first marriage, the testator had three children, viz., Dennis,

Eileen Gertrude Stepto, and Nigel Whittington Walsh. Of remoter issue there are two children of Dennis, both of whom are infants, and a daughter of Mrs. Stepto who is an adult and married.

The will is said to be a document very inartistically framed. The testator was obviously conversant with legal phraseology up to a point, but there are indications in the will that his long service as a judge in India and absence from the English Bar caused him to forget or overlook a great many of the elementary principles which should be borne in mind when testamentary and other documents are being prepared. He begins by revoking former wills and appoints his wife, Phyllis, and his son, Dennis, his executors and trustees. He then gives to Dennis a large number of chattels, in the proper limited sense of the word, viz., some presentation plate, some pictures, some books, a gold watch and chain, gold links and studs, walking-sticks, badges and decorations, certain family portraits, and a nautical clock and barometer. He gives to his daughter, Mrs. Stepto, all his devotional books and certain other books which he names, certain pictures, a stuffed crocodile ornament, and other decorations which were at Wimbledon where he had previously lived. Then he gives to his younger son, Nigel, certain chattels in these words:

" . . . all my links and studs and personal belongings not already left by this will to Dennis; my silver cups and pewters, my suit cases, my revolver and field-glasses and any articles of wear thought worth sending to Kenya; all the above-mentioned movables left to Eileen and Nigel to be sent to them at the expense of my estate."

He then gives to his clerk, as a token of affection and gratitude, a legacy of £100 free of duty and he gives to his wife a legacy of £200 free of duty. Following these pecuniary legacies come the words which create the difficulty which I have now to resolve:

" All the remainder of my furniture and movables not hereby specifically disposed of not consisting of mortgages shares bonds or securities of any kind I give to my wife absolutely . . ."

He then adds a direction which is in these words:

" . . . subject only to the condition that if she should sell anything whatever left to her by this clause, the proceeds of such sale shall immediately pass to and vest in my executors and trustees and form part of my residuary estate."

He goes on to declare:

" The residue of my real and personal estate I give to my trustees in trust to pay the income thereof to my wife for her life without power of anticipation, or of charging it or of disposing of it or of any part thereof except the income arising therefrom."

The dispute is between the widow, who is the plaintiff, and the children and remoter issue of the testator, who are the defendants. The defendants are interested in the residue subject to the widow's life interest therein. The question is what is the meaning of the word " movables " in the phrase: " All the remainder of my furniture and movables not hereby specifically disposed of ". I think it is perfectly clear that, if these were the only words which I had to construe, " movables " would mean the residuary personal estate. If the bequest stopped at the words " not hereby specifically disposed of ", there would be no doubt at all that it would be a complete disposition of the whole of the personal estate, and there would be no difficulty. In *Steignes v. Steignes* (1) it was held that the word " movables " in its full sense takes in all personal chattels. That was a decision given at the Rolls on Feb. 17, 1730, and, so far as I am aware, that word has never been construed in these courts from that date to this. I think, however, that that case is still authority

that the word "movables", apart from any context and standing alone, would be sufficient to cover the whole of the personal estate. But in the present case we have the added words "not consisting of mortgages shares bonds or securities of any kind", and that seems to introduce the consideration which is clearly stated in JARMAN ON WILLS, 8th ed., vol. 2, p. 1001 (that being a part of the work of which the author was Mr. Jarman himself):

"A conclusive ground for giving to equivocal words their larger signification, occurs where the bequest contains an exception of certain things, which such bequest, according to its restricted construction, would not comprise; the testator having in such a case afforded a key or explanation to his own ambiguous language, by showing that he considered that the bequest would, without the exception, have included the excepted articles. This question has generally arisen under gifts of goods and chattels, restricted to a certain locality; but the principle, it is obvious, is equally applicable to bequests not so restricted."

The question is whether the word "movables", having been limited by the phrase "not consisting of mortgages shares bonds or securities of any kind", has been taken out of the ejusdem generis rule by that exception, or whether it has been given a larger signification on the principle of the words which I have just read from JARMAN ON WILLS. The word "movables" is used twice. Referring to the gifts to Mrs. Stepto and Nigel, the testator has said "all the above-mentioned movables", although he has specified various items. I should have thought that down to this point he was dealing only with chattels in the limited sense, i.e., furniture, jewellery, china, pictures and so on, and that, when he says: "All the remainder of my furniture and movables not hereby specifically disposed of", it was reasonably clear that "movables" could no longer be construed as the whole of the personal estate, but had to be limited to articles of some kind of furniture. The question is whether the excepting words have turned the situation so as to make the word "movables" of wider significance and to restore it to its larger meaning of personal estate because otherwise the exception would be otiose and contradictory.

There is a further point to be observed, viz., that the testator has given the residue of his real and personal estate in trust and, therefore, "movables" cannot mean the whole of his personal estate. It is also noticeable that the widow is given a legacy of £200, although that does not found a conclusive argument that the testator intended to give her nothing but chattels in the limited (ejusdem generis) sense. I think that the condition that, if the widow sold anything whatsoever left to her by the clause, the proceeds should form part of the residuary estate is in itself inoperative, but, in my view, it throws a good deal of light on what the testator intended to leave to her by the clause. It clearly suggests that the testator intended to put the widow on terms that, if she should sell movable property (in the sense of chattels), she should hand over the proceeds to the residuary estate. It cannot be supposed that the condition "anything whatever" could possibly extend to money—money at the bank or in the house. I agree that this construction presents some difficulty because of that very inept exception from the category "furniture and movables", viz., "not consisting of mortgages shares bonds or securities of any kind". I think that it was put in as a sort of echo from forms the testator learned in his youth and that the words were used inaccurately and were put in out of caution. It might have occurred to the testator that, if there were a mortgage on a piece of parchment which could be moved about, some person construing his will might take the view that such pieces of parchment were movables, and, therefore, he expressly excluded them. He did not intend his papers—those pieces of paper which were in a sense movables—to be included. I think that is exclusive. The testator had already disposed of his studs, pictures and books and so on, and I think that "All the

- remainder of my furniture and movables not hereby specifically disposed of . . .” means that all the furnishings of his house and all his movable possessions, other than those which he had already disposed of, were to go to his wife, and that the somewhat inept and over-cautious insertion of the words “not consisting of mortgages shares bonds or securities of any kind” cannot possibly extend the meaning of the word “movables” so as to include any of the items the destination of which I am asked to decide. I am asked, for
- A instance, whether the expression “movables” includes the sum of £607 17s. 4d. standing to the credit of the testator at the date of his death. I hold that this sum of money is in no sense of the word a movable. Similarly, there is an insurance policy under which £590 is payable on the testator’s death. It may be excluded, in any case, as being a “security” of some kind, but I cannot see my way to hold that it comes under the word “movables”. There is a sum of £107 16s. 5d.
- B accrued in respect of his pension—again that is not a movable—it is a most inept word to describe it. I do not think that this cautious addition of an excluding clause can possibly extend to goods or items such as that. Small sums of money representing accrued income of certain shares and under a trust are not movables. Then there is the sum of £925 which has been received since the testator’s death from the War Damage Commission in respect of
- C damage to the testator’s house. I really do not know how exactly that should be described. It may be a chose in action, or something in the nature of a statutory debt, but, whatever it is, it is not, in my opinion, a “movable”. Lastly, there are certain sums due to the testator’s estate from income tax, certain post-war credits and director’s fees. The only ground on which any of these items can be held to be movables is that contained in the passage which
- D I have read from JARMAN ON WILLS. Mr. Jarman’s statement is founded on *Hotham v. Sutton* (2). In that case there was a general residuary bequest in a will and revocation by codicil “as to plate linen household goods and other effects (money excepted)”. It was held that the exception prevented the restrained (*ejusdem generis*) interpretation in general of the words “other effects”. So far as my attention has been drawn to it, that case accurately
- E deals with the principle enunciated by Mr. Jarman in the passage which I quoted.

Order accordingly.

Solicitors: *Nickinson & Co.* (for the plaintiff); *Sweepstones* (for the defendants).

[*Reported by MISS PHILIPPA PRICE, Barrister-at-Law.*]

**NORDISK INSULINLABORATORIUM v. C. L. BENCARD
(1934), LTD.**

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Jenkins, L.J. and Roxburgh, J.), February 17, 18, 19, 20, March 31, 1953.]

Agent—Profit acquired through knowledge obtained in course of agency—Agency terminated by war—Right to transfer property vested in Custodian of Enemy Property—Purchase by agent and re-sale—Duty to account for profit.

For some years before 1939 the defendants acted as agents for the plaintiffs for a variety of purposes, including the importation and sale of liquid insulin. In 1939 the plaintiffs, a Danish corporation, owned stocks of crystal insulin which, to the knowledge and with the help of the defendants, had been deposited in banks in England. On or about May 15, 1940, Denmark having been occupied by the enemy, the President of the Board of Trade, by order made under the Trading with the Enemy Act, 1939, s. 7 (1) (c), vested in the Custodian of Enemy Property the right to sell and transfer the stocks of insulin. On Sept. 4, 1940, the defendants, asserting a moral claim in view of their former relationship with the plaintiffs, purchased the insulin from the Custodian for £9,623 3s., and on Nov. 8, 1940, re-sold it for £13,169 8s. 6d. The plaintiffs claimed the amount of the profit so realised by the defendants. The court found that, had it not been for the information acquired by the defendants from the plaintiffs by reason of their agency, they would not have had knowledge of the existence of the insulin and would not have had the opportunity of buying it.

HELD: at the date of the re-sale the agency had ceased and the insulin was not the property of the plaintiffs, the defendants having acquired an absolute title to it from the Custodian; the defendants' knowledge relating to the insulin was not confidential in the sense that it imposed on them any special duty or restraint or placed them under a fiduciary duty to the plaintiffs for the purposes of a purchase of the insulin by them from the plaintiffs, and, especially in view of the fact that their agency had extended to dealing with liquid insulin but not with crystal insulin, the defendants, in buying and selling the insulin, could not be regarded as agents dealing with the property of their principals, or as acting in relation to their principals' affairs; and, therefore, there was no equity enabling the plaintiffs to claim the profit made by the defendants in the transaction.

Decision of **VAISEY, J.** ([1952] 2 All E.R. 1040), reversed.

AS TO RIGHTS OF PRINCIPAL AGAINST AGENT, see **HALSBURY**, Hailsham Edn., Vol. 1, pp. 241-255, paras. 412-427; and **FOR CASES**, see **DIGEST**, Vol. 1, pp. 448-456, Nos. 1372-1446, and pp. 475-479, Nos. 1572-1600.

Cases referred to:

- (1) *Zinc Corpn., Ltd. v. Hirsch*, [1916] 1 K.B. 541; 85 L.J.K.B. 565; 114 L.T. 222; 2 Digest 174, 402.
- (2) *Carter v. Palmer*, (1842), 8 Cl. & Fin. 657 (8 E.R. 256); 1 I.Eq.R. 289; 1 Dr. & Wal. 22; 1 Digest 472, q.
- (3) *Regal (Hastings), Ltd. v. Gulliver*, [1942] 1 All E.R. 378; 2nd Digest Supp.
- (4) *Stevenson (Hugh) & Sons v. Akt. für Cartonnagen Industrie*, [1918] A.C. 239; 87 L.J.K.B. 416; 118 L.T. 126; 2 Digest 177, 416.
- (5) *Keech v. Sandford*, (1726), Sel. Cas. Ch. 61; 25 E.R. 223; 43 Digest 633, 720.

APPEAL by defendants from a decision of **VAISEY, J.**, dated Nov. 19, 1952, reported [1952] 2 All E.R. 1040.

The plaintiffs claimed a declaration that £3,546 5s. 6d. received by the defendants in November, 1940, from Boots Pure Drug Co., Ltd., being profit

realised on the sale of insulin, was received by the defendants and thereafter held by them as trustees for the plaintiffs, and for an account of the said sum and profits or interest thereon, and payment of the amount found due. Alternatively, the plaintiffs claimed damages for breach of duty or breach of trust. VAISEY, J., gave judgment for the plaintiffs.

J. G. Strangman, Q.C., and D. S. Chetwood for the defendants.
Beney, Q.C., and M. R. Hoare for the plaintiffs.

Cur. adv. vult.

Mar. 31. The following judgments were read.

SIR RAYMOND EVERSLED, M.R.: The claim in this action was for £3,546 5s. 6d. profit made by the defendants on the sale to them and re-sale by them in the autumn of 1940 of 57½ million international units of crystallised insulin. The defendants, formerly known and sued as "C. L. Bencard (1934), Ltd." (and I shall hereafter refer to them, as did the learned counsel in the case, simply as "Bencard", the name being also used with the prefix "Mr." to indicate the managing director of the defendants), bought this parcel of insulin from the Custodian of Enemy Property, it having belonged to the plaintiffs (hereafter referred to as "Nordisk") who had deposited the insulin not long before the outbreak of the second world war in certain branches of the National Provincial Bank, Ltd., in England. Nordisk were and are a Danish corporation, and by virtue of the Trading with the Enemy legislation became, therefore, "enemies" within the meaning of that legislation on or shortly after the invasion of Denmark by the Germans in April, 1940. The order of the Board of Trade giving power to the Custodian of Enemy Property to transfer this insulin was dated May 15, 1940, and the sale by him to Bencard was made in pursuance of that order. It is conceded on the part of Nordisk that the Custodian on completion of the sale passed a good title in the insulin to Bencard or, rather, to Bencard's sub-purchasers, and from this it appears to follow that from the moment that the sale took effect Nordisk ceased to have, for all time, any proprietary interest at all in the insulin. No point has been made of the fact that the property in the insulin passed direct from the Custodian to Bencard's sub-purchasers so that Bencard in fact paid away nothing and received from their sub-purchasers the amount of the profit made on the sub-sale. The case is of an unusual character, and the basis of Nordisk's claim is a manifestation of an old and broad equitable principle to the effect that, notwithstanding the intervention of the Custodian of Enemy Property, it is unconscionable for Bencard to make the profit in question out of the former property of Nordisk, and that it is so unconscionable because, prior to the invasion of Denmark by the Germans, the relationship between Nordisk and Bencard was that of principal and agent. No case has been found in the books which can fairly be said to be comparable to the present.

The claim of Nordisk which I have thus indicated is pleaded in para. 5 of the statement of claim as follows:

"Thereafter the defendants, without the knowledge or consent of the plaintiffs, and without disclosing to the Custodian their knowledge of and interest in the said stocks of insulin . . . or the true value thereof . . . in breach of the duty which they owed to the plaintiffs as a consequence of the agency aforesaid . . . purchased the whole of the said stocks of insulin from the Custodian at what they knew to be under value . . . and re-sold the same to . . . Boots Pure Drug Co., Ltd. . . . for . . . its true value . . . and thereby in fraud of the plaintiffs made a profit upon the said transaction for themselves of £3,546 5s. 6d."

Notwithstanding the express reference to fraud in the paragraph which I have read, counsel for Nordisk has made it perfectly clear in this court, as he made it clear in the court below, that he was not relying on any allegation of fraud

or misrepresentation on the part of Bencard. In other words, the use of the word "fraud" in the paragraph must be taken to be the alleged effect in the eye of equity of the circumstances earlier pleaded—i.e., that the retention against Nordisk of the profit made by Bencard would be unconscionable conduct on the part of the latter. I shall have to examine more closely hereafter the premises on which this alleged equity is said to rest. But it is first convenient to refer to the conclusion of VAISEY, J., on the matter. He said ([1952] 2 All E.R. 1042):

"The agency necessarily came to an end when the plaintiffs became technical 'enemies', and it was sought to be argued for the defendants that all the present and future consequences of the past agency were finally and irrevocably destroyed by that event. I cannot accept that. The equitable obligations which flow from the relationship of principal and agent cannot be so easily got rid of, nor does it seem to me to make any difference that the property in this stock of insulin was no longer, at the time when it was sold, the property of the plaintiffs. I cannot accept the view that the Custodian either could or did deal with the insulin so as to destroy entirely the consequences of its previous history. Yet the defendants' view is that they were entitled to make this quick substantial profit exactly as if they had purchased this insulin from a vendor in the open market with no knowledge at all of any previous ownership. The fiduciary nature of an agency is, to my mind, far too deeply seated to be shaken and destroyed as easily as the defendants would seem to have supposed."

It will be noticed from the passage that I have read that in the view of the learned judge the pre-existing relationship of principal and agent between Nordisk and Bencard gave rise, during the existence of the agency, to fiduciary relations so "deeply seated" that they survived the destruction of the agency as the result of the war, and so enabled Nordisk, as soon as the "enemy" status had been cast off, to treat Bencard as still affected, as regards former property of Nordisk or its proceeds, by the fiduciary relationship which (it is assumed) emerged from the agency itself.

There is no doubt whatever that VAISEY, J., took a most unfavourable view of Mr. Bencard himself on the ground that in his dealings with the Custodian, and particularly in certain of his letters to the Custodian, he had been not only uncandid and tendentious in his statements, but had also deliberately misled the Custodian. Thus, VAISEY, J., said (*ibid.*, 1041):

"The defendants, without disclosing (or at any rate without fully and frankly disclosing) to the Custodian their knowledge of and previous connection with the plaintiffs and with the said stock of insulin in particular, purchased the said stock . . ."

Again (*ibid.*, 1042):

"I am bound to say that . . . the defendants deliberately misled the Custodian by misrepresenting their true position, particularly [in certain letters] . . . and in these and other questionable ways they put the strongest pressure on the Custodian to sell the insulin to them at the lowest possible price."

Finally (*ibid.*):

"I am satisfied on the evidence that the sum paid by the defendants . . . was, both in fact and to the knowledge of the defendants, less than the true value of the said stock . . ."

The learned judge's final conclusion on the facts was thus (*ibid.*, 1044):

"I hold as a fact that had it not been for the information acquired by the defendants, in the course of their agency, from the plaintiffs, they

would probably never have heard of this stock of insulin, and would never have had the chance of first buying it and then re-selling it on such advantageous terms. Had it not been for their uncandid and, indeed, untruthful letters, I should have been glad to acquit the defendants of any fraudulent intention."

It is to be noted that in the passage last cited there are, as I think, two separate findings of fact, viz., (i) that Bencard's chance (of which advantage was taken) of obtaining the insulin at all, i.e., the opportunity to approach the Custodian in regard to it, and thereby set on foot the various steps which ended in the sale, was attributable to the fact that, as agent of Nordisk, Bencard had special knowledge of the existence, location, etc., of the insulin; and (ii) that during his negotiations with the Custodian and with a view of persuading the Custodian (as he in fact did) to sell the insulin to his company, Mr. Bencard deliberately misled the Custodian. For the purposes of the present proceedings these two separate findings seem to me to be of a wholly different character and importance, and the second is not, in my view, directly relevant to Nordisk's claim, nor was it, as I understood his argument, relied on as such by counsel for Nordisk. Counsel for Bencard challenged all these findings of fact by the learned judge, and I am bound to say that he did so with some force and not the less so because of the plain disclaimer of counsel for Nordisk, already noticed, of any allegation of fraud or misrepresentation. I have not had the advantage which the judge had of seeing Mr. Bencard in the witness box and observing not only the answers that he gave but the way in which he gave them. Having regard, however, to the disclaimer of counsel for Nordisk, it seems to me that Mr. Bencard is at least entitled to have it said that no charge of fraud or dishonesty has been made against him or his company, and there is, accordingly, no room for any finding to that effect. As regards Mr. Bencard's negotiations with the Custodian (so far as they are relevant, and I have already said that I do not think they are) counsel for Nordisk was content to proceed on the basis that Mr. Bencard thought—with some justice—that in all the circumstances his company had a far better moral claim to become the purchaser of the insulin than Boots Pure Drug Co., Ltd. and their English associates, that this claim was of so strong a character that there should be no question of exacting from Bencard the best price, but that in pressing this view on the Custodian he did appreciably overstate in fact the grounds for its validity. Though it is fair to say that these matters may not have been investigated as fully as might have been the case apart from counsel's disclaimer in the court below, there seems no doubt to me that at least in some of the letters Mr. Bencard did in certain respects appreciably overstate his case, though this is not, of course, to say that he did not honestly believe or persuade himself of the truth of what he said and the justice of his claim. Perhaps Mr. Bencard provides the best commentary on his own conduct in the following passage from the concluding passage of the transcript of the evidence in which he answered certain questions put to him by the learned judge.

"VAISEY, J.: Mr. Bencard, put yourself for a moment into the position as it could have been looked at from Denmark in 1940. This insulin was never in your physical possession, was it? A.—No. Q.—It passed out of the physical possession of the Custodian into the physical possession of Boots Pure Drug Co., Ltd. on Nov. 8? A.—Yes. Q.—And they, on that transaction, paid £13,169 8s. 6d.? A.—Yes. Q.—And it is now known to the plaintiffs that of that sum only £9,000 odd was credited to the former owners of the insulin, and £3,546 5s. 6d. went straight into your pocket? A.—Yes, my Lord. Q.—You having been the intermediate purchaser in October, a few weeks before Boots took it over? A.—Yes. Q.—Are you surprised that the plaintiffs should be rather vexed at that

extraordinary division of the purchase money of the insulin which was paid by Boots? A.—No, I am not. Q.—You see, that is one way of looking at it. It went from the Custodian to Boots, Boots paid £13,000, and only £9,000 odd was credited to the plaintiffs. A.—Yes; but I was financially committed from Sept. 4, 1940. Q.—I follow that. However, you have answered my question. You are not surprised that they were rather annoyed or vexed or, as you said, cross about it? A.—No.”

Having said so much—in part out of respect for the argument of counsel for Bencard—I leave these matters, having already indicated more than once that I do not think they are relevant to the claim in the action.

It is now convenient that I should state as briefly as I can the essential matters of fact on which there seems no doubt or dispute. These are: (i) Bencard had for some years under the terms of a written contract been the selling agents of Nordisk in respect of the latter's “Leo” insulin, which was insulin in liquid form appropriate for supply to hospitals, doctors, etc. (ii) Shortly before the second world war Nordisk had deposited in certain branches of the National Provincial Bank in England solid insulin (originally powdered insulin for which crystal insulin was later substituted) in the name of Nordisk. The crystal insulin remained the exclusive property of Nordisk. (iii) This crystal insulin was the raw material for the liquid “Leo” insulin though the process of conversion to liquid form was not an entirely simple matter. (iv) Though in no sense was any of the crystal insulin earmarked for conversion into liquid “Leo” for sale by Bencard in England, one reason for the deposit was, no doubt, to guard against the event of supplies from Denmark to England being interrupted as a result of war, and, consequently, to guard against the business of the sale of Nordisk's “Leo” insulin by Bencard in England being brought to an end. (v) Though Nordisk kept control of the deposited insulin and had in fact made some withdrawal from the stocks without the knowledge of Bencard, the latter had taken a hand in the steps which it had been necessary to take in order to secure the deposit in England. Bencard's knowledge of the existence and location and also (broadly) of its quantity and value was, no doubt, therefore, in an intelligible sense attributable to and derived from their business association with Nordisk as selling agents. (vi) As soon as Denmark was invaded Bencard took immediately all steps that it was possible to take to set in motion the appropriate procedure designed to get the crystal insulin transferred to Bencard by the Custodian. In this Bencard was eventually successful and obtained on Sept. 4, 1940, a contract for the sale of the insulin by the Custodian at the price of 4d. per hundred international units, being slightly less than the price which had been offered by Boots Pure Drug Co., Ltd., and their English associates. And, finally, (vii) the Custodian entered into this contract for sale with Bencard in large measure, at any rate, because he had been persuaded of the validity of Bencard's special or “moral” claim thereto.

Unfortunately, there was a considerable delay between Bencard's first approaches to the Custodian soon after the invasion of Denmark and the making of the contract on Sept. 4, 1940, above mentioned. Bencard said in letters and said in this court by counsel (and I do not think counsel for Nordisk really challenged the statements) that Bencard's plan had been to set up some manufacturing equipment for conversion of the crystal insulin into liquid “Leo” and so to maintain in continuity the former business of selling “Leo” insulin to hospitals and others, but that the delay of four months or so before the making of the contract had been such as to put a stop to the selling business and ruin the proposed plans, so that when the sale was ultimately made Bencard no longer wanted the insulin for the original purpose. So much Mr. Bencard had, indeed, made clear by the letter to the Custodian of Aug. 7, 1940, in which he said he was no longer interested in the insulin for business purposes, and

that if it was sold to Bencard it should be sold without any restrictions on their part as to what they did with it. Very soon after the making of the contract Bencard sub-sold the insulin to Boots Pure Drug Co., Ltd., at the sum of profit claimed in these proceedings. When the sale was completed in November, 1940, the Custodian was well aware of these last-mentioned facts—he in fact passed the insulin direct to Boots, who made out two cheques, one to the Custodian for Bencard's purchase price, the other to Bencard for their profit. If the Custodian had been misled as regards Bencard's intentions or in any other relevant respect, the resulting cause of action would have been the Custodian's, but the Custodian, with full knowledge of all the facts, affirmed the sale.

Counsel for Nordisk does not, then, rest his case on any undue persuasion of, or representations made to, the Custodian. He bases it on the initial advantage that Bencard had towards acquiring the insulin from their knowledge of its existence, location, etc. They had this knowledge because they had been the agents of Nordisk, and (says counsel) the knowledge was, accordingly, of a fiduciary character so that the obligations which, as he claims, flow therefrom persist to this day, and, however much they may have been suspended while Nordisk bore an enemy character, they are now available to Nordisk.

The question was raised during argument, and in other cases might call for determination, whether, if such fiduciary relationship and duties existed, they were in origin and essence contractual, and if so, whether they would necessarily come to an end when one party to the contract became an enemy. ROXBURGH, J., during the course of the argument before us, sought to test the matter by supposing that the obligations which, as Nordisk now say, rest

on Bencard had been expressly set out in appropriate terms as part of the original contract of agency between them. In such case it would at least appear from authorities like *Zinc Corp., Ltd. v. Hirsch* (1) that, as soon as one party to the contract acquired enemy status, all the contractual terms would come entirely to an end. If so, then can some residuary obligation in equity, notwithstanding the final abrogation of the contract, be asserted by one party to the former contract against the other? And can Nordisk be in any stronger position if the obligations never formed part of the express terms of the contract?

It is unnecessary for me to answer these questions. Nor do I have to suggest what the answer would be to a case like that of *Carter v. Palmer* (2), supposing that the principal or client, Palmer, had become an enemy and that during the period of his enemy character his counsel, Carter, had acquired from the Custodian, by making use of information which he had acquired as Palmer's counsel, some of Palmer's property. Another case was also suggested in argument, that is, where the property formerly belonging to the "enemy" and sold by the Custodian contained some hidden value or secret additional material, knowledge of which had been acquired confidentially by the buyer before the war. It is unnecessary for me to express conclusions on any of these matters because, in my judgment, the major premise on which the argument of counsel for Nordisk rests is not well founded. In my opinion, such knowledge as Bencard had as regards the existence, location, quantities or value of the insulin bought was not "confidential" in any relevant sense, i.e., such as to impose any special duty or restraint on Bencard in the events which happened. It

does not, for one thing, appear to have been secret—the existence of the insulin had been disclosed to several persons (hospitals, doctors, and the like) by Bencard with the approval of Nordisk, and I cannot find any basis for the view that Bencard was under some strict duty not to disclose to anyone that the stocks of insulin were here. Certainly, anything that Bencard knew was also known to Nordisk—there is no question at all of Bencard having, while acting as agents, acquired some knowledge which they could have used against

their principals because their principals did not themselves have that knowledge. Once the insulin had been deposited, Bencard had towards Nordisk no duties whatever to perform in regard to it. It is conceded that Bencard cannot be treated as having at any time been under an absolute bar against purchasing like that which attaches to a trustee towards his beneficiary, for Bencard were not in any sense a trustee of the insulin. Bencard had in fact no right or interest in it.

It also seems to me that Bencard were not in a position vis-à-vis Nordisk A comparable to the position of directors of a company vis-à-vis their own company as in *Regal (Hastings), Ltd. v. Gulliver* (3) which was much relied on by Nordisk, for in the latter case the directors were essentially acting in regard to the affairs of the company of which they were the directors. In my judgment, Bencard cannot in the circumstances of this case be regarded as agents dealing with the property of their principals, or as acting in relation to the affairs of B their principals. As I have already said, Bencard had no duties whatever to perform in regard to it, and assuming that the part (such as it was) played by Bencard in assisting Nordisk to make the deposit was attributable to the fact that Bencard were Nordisk's selling agents for "Leo" insulin, Bencard's agency as a matter of contract had later altogether gone, and the property when it was sold admittedly became absolutely the property of the purchasers. C

It is to be observed that if I am wrong in this view the consequence would appear to be that, even if the insulin had been bought by Bencard at the best possible price, and had then been used by Bencard for conversion into "Leo" insulin and thereafter distributed in the ordinary course of business to hospitals and doctors, Bencard would be accountable to Nordisk for any profit made out of this part of their business. It would also seem to follow (as counsel for D Bencard observed in the course of his reply) that in the case of a partnership subsisting before the impact of war, an English partner would be disabled from acquiring from the Custodian the share in the business of another, who became an enemy, without liability to account to that other when his enemy status ceased for any profits attributable to that other's share, a conclusion which appears to be in conflict with the language of LORD DUNEDIN in *Hugh E Stevenson & Sons v. Akt. für Cartonnagen Industrie* (4) ([1918] A.C. 248).

The matter can, in my judgment, be properly put thus: Nordisk claim in the action on the basis that Bencard, being former agents, have made a profit out of a dealing with the property of Nordisk. To such a claim Bencard have prima facie this answer: "The agency had wholly ceased and the property in question was not at the material date your property, for an absolute title F to it was acquired from the Custodian". Whatever might be said in other circumstances and in other cases, Bencard cannot, in my judgment, on the facts of this case be disentitled to plead this answer to Nordisk's claim, either on the ground that they would thereby be relying on or pleading their own wrongful conduct or otherwise. Although, therefore, I think that a man of finer sensibilities than Mr. Bencard might not have wished his company to G retain the quick profit that they made against their own former principals and business associates who were rendered powerless and mute by the irruption of a common enemy, that is not a matter with which we are concerned. Nor are we concerned with any complaint that the Custodian might have had of the arguments used by Mr. Bencard to persuade him (the Custodian) to sell to Bencard this insulin, for, beyond a peradventure, the Custodian affirmed H the sale and Nordisk have not become entitled by assignment or otherwise to any cause of action (if such there could have been) in the Custodian. The question for our determination is whether we can discern any recognisable equity which enables Nordisk to attach, so to speak, in Bencard's hands the profit made by them to the Custodian's knowledge on the sale and re-sale of the insulin, or otherwise to make Bencard accountable therefor to Nordisk.

In my judgment, there is no such equity and I think, therefore, that the appeal must be allowed.

JENKINS, L.J.: I agree. In order to hold the judgment given in their favour by VAISEY, J., the plaintiffs must show : (a) that the defendants owed the plaintiffs some fiduciary duty with respect to the plaintiffs' deposits of insulin crystals in this country; (b) that, unless destroyed by the relegation of the plaintiffs to enemy status occasioned by the German occupation of Denmark in April, 1940, this fiduciary duty had the effect of making the defendants accountable to the plaintiffs for the profit arising from the defendants' purchase from the Custodian of Enemy Property, and re-sale to Boots, of the plaintiffs' deposits of insulin crystals, having regard to the way in which these transactions were in fact carried out; and (c) that this fiduciary duty was not destroyed by such relegation, or (I should add) by the effect of the Trading with the Enemy legislation. I have found myself unable to reach a conclusion favourable to the plaintiffs on the first two of these three essential elements of their case, and it is, therefore, unnecessary in the view I take to determine whether, given success on the first two points, they would have been able to surmount the difficulties involved in the third.

The alleged fiduciary duty, if it existed at all, could only have existed by virtue of the agency agreement. But the agency agreement was concerned only with the sale of "Leo" insulin in solution. It had nothing to do with crystal insulin or with dry insulin in any form. Its connection with the plaintiffs' deposits of crystal insulin was tenuous in the extreme, and consisted merely in the fact that the defendants, being the plaintiffs' agents for "Leo" insulin in solution and, consequently, known to the plaintiffs, and being licensed importers of insulin as they had to be for the purposes of the agency, were asked by the plaintiffs to assist, and did in fact assist, in the importing and depositing of the crystal insulin at the three agreed bank branches. The crystal insulin, once deposited, was held by the branch banks to the order of the plaintiffs as the plaintiffs' property and the defendants thenceforth had no more to do with it, and no further responsibility for or functions to perform in regard to it. Mr. Bencard did, no doubt, regard these deposits as, so to speak, earmarked for the purpose of maintaining his stocks in this country of "Leo" insulin in the event of supplies from Denmark being cut off, but this represented no more than his own wish in the matter. The plaintiffs had exclusive ownership and control of the deposits, and it was for them to decide whether the deposits should, if occasion arose, be used in the way contemplated by Mr. Bencard, or returned to Denmark, or removed to some other country, or otherwise disposed of. The defendants were not put in charge of the deposits on the plaintiffs' behalf, or engaged to sell them for the plaintiffs, or to advise the plaintiffs as to their disposal. The most that can be said is that the defendants knew of the existence or location of the deposits, of their approximate amount, and of their insured value, that they possessed this knowledge because they had assisted in making the deposits, that they would not have been selected to assist in making the deposits if they had not been the plaintiffs' agents for "Leo" insulin, and, consequently, that this knowledge was acquired by the defendants by reason of such agency. In these circumstances it would, to my mind, be obviously quite impossible to hold that the defendants were trustees for the plaintiffs of the deposits of crystal insulin so as to bring them within the strict rule established by the line of cases beginning with *Keech v. Sandford* (5) that a trustee must not profit from his trust, and thus make them accountable to the plaintiffs for the profit here in question.

But it is said that, the knowledge I have mentioned having been acquired by the defendants by reason of the agency (albeit only by reason of it in the indirect and collateral sense I have indicated), the defendants, on the principle illustrated by *Carter v. Palmer* (2), were under an obligation to the plaintiffs

not to make use of it to the detriment of the plaintiffs or to their own profit. To assess the merits of this argument a distinction must be drawn between knowledge possessed by the agent but not by the principal and knowledge common to principal and agent, and also between dealings by the agent with the principal and dealings by the agent with third parties. The knowledge here imputed to the defendants was knowledge common to themselves and the plaintiffs. Indeed, the plaintiffs as the actual manufacturers must be taken to have had fuller and more accurate knowledge than the defendants of the quantity, quality and value of the deposits. It surely follows that the mere fact that the defendants possessed this knowledge, fully shared as it was by the plaintiffs, could not place the defendants under any fiduciary duty to the plaintiffs for the purposes of a purchase of the deposits by the defendants from the plaintiffs. Suppose the agency had been terminated for some reason other than the relegation of the plaintiffs to enemy status, and suppose the defendants had offered to purchase the deposits for themselves from the plaintiffs at the price of 4d. per hundred units, and suppose further that the plaintiffs had accepted such offer, I fail to see on what principle the plaintiffs could have held the defendants accountable for any profit they might make on a re-sale at (for example) 5½d. per hundred units.

If I am right in thinking that in these hypothetical circumstances the defendants would have been under no liability to account to the plaintiffs, there, as it seems to me, is an end of the case, for if a sale by the plaintiffs themselves to the defendants at 4d. per hundred units, followed by a re-sale by the defendants at 5½d. per hundred units would not have placed the defendants under any liability to account to the plaintiffs for the profit, I fail to see how the plaintiffs could hold the defendants accountable for the profit derived from a sale by the Custodian to the defendants at 4d. per hundred units followed by a re-sale by the defendants at 5½d. per hundred units. In other words, I fail to see how the defendants, in purchasing from the Custodian at 4d. per hundred units and re-selling to Boots at 5½d. per hundred units, could have placed themselves under a liability to account to the plaintiffs which they would not have been under if the plaintiffs had not been enemies, and the defendants had bought from the plaintiffs and re-sold to Boots at those same prices.

There was one other argument to the effect that the defendants in bringing to the notice of the Board of Trade and the Custodian the existence and location of the deposits were divulging to third parties confidential information acquired by reason of their agency; that it was this disclosure which enabled the defendants to buy the deposits from the Custodian and re-sell them at a profit; and that the defendants consequently became accountable to the plaintiffs for such profit on the principle to which I have already referred. I cannot accept this argument. The defendants wanted to acquire the deposits. That they were perfectly entitled to do, if they could come to terms with a person entitled to sell. They could not lawfully make an offer for the deposits to the plaintiffs, who were enemies. The only person with whom they could treat was the Custodian, in the event of an order authorising him to sell being made. In these circumstances I cannot see that by causing the existence of the deposits to be brought to the notice of the Board of Trade and the Custodian, with a view to making an offer for them in the event of an order for sale, the defendants were divulging confidential information to third parties within the meaning of the principle referred to above. To hold otherwise, and make the defendants consequently accountable for their profit, would, I think, be contrary to public policy, for that would tend to the suppression of information required by law to be communicated to the proper authorities. The bank was in any case under a legal obligation to report the existence and particulars

of the deposits, and would, doubtless, have done so without the defendants' intervention.

A For these reasons I am of opinion that the plaintiffs' claim fails, and, as I have already indicated, I find it unnecessary to consider what the effect of the relegation of the plaintiffs to enemy status and the Trading with the Enemy legislation might have been on the existence or operation of any relevant fiduciary duty which would otherwise have been owed by the defendants to the plaintiffs, because my consideration of the case without regard to these factors has led me to conclude that no such fiduciary duty would have been so owed.

B Counsel for the plaintiffs disclaimed any charge of fraud or misrepresentation on the part of the defendants in their dealings with the Custodian, and it is, therefore, unnecessary for me to deal with that aspect of the case. Accordingly, I would allow the appeal.

C ROXBURGH, J. (read by SIR RAYMOND EVERSHED, M.R.): I agree. Although VAISEY, J., expressed an unfavourable view of Mr. Bencard, he did not, I think, decide against the defendants on the ground of fraud (a charge which counsel for the plaintiffs had not made, and of which, therefore, they could not have been found guilty), but on the ground that they had acquired confidential information in the course of their agency for the sale of "Leo" insulin in solution which precluded them from disclosing the existence and whereabouts of the deposits of crystals to the Custodian without at the same time more fully and frankly disclosing other matters, and that this breach of duty procured them the profit. I find no analogy between the Custodian and any other third party, e.g., a trade competitor, and there is no reported case in which any such duty has been cast on an agent who has dealings with the Custodian after his principal has become an "enemy". In my view, no such duty exists, or could exist consistently with the requirements of public policy.

Appeal allowed; judgment for the defendants.

Solicitors: W. Wallace Harden (for the defendants); Roche, Son & Neale (for the plaintiffs).

[Reported by F. GUTTMAN, ESQ., Barrister-at-Law.]

Re HUTCHINSON'S WILL TRUSTS. GIBBONS AND OTHERS
v. NOTTINGHAM AREA NO. 1 HOSPITAL MANAGEMENT
COMMITTEE AND OTHERS.

[CHANCERY DIVISION (Upjohn, J.), March 26, 27, 1953.]

*Will—Lapse—Gift to ear, nose and throat hospital at a particular address—
Work of hospital at that address closed down after date of will and before
testator's death—Patients transferred to special wing of general hospital—
Assets transferred to general hospital exclusively for benefit of special wing.*

A

B

C

D

E

F

G

H

By his will, dated July 11, 1945, the testator devised and bequeathed his residuary real and personal estate to his trustees on trust for sale and conversion, and, after giving the usual directions in regard to the payment of his debts and funeral and testamentary expenses, he directed his trustees to stand possessed of the residue on trust for five hospitals in Nottingham, viz., the general hospital, the children's hospital, the hospital for women, "the Nottingham . . . Hospital for Diseases of the Throat Ear and Nose of 63 Goldsmith Street, Nottingham", and the eye infirmary, in equal shares, and he declared that "the receipts of the respective treasurers or secretaries for the time being of the said hospitals and infirmary shall be effectual discharges to my trustees for the said shares of residue respectively". The throat, ear and nose hospital (referred to hereafter as the throat hospital) which carried on its work at 63 Goldsmith Street at the date of the will was a voluntary hospital opened in 1887. Before the trustees acquired the premises in Goldsmith Street on behalf of the hospital, its work had been carried on elsewhere. In 1947, on account of the impending transfer of hospitals to the Minister of Health on July 5, 1948, under the National Health Service Act, 1946, there was difficulty in finding honorary surgeons for the throat hospital for the short time that it was to remain in private ownership. Also, the hospital being small, it was difficult to run it economically, and it could not be maintained efficiently as the in-patients' department did not comply with modern standards. By a letter, dated Sept. 16, 1947, the managers of the hospital suggested to the Minister of Health that it should be closed and that its assets should be transferred to the general hospital for the exclusive use of the ear, nose and throat wing of that hospital. By a letter, dated Oct. 8, 1947, the Minister gave his approval to the plan, but no scheme was approved by the court or the Charity Commissioners. On Oct. 29, 1947, at a meeting of the subscribers to the throat hospital, a resolution was passed that "the hospital, its properties and funds, be amalgamated with and the patients' waiting list be transferred to the ear, nose and throat wing" of the general hospital "in accordance with schemes submitted to and approved by the Minister of Health." By the end of 1947 the throat hospital was closed down, its patients being transferred to the ear, nose and throat wing of the general hospital. Its investments were transferred to the trustees of the general hospital, and, by a conveyance dated Feb. 18, 1948, and a deed of the same date, the premises in Goldsmith Street were conveyed to the trustees of the general hospital to be held by them on trust exclusively for the ear, nose and throat wing of that hospital. From July 5, 1948, the general hospital was administered by a hospital management committee and was subject to the jurisdiction of a regional hospital board, under the National Health Service Act, 1946. The testator died on Feb. 14, 1952. It was contended, inter alia, by the next of kin that the gift of a share of the residue to the throat hospital was for the purpose of the particular institution at 63 Goldsmith Street, and that, therefore, as the institution had become extinct during the life of the testator, the gift lapsed.

HELD: on the true construction of the will, the gift of a share of the testator's residue to the throat hospital was a gift for that charity in augmentation of its funds, and not merely a gift to the institution carried on at 63 Goldsmith Street; the testator's intention to benefit the charity generally was not affected (a) by the fact that he had referred to the address at which it carried on its work at the time when he made his will: *Re Lucas* ([1948] 2 All E.R. 22), followed; or (b) by the fact that there was no longer a treasurer or secretary of the charity who could give a receipt in accordance with the terms of the will: *Re Meyers* ([1951] 1 All E.R. 538), followed; whether or not the amalgamation between the throat hospital and the general hospital was valid, the gift to the throat hospital, being a gift to a charity, did not lapse, as a charity could not die, and the share of residue bequeathed to the throat hospital was to be held as part of the assets of that hospital.

Re Withall ([1932] 2 Ch. 236), applied.

AS TO LAPSE, see HALSBURY, Hailsham Edn., Vol. 34, p. 134, para. 173, and p. 148, para. 194; and FOR CASES, see DIGEST, Vol. 44, pp. 492-494, Nos. 3111-3134.

C Cases referred to:

(1) *Re Faraker*, [1912] 2 Ch. 488; 81 L.J.Ch. 635; 107 L.T. 36; 8 Digest 311, 921.

(2) *Re Lucas*, [1948] 2 All E.R. 22; [1948] Ch. 424; [1948] L.J.R. 1914; 2nd Digest Supp.

(3) *Re Joy*, (1888), 60 L.T. 175; 8 Digest 309, 898.

D (4) *Re Withall*, [1932] 2 Ch. 236; 101 L.J.Ch. 414; 147 L.T. 526; Digest Supp.

(5) *Re Morgan's Will Trusts*, [1950] 1 All E.R. 1097; [1950] Ch. 637; 2nd Digest Supp.

(6) *Re Glass*, [1950] 2 All E.R. 953 n.; [1950] Ch. 643 n.; 2nd Digest Supp.

(7) *Re Meyers*, [1951] 1 All E.R. 538; [1951] Ch. 534; 2nd Digest Supp.

E (8) *Re Rymer*, [1895] 1 Ch. 19; 64 L.J.Ch. 86; 71 L.T. 590; 8 Digest 312, 926.

(9) *Re Ovey*, (1885), 29 Ch.D. 560; 54 L.J.Ch. 752; 52 L.T. 849; *subsequent proceedings*, 31 Ch.D. 113; 8 Digest 312, 925.

ADJOURNED SUMMONS to determine whether, on the true construction of the will of Herbert Hutchinson, deceased, a share of residue bequeathed to "the Nottingham and Nottinghamshire Hospital for Diseases of the Throat Ear and Nose of 63 Goldsmith Street Nottingham" was (a) payable to the first defendants, the Nottingham Area No. 1 Hospital Management Committee, (b) applicable cy-près for charitable purposes, (c) undisposed of by the will, or how otherwise it should be dealt with by the plaintiffs, the trustees of the will.

G The throat, ear and nose hospital, which was founded in 1887, was an unincorporated association regulated by rules. Its property was vested in trustees and its affairs were controlled by a committee of managers. The rules contained no provision for amalgamation or winding-up. At an extraordinary general meeting of the subscribers to the hospital and its managers, held on Oct. 29, 1947, it was resolved that the hospital, its properties and funds be amalgamated with, and its patients transferred to, the ear, nose and throat wing of the Nottingham General Hospital in accordance with schemes submitted to and approved by the Minister of Health. Pursuant to this resolution, the patients were transferred, and by the end of 1947, during the lifetime of the testator, the work of the hospital at 63 Goldsmith Street ceased. Its funds were transferred to the general hospital for the benefit of the ear, nose and throat wing, and in February, 1948, its real property, including the premises in Goldsmith Street, were conveyed to the trustees of the general hospital

to be held by them exclusively for the benefit of the ear, nose and throat wing. From July 5, 1948, under the National Health Service Act, 1946, the general hospital was administered by the first defendants. The testator died in 1952.

The first defendants claimed the share of the residue given to the throat hospital on the ground that the work of that hospital was being carried on by the general hospital. It was contended by persons interested in the event of an intestacy that the gift was to the institution in Goldsmith Street, and that, as the institution had become extinct during the lifetime of the testator, the gift lapsed. A

Rubin (R. W. Goff with him) for the plaintiffs, the trustees of the will.

Monckton for the first defendants, the Nottingham Area No. 1 Hospital Management Committee.

Parbury for the second defendant, the testator's sister, and the third defendant, a niece of the testator. B

N. S. S. Warren (Dennys B. Buckley with him) for the Attorney-General.

UPJOHN, J.: In 1887 a hospital known as the Nottingham and Nottinghamshire Hospital for Diseases of the Throat, Ear and Nose, was opened in Nottingham. It carried on its work at a number of addresses, and, finally, at the premises known as No. 63 Goldsmith Street, Nottingham, where it moved early in the second decade of this century. During the course of its activities, the hospital purchased certain adjacent houses with a view to enlarging its premises. In 1947, however, it became clear that, for a number of reasons, the hospital could no longer conveniently carry on the specialised work which it had been doing. The main reason was that, with the impending transfer of the hospitals of this country to the Minister of Health under the National Health Service Act, 1946, it was difficult to find honorary surgeons to carry on the work in the hospital in the few months of private ownership which remained to it before the transfer date, July 5, 1948. Other reasons were that the hospital, being a small one containing only some twelve beds, was uneconomical to run, and that, although the out-patients' department was modern, the in-patients' department no longer complied with modern standards. For these reasons, the managers of the hospital wrote to the Minister of Health on Sept. 16, 1947, and put to him a scheme for his approval. Having stated in the letter the reasons for their being anxious to close the hospital, they suggested that it should be closed and that its invested funds, which amounted to some £13,000, and its real property, i.e., the premises on which the hospital was carried on and the adjacent property (which had never, in fact, been utilised for hospital purposes), should be transferred to the Nottingham General Hospital for the exclusive use of the ear, nose and throat wing of that hospital. They also proposed to retain and invest in the name of trustees a sum of £1,500 as a pension for two members of the staff. On Oct. 8, 1947, the Minister of Health approved of the plan. The approval did not have the effect of constituting an amalgamation between the old hospital (as I shall refer to it hereafter) and the general hospital, in the sense that the approval of the Charity Commissioners would have done. The assent and approval of the Minister were necessary, no doubt, for the reason that the governors of the old hospital were proposing to part with assets which would otherwise vest in the Minister on July 5, 1948. A meeting of subscribers to the old hospital was held on Oct. 29, 1947, when the chairman addressed them on the matter, and a resolution was passed in this form: C
D
E
F
G
H

"That the hospital, its properties and funds, be amalgamated with and the patients' waiting list be transferred to the ear, nose, and throat wing of the Nottingham General Hospital, in accordance with schemes submitted to and approved by the Minister of Health, including therein the transfer to trustees of the sum of £1,500 as a pension fund."

During the course of the argument, it was pointed out that the rules of the hospital contained no provision for the amalgamation of the hospital with any other institution. But, in view of the fact that the rules contained provisions for their alteration, counsel for those interested on an intestacy properly conceded that he could not rely on the technical failure of the hospital to alter its rules so as to provide for an amalgamation.

The resolution having been passed, the old hospital, in fact, closed down.

- A By December, 1947, the work at the old premises, No. 63 Goldsmith Street, ceased, the patients who were in the old hospital being transferred to the ear, nose and throat wing of the general hospital. The chairman of the managers of the old hospital joined the board of governors of the general hospital. A circular letter, dated Nov. 8, 1947, was sent to the patients and to those who were on the waiting list. The waiting list was thereby transferred automatically to the general hospital's waiting list, and out-patients who had previously been treated at the old hospital were thereafter treated at the ear, nose and throat wing of the general hospital. Recommendations or vouchers from contributors to the funds already held by patients of the old hospital were accepted at the general hospital. In addition, a tablet was erected in the ear, nose and throat wing of the general hospital, saying:

- C "This plaque records that, after a period of sixty years' service in this city, the Nottingham and Notts Ear, Nose and Throat Hospital was amalgamated with the ear, nose and throat department of the Nottingham General Hospital on Dec. 1, 1947."

Under that was a plaque which was previously in the old hospital, and on which were these words:

- D "This tablet is erected in memory of Dr. Donald Stewart who was the first to specialise in throat and ear surgery in Nottingham and founded this [the old] hospital (in Peachey Terrace) in 1887."

The investments of the old hospital, after the deduction of the sum of £1,500, were transferred to the trustees of the general hospital, on the terms that they

- E were to be held and administered as a capital fund separate from the general funds of the general hospital and were to be applied to the general purposes of the ear, nose and throat department of the general hospital. By conveyances, dated Feb. 18, 1948, the other properties of the old hospital, viz., the hospital premises and the premises adjacent thereto, were conveyed to the trustees of the general hospital on trust for sale and to hold the proceeds of sale and the
- F rents and profits until sale, not for the benefit of the general hospital, but on special trusts which were set out in deeds of the same date. By these deeds the trustees declared that they would stand possessed of the money arising under the trust for sale

- G "... to the intent that the same should be administered as a capital fund separate from the general funds of the general hospital . . ."
- and also that they held

"... the rents and profits of the said property until sale upon trust to apply the same as income for the general purposes of the ear, throat and nose wing of the general hospital in such manner as the trustees should think most beneficial for promoting the objects of the said wing."

- H The old hospital and the adjacent premises are now let and are income-producing investments. From July 5, 1948, the general hospital has been administered by the first defendants, the Nottingham Area No. 1 Hospital Management Committee. I am not otherwise concerned, in this case, with the provisions of the National Health Service Act, 1946.

On July 11, 1945, the testator, Herbert Hutchinson, who was a retired solicitor living in the city of Nottingham, made his will. After giving a number

of legacies to private individuals, by cl. 4 of his will he made large charitable bequests, amounting in all to £22,000, to some six charitable institutions or purposes. By cl. 5, he dealt with his residuary real and personal estate, which he gave to his trustees on trust for sale and conversion, and, after giving the usual administrative directions, he directed that they should

“ . . . stand possessed of the residue of such proceeds and of my ready money in trust for the Nottingham General Hospital the Nottingham Childrens Hospital the Nottingham Hospital for Women, the Nottingham and Nottinghamshire Hospital for Diseases of the Throat Ear and Nose of 63 Goldsmith Street Nottingham, and the Nottingham and Midland Eye Infirmary in equal shares absolutely.”

He then went on to say:

“ And I declare that the receipts of the respective treasurers or secretaries for the time being of the said hospitals and infirmary shall be effectual discharges to my trustees for the said shares of residue respectively.”

The will was made while the old hospital was in existence. The testator died on Feb. 14, 1952, and the will was duly proved on Apr. 2, 1952. The residue amounted to about £20,000.

The question which I have to determine is whether the gift to the old hospital takes effect in favour of the first defendants, whether it has failed and there is a lapse, or whether the share given to the old hospital is applicable cy-près. Counsel for the first defendants submitted that there was an amalgamation or consolidation of the old hospital with the wing of the general hospital. He pointed out that a charity, once constituted, could not die (unless its funds became exhausted), but must continue, and he referred me to *Re Faraker* (1). He contended that the gift to the old hospital was not merely for the charitable work carried on at the particular premises at 63 Goldsmith Street, Nottingham, but was for the work of the charity constituted in 1887 generally, and that that work was now represented by the work of the general hospital. He also relied on *Re Lucas* (2) and the decision of CHITTY, J., in *Re Joy* (3), where there were legacies to two societies which had been amalgamated and it was held that the amalgamated society took both legacies. In this connection, I was also referred by counsel for the Attorney-General to *Re Withall* (4). Counsel for the first defendants put his case in an alternative way. He said that the gift in question was really for the work carried on by the general hospital, and he relied on *Re Morgan's Will Trusts* (5), *Re Glass* (6) and *Re Meyers* (7). With regard to this alternative submission, it is to be observed that the cases to which he has referred are decisions on the effect of the National Health Service Act, 1946. In each of those cases it was contended that, because there had been a vesting of the hospital property in the Minister, the testator's gift to the hospital failed, but it was held that that was not so. The gifts were intended for the work carried on at the particular hospital, and it was fundamental to the decision of ROXBURGH, J., in *Re Morgan's Will Trusts* (5) that there had to be evidence that the work was being carried on on the same premises. Accordingly, it does not seem to me right to rely on the analogy of those cases, which were decisions directed to a different point.

On the other hand, counsel for the persons interested on an intestacy contended that, on the true construction of the testator's will, there was a gift for the particular purposes of a particular institution, and that, if the institution had become extinct during the lifetime of the testator, the gift must lapse. In support of his contention, he relied on *Re Rymer* (8), and, in particular, on the judgment of LINDLEY, L.J., where he said ([1895] 1 Ch. 35):

“ But when once you arrive at the conclusion that a gift to a particular seminary or institution, or whatever you may call it, is ‘ for the purposes

thereof', and for no other purpose—if you once get to that, and it is proved that that institution or seminary, or whatever it is, has ceased to exist in the lifetime of the testator, you are driven to arrive at the conclusion that there is a lapse, and then the doctrine of *cy-près* is inapplicable."

Secondly, counsel for those interested on an intestacy submitted that there was no amalgamation or consolidation of the old hospital with the wing of the general hospital, because no scheme had been approved by the court or by the Charity Commissioners. The facts, he said, showed that the work of the old hospital could no longer be carried on, not so much because of financial stringency, but because of difficulties with the staff, e.g., in finding honorary surgeons, and difficulties over the accommodation, which was out of date, and, therefore, the work of the hospital came to an end. He contended that, as the assets of the hospital were transferred to an entirely separate institution, it could not be said that there was any amalgamation or consolidation, as there was in *Re Lucas* (2) and in the other cases which I have mentioned. He also relied on *Re Ovey* (9). In that case, the testator gave a legacy to the "Ophthalmic Hospital (near Hanover Square, London)". Some nine years before the testator made his will an ophthalmic hospital near Hanover Square was closed, its affairs were wound up, and its assets transferred to the Moorfields Hospital. It was held that the legacy lapsed and was not to be administered *cy-près*. On the other hand, it is fair to point out that the Moorfields Hospital does not appear to have been a party to that action. Although counsel for the Attorney-General in that case mentioned that it might be right to give the legacy to the Moorfields Hospital, it seems clear from the report that he based his argument on the principle of *cy-près*, and the real debate in that case was whether there was a lapse or whether there was room for the application of the *cy-près* doctrine. The point that the Moorfields Hospital might be entitled to the legacy as representing the continuance of the Hanover Square Hospital was never really argued.

In my judgment, the principle which I have to apply is clear. It is primarily a matter of construction of the will. If this gift is a gift to a particular institution carried on in a particular place and for no other purpose, then, if that institution has ceased, there is a lapse, unless, on the true construction of the will, there is some overriding charitable intention. But, if it is a gift for the general work of the charity and is to be construed as a gift in augmentation of the funds of that charity, there cannot be a lapse because the charity cannot die. That seems to me to be the effect of *Re Faraker* (1) and *Re Lucas* (2). I turn then to this will. *Re Lucas* (2) makes it plain that the mere fact that the testator has referred to the address of the old hospital is not decisive of the matter one way or the other, and *Re Meyers* (7) makes it clear that the fact that there are no longer treasurers or secretaries capable of giving receipts is, again, not decisive of the matter.

What was the intention of the testator in making these gifts and disposing of the whole of his residue between five hospitals in Nottingham, the general hospital, the children's hospital, the women's hospital, the hospital for throat, ear and nose diseases, and the eye hospital? In my judgment, he was intending to benefit not merely these particular institutions carried on at the places where they were being carried on at the time when he made his will, but the work of each charity as such. I cannot think, that, if one of them had amalgamated, in the true sense, with another, the testator would have intended his gift to fail. In my judgment, he was intending to benefit the charitable work of each of these charities in the sense of augmenting the funds of each of these charities respectively and not the particular institution carried on in certain particular premises in each case. I am guided to that conclusion by the fact that he has given the whole of his residue to these five hospitals dealing with five

branches of sickness in the city of Nottingham. I am assisted in coming to that conclusion by the observations of LORD GREENE, M.R., in *Re Lucas* (2). Once that conclusion is reached, it seems to me that the claim of the next of kin must necessarily be defeated, because, whatever may have happened to the work of the old hospital, that particular charity cannot die. If it was wrongly amalgamated with the general hospital, the Attorney-General can intervene, but, as I have found that the gift is for the charity and not for the work carried on upon particular premises, it seems to me that the authorities make it clear that there cannot be a failure of the gift, and, therefore, there cannot be a lapse. In *Re Withall* (4) there was some doubt whether a new hospital was the same institution as a hospital to which the testatrix had given the proceeds of sale of her residue or whether it was a new and different body. CLAUSON, J., held that there was a valid charitable bequest of the moneys to which the next of kin of the testatrix had no title. In the present case there may be some doubt whether there was a valid amalgamation, although I myself do not desire to cast any doubt on it, and it is not a point with which I am concerned. But, in any event, it seems to me, bearing in mind the observations of CLAUSON, J. ([1932] 2 Ch. 242), in *Re Withall* (4), that the claim of the testator's next of kin is defeated. Therefore, I propose to follow the course adopted by CLAUSON, J., and to declare that the one-fifth share of residue bequeathed to the Nottingham and Nottinghamshire Hospital for Diseases of the Throat, Ear and Nose is not undisposed of by the will, but is to be held as part of the assets of that hospital.

Order accordingly.

Solicitors: *Loxley & Preston*, agents for *Clifton, Woodward & Smith*, Nottingham (for the plaintiffs and the second and third defendants); *Peacock & Goddard*, agents for *Acton, Simpson & Hanson*, Nottingham (for the first defendants); *Treasury Solicitor*.

[Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.]

R. v. GOVERNOR OF BEDFORD PRISON AND OTHERS.

Ex parte AMES.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Byrne and Parker, JJ.), March 30, 1953.]

Justices—Husband and wife—Maintenance order—Arrears—Examination of husband as to means—Committal order suspended on condition that current payments made, with further payments on account of arrears—Failure to comply with terms of suspension—Issue of warrant of commitment—No further inquiry as to husband's failure to pay—Money Payments (Justices Procedure) Act, 1935 (c. 46), s. 8 (1) (a).

On Mar. 5, 1952, the husband was in arrears under a maintenance order in the sum of £103 4s. 6d., and justices, having examined him as to his means, made a committal order against him, but suspended it so long as he paid the amounts due under the maintenance order, namely, £1 per week, and 2s. 6d. per week off the arrears. Between Mar. 5, 1952, and Feb. 11, 1953, the husband made payments totalling £39 1s. 6d. On Feb. 11, 1953, the justices found the arrears then due to be £113 3s., arriving at that figure by adding to the £103 4s. 6d. the sum of £49 (due under the maintenance order of £1 per week from Mar. 5, 1952 to Feb. 11, 1953) and then deducting the payments of £39 1s. 6d., and, on the wife's application and without examining the husband a second time, they removed the suspension of the committal order and issued a warrant for commitment in the sum of £126 13s. 8d., being the sum of £113 3s. with £13 10s. 8d.

costs, and the husband was arrested and imprisoned. On a motion by the husband for a writ of habeas corpus,

HELD: (i) the husband having been examined personally as to his means on Mar. 5, 1952, and having failed to comply with the terms on which the issue of the warrant had been suspended, there was, on Feb. 11, 1953, no need, under s. 8 (1) (a) of the Money Payments (Justices Procedure) Act, 1935, for the justices further to make inquiry whether his failure to pay the sums owing was due either to his wilful refusal or to his culpable neglect, and so the warrant for commitment could properly issue, but

(ii) the husband should not have been committed for non-payment of a sum including the £49 due under the maintenance order, and, therefore, the warrant had been issued for a wrong amount and a writ must issue.

R. v. Miskin Lower JJ. Ex p. Young (ante, p. 495), applied.

EDITORIAL NOTE. The Money Payments (Justices Procedure) Act, 1935, contains provisions relating to the enforcement of orders which are enforceable as affiliation orders. By the Summary Jurisdiction (Married Women) Act, 1895, s. 9, a maintenance order is an order which is so enforceable, and, therefore, s. 8 (1) (a) becomes applicable in the present case.

FOR THE MONEY PAYMENTS (JUSTICES PROCEDURE) ACT, 1935, s. 8 and s. 11, see HALSBURY'S STATUTES, Second Edn., Vol. 14, pp. 985, 986.

Case referred to:

(1) *R. v. Miskin Lower JJ. Ex p. Young*, [1953] 1 All E.R. 495.

MOTION for a writ of habeas corpus.

At a court of summary jurisdiction sitting at Swansea on Dec. 15, 1948, the husband was ordered to pay £1 a week for the maintenance of the wife. On Nov. 28, 1951, the wife issued a summons for arrears against the husband. On Mar. 5, 1952, the husband appeared before the justices and was examined as to his means. At that date the arrears due under the order were £103 4s. 6d., and the justices made an order committing the husband to prison for three months, the order to be suspended so long as he paid the amount of the order of Dec. 15, 1948, namely, £1 per week, and 2s. 6d. per week off the arrears. Between Mar. 5, 1952, and Feb. 11, 1953, the husband made thirty-three payments totalling £39 1s. 6d. On Feb. 11, 1953, the wife applied to the justices for the removal of the suspension of the committal order, and the justices, being of the opinion that it was not necessary a second time to examine the husband as to his means, granted the application, and the husband was committed to Bedford Prison. The justices found the arrears then due to be £113 3s., being £103 4s. 6d. due at Mar. 5, 1952, plus £49 due under the original maintenance order between Mar. 5, 1952, and Feb. 11, 1953, less £39 1s. 6d. paid between those dates. The warrant for commitment included court and other costs, namely, £13 10s. 8d., making a total sum due of £126 13s. 8d. The husband now applied for a writ of habeas corpus.

T. H. K. Berry for the husband.

Sheen for the wife.

R. J. Parker for the governor of Bedford Prison.

F. E. Jones for the justices.

LORD GODDARD, C.J.: In this case, on not very full information as to the facts, the court gave leave to move for a writ of habeas corpus. The application was by the husband who had been committed to prison by the Swansea justices for his default in making payments under a maintenance order. The circumstances seem to show that on Mar. 5, 1952, the justices, who had the husband before them, made an order that he was to pay the arrears, which at that time were £103 4s. 6d., and they suspended the operation of the committal order which they then ordered, provided that he paid the

£1 a week under the original maintenance order and 2s. 6d. a week off the arrears. Between Mar. 5, 1952, and Feb. 11, 1953, he made payments totalling in all £39 1s. 6d., and those payments, in accordance with the decision of this court in *R. v. Miskin Lower JJ. Ex p. Young* (1), must go in the first instance, unless they are appropriated otherwise, to the payment of the arrears. As, on Feb. 11, 1953, the husband was in default in making further payments, an application was made to the justices for the removal of the suspension of the committal order, and the justices removed the suspension. The warrant was, accordingly, placed in the hands of the police for execution, and he was taken in execution and lodged in Bedford gaol.

The point that was made on his behalf was that his committal was irregular because by s. 8 (1) (a) of the Money Payments (Justices Procedure) Act, 1935, it is provided that on an application to commit an inquiry must be made in the defendant's presence as to whether his failure to pay the sum due was owing either to his wilful refusal or to his culpable neglect, and, counsel says, on Feb. 11, 1953, no such inquiry was held. The court, however, thinks that the justices had power to issue the warrant on Feb. 11, 1953, because the husband had not complied with the terms on which the issue of the warrant had been suspended. He had been examined by the justices on Mar. 5, 1952, and the examination had taken place in his presence. The justices ordered that he should be committed to prison for three months, the order to be suspended as long as he paid the sum of £1 2s. 6d. a week, namely, £1 under the original order and 2s. 6d. off the arrears. He failed to pay that sum, and, therefore, there was no reason why the warrant should not issue and he should not be lodged in prison.

The difficulty is that the warrant was for a wrong amount. The amount which was found due on Feb. 11, 1953, was £113 3s. with £13 10s. 8d. which was owing for costs, so that together there was found due £126 13s. 8d., but the justices ought not to have included £49 which was owing, not for arrears, but under the original maintenance order. This makes a total sum due of £77 13s. 8d., and, as the governor of the prison was ordered to hold this man for three months unless he earlier paid the sum of £126 13s. 8d., it follows, I regret to say, that the warrant is bad and we must discharge it.

BYRNE, J.: I agree.

PARKER, J.: I also agree.

Writ issued.

Solicitors: *Field, Roscoe & Co.*, agents for *C. C. Bell & Son*, Bedford (for the husband); *John T. Lewis & Woods*, agents for *W. G. Christians & Sons*, Swansea (for the wife); *Treasury Solicitor* (for the governor of Bedford Prison); *T. D. Jones & Co.*, agents for *Edward Harris & Son*, Swansea (for the justices).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

**Re LEWIS'S DECLARATION OF TRUST. LEWIS v. LEWIS.
LEWIS v. RYDER.**

[CHANCERY DIVISION (Harman, J.), March 4, 5, 6, 9, 10, 11, 12, 13, 16, 17, 25, 1953.]

Slander of Title—No proof of malice or damage—Power of court to declare right to title—R.S.C., Ord. 25, r. 5.

A *Intestacy—Right asserted on behalf of intestate's estate—No letters of administration yet granted—Action disputing right—Competency.*

The defendant represented to companies in which the plaintiff held investments that the said investments belonged to the estate of his (the defendant's) sister, in which estate he (the defendant) was beneficially interested and of which he was entitled to letters of administration. The plaintiff sought an injunction to restrain the defendant from representing that he had any interest or claim to the said investments, and a declaration that he had no interest therein. No damage was alleged in the statement of claim, and the court found that the defendant's representations had not been made maliciously. The defendant pleaded, *inter alia*, that the action was premature as no letters of administration to his sister's estate had been granted before the date of the writ.

HELD: (i) the defendant had set up a claim alleged to be wrongful, and, therefore, the plaintiff was entitled to bring an action against him to test that claim notwithstanding that letters of administration had not been granted.

(ii) although the gist of the action was for slander of title which would not lie without proof of malice and damage, the plaintiff was, nevertheless, entitled to judgment in the form of a declaration that as personal representative of his sister the defendant had no interest in the said investments.

Guaranty Trust Co. of New York v. Hannay & Co. ([1915] 2 K.B. 536), applied.

E AS TO DECLARATORY JUDGMENTS, see HALSBURY, Hailsham Edn., Vol. 19, pp. 212-217, paras. 511-514; and FOR CASES, see DIGEST, Replacement Vol. 30, pp. 168-171, 172-175, Nos. 192-219, 228-241.

Cases referred to:

(1) *Ingall v. Moran*, [1944] 1 All E.R. 97; [1944] K.B. 160; 113 L.J.K.B. 298; 170 L.T. 57; 2nd Digest Supp.

F (2) *Balden v. Shorter*, [1933] Ch. 427; 102 L.J.Ch. 191; 148 L.T. 471; Digest Supp.

(3) *London Ferro-Concrete Co., Ltd. v. Justicz*, (1951), 68 R.P.C. 65; *affd.* C.A., 68 R.P.C. 261; 2nd Digest Supp.

(4) *Guaranty Trust Co. of New York v. Hannay & Co.*, [1915] 2 K.B. 536; 84 L.J.K.B. 1465; 113 L.T. 98; 30 Digest, Replacement, 174, 239.

G ACTION for (i) an injunction restraining the defendant, Napoleon Ryder, from representing to the Woolwich Equitable Building Society or any other company, society, or authority in or from which the plaintiff, Diana Myrna Spencer Lewis, held shares or other interests or investments that the defendant had any interest in or claim thereto; (ii) a declaration that the defendant had no interest in any such shares, interests or investments; and (iii) damages.

H By her statement of claim, the plaintiff alleged that she was the owner of shares in the Woolwich Equitable Building Society and of a deposit of £99 17s. 6d. with the said society, and that on or about June 1, 1951, the defendant fraudulently asserted a claim to the said shares and deposit and had refused to withdraw his claim. It was further alleged that since the issue of the writ the defendant had fraudulently asserted a claim to other investments belonging to the plaintiff. The claims were alleged to be fraudulent in that the

defendant knew that they were untrue or put them forward not caring whether they were true or false, and the plaintiff said that, by reason of the said claims, she was unable to deal with the investments. The statement of claim made no allegation of damage. In his defence, the defendant denied that his claims were fraudulent, and said that they were asserted on behalf of the estate of his sister, Rozia Liebeskind, who was believed to have died intestate in Poland as a victim of persecution between 1939 and 1947. He made no claim to the investments other than through the estate of his said sister. He alleged that the investments represented part of £12,000 entrusted to the plaintiff's mother by the defendant's said sister and invested in the name of the plaintiff by her mother. A

The action was consolidated with an action, relating inter alia to the said investments, by the plaintiff against her mother, Dorothy Spencer Lewis. The latter action does not call for a report.

J. G. Strangman, Q.C., and R. O. Wilberforce for the plaintiff. B

Edwards, Q.C., and J. G. Monroe for the defendant, Napoleon Ryder.

H. Edmund Davies, Q.C., and F. E. Skone James for the defendant, Dorothy Spencer Lewis.

Cur. adv. vult.

Mar. 25. **HARMAN, J.**, read a judgment relating to both actions. His LORDSHIP stated the facts, and gave his decision in the plaintiff's action against Dorothy Spencer Lewis. Having referred to the pleadings in the action against Napoleon Ryder, he continued: It follows from what I have said that the defendant is mistaken in supposing that his sister's money was invested in these securities and that his assertions are unjustified, and the issue is whether they were honestly made or were part of a conspiracy between himself and the plaintiff's mother to deprive the plaintiff of her property. C D

The defendant Ryder is a Polish Jew, born in Galicia, and educated in Vienna. He lived until 1938 on the continent, either in Rumania or in Brussels, and though he has been in this country since shortly before the war and was naturalised in 1947, he remains very much a foreigner. He is obviously an impulsive and emotional person, and has espoused Mrs. Lewis's cause wholeheartedly, and immoderately. He regards her for some reason as an ill-used person, oppressed by her daughters and morally entitled to that which they are now claiming. So much has he thrown in his lot with Mrs. Lewis that he allowed himself to be made her catspaw in an attempt to eject the plaintiff forcibly from her own property in May, 1951. For that piece of folly he has paid a heavy price in damages. It has not deterred him; apparently, from his advocacy of Mrs. Lewis's wrongs, and he has been willing to make common cause with her in at least one other transaction, namely, Mrs. Lewis's second daughter's property, "Shalimar", about which I will say no more than that one cannot be surprised that he is regarded with hostility by the plaintiff and her sister Maritta. In my judgment, however, they were entirely unjustified in concluding from the fact that they never met him before 1950 that he had not known their mother for many years before. I do not doubt that he believed in the Liebeskind story, and was justified in believing it up to the time when the money reached this country. He had no reason to doubt Mrs. Lewis's word in September, 1938, and from then onwards regarded her as, in effect, his debtor if his sister should fail, as she did, to emerge from the ghetto of Krakau. E F G H

His position was, however, a delicate one. He had no right to question Mrs. Lewis's transactions. He said that she did from time to time tell him that she was investing the money, and even gave him the numbers of the investments. This I take leave to doubt, though I accept his statement that it was not until comparatively recently that he knew that his sister's money was said to be entirely invested in the children's names. [His LORDSHIP referred

to part of the defendant's evidence which he was unable to accept, and continued:] Must I, then, reject the whole of his evidence and find that he has never had any belief in the claims that he has made? I do not think so. I see no reason to suppose that he did not accept Mrs. Lewis's story. It may be that his acceptance was careless and was due to the fact that he was an advocate of the lady against her daughters, but that he acted in an ill-considered and foolish way does not make his act fraudulent. Recklessness, as used when applied to fraud, is never the same as carelessness.

By way of additional defence it is pleaded that at the date when the writ was issued there was no personal representative of Mrs. Rozia Liebeskind in existence and that the action was, therefore, premature. During the course of the action Mr. Ryder did obtain a grant of letters of administration to his sister's, Mrs. Liebeskind's, estate, but I was asked to hold that the doctrine of relation back did not apply to administrators, and that the plaintiff's proper course was to have waited for a grant to be made. I cannot accept this plea. It is, of course, the law, as pointed out, for instance, in *Ingall v. Moran* (1), that a plaintiff cannot maintain an action as personal representative when it appears that no letters of administration had issued before the writ, but it does not, in my judgment, follow that a defendant who asserts a right as next of kin of a deceased person and as being the person entitled to a grant cannot be sued if he sets up a wrongful claim. To admit this would be to allow a defendant to take advantage of his own procrastination, which he might continue indefinitely, for the plaintiff could have no title herself to obtain a grant or the appointment of a receiver.

There remains a point of some difficulty not alluded to in the defence, but open to the defendant, namely, that an action such as this is in effect a claim of slander of title, and that the gist of that action is that the defendant should have made his claim maliciously and have thereby caused special damage to the plaintiff. The modern authority for this proposition is a case before MAUGHAM, J., as a judge of first instance, the case of *Balden v. Shorter* (2). There the headnote is:

"An action for injurious falsehood does not lie without proof of actual malice in the sense of a wrongful intention to injure the plaintiff. A statement false in fact, and detrimental to the plaintiff's business though not defamatory, will therefore not support such an action if it was made in the belief, even a careless belief, that it was true, and without any indirect motive of hostility to the plaintiff."

MAUGHAM, J., said ([1933] Ch. 429):

"If I could properly conclude that the story told in the witness box by Mr. Bensted was untrue and that he knew that the plaintiff was not employed by the defendants, I should have little difficulty in determining the action in the plaintiff's favour because, if Mr. Bensted said that knowing it to be untrue, I should draw the inference that he did it from a dishonest motive and maliciously. But I cannot come to that conclusion. I think that he made a careless mistake, and that it was likely that he had originally heard that the plaintiff was contemplating taking new employment but had not heard that he had definitely obtained it and had concluded that, having been one of the company's most important travellers, he had been employed by the defendants. I am not prepared to conclude that Mr. Bensted was telling a lie when he said in the witness box that he had made a mistake in thinking that the plaintiff was employed by the defendants. He did make the statements alleged but made them, at the worst, carelessly; and the only question to be determined is whether that amounts to malice. The meaning of 'malice' in connection with injurious falsehood is dealt with in SALMOND ON TORTS . . . ' . . . Notwithstanding LORD DAVEY's dictum, it is now apparently settled

that malice in the law of slander of title and other forms of injurious falsehood means some dishonest or otherwise improper motive. A bona fide assertion of title, however mistaken, if made for the protection of one's own interest or for some other proper purpose, is not malicious'."

On that ground the action failed. This case has lately been followed by VAISEY, J., in *London Ferro-Concrete Co., Ltd. v. Justicz* (3). In both those cases, however, the claim was for an injunction and damages. The defence was that the defendant had made his assertions in good faith, i.e., without malice, and that the action would not lie. And it was so held in the earlier case. In the latter the plaintiff proved both malice and special damage and, therefore, succeeded. In neither case was the truth of the allegation maintained at the hearing.

Here I have negatived malice, which is tantamount to the fraud alleged in the statement of claim, and it is urged on me that the action will not lie. That, I think, is right in so far as it is an action for damages for slander. In the present case, however, the defendant never withdrew his wrongful claim. He maintains it still, and if I dismiss the action against him he will, I suppose, continue to do so, with the result that the plaintiff will not be able, at any rate without giving an indemnity, to make herself mistress of what I have held to be her own property. Is she, then, to be put to the cost of starting a new action, to be met, perhaps, with the same defence? I think not. The answer appears to me to lie in the provisions of R.S.C., Ord. 25, r. 5, which enable a declaratory judgment to be pronounced. It is in these words:

"No action or proceeding shall be open to objection, on the ground that a merely declaratory judgment or order is sought thereby, and the court may make binding declarations of right whether any consequential relief is or could be claimed, or not."

This is so, as the Court of Appeal held in *Guaranty Trust Co. of New York v. Hannay & Co.* (4), even in a case where, apart from the rule, there would be no cause of action in the plaintiff. I read from the headnote, where it is reported that PICKFORD and BANKES, L.JJ., held that:

"... the court has power to make a declaration at the instance of a plaintiff though he has no cause of action against the defendant; and that the rule so construed is merely an extension of the practice and procedure of the court, and is not *ultra vires*."

This is based on a passage to be found in the judgment of PICKFORD, L.J. ([1915] 2 K.B. 561, 562).

Accordingly, I conceive myself entitled, with a view to quieting the plaintiff's title, and to prevent further mischief, to pronounce a judgment against the defendant Ryder, limited in form to a declaration that as personal representative of his sister he has no right, title or interest in the building society shares and in the savings certificates in the plaintiff's name. This relief was not specifically claimed in the writ, but, in my judgment, that does not preclude me from awarding it under the claim to further or other relief.

Judgment for the plaintiff.

Solicitors: *Hardman, Phillips & Mann* (for the plaintiff); *M. Landy* (for the defendant, Napoleon Ryder); *B. L. Elman* (for the defendant, Dorothy Spencer Lewis).

[Reported by R. D. H. OSBORNE, Esq., Barrister-at-Law.]

NORTH CENTRAL WAGON & FINANCE CO., LTD. v.
FIFIELD (INSPECTOR OF TAXES).

[COURT OF APPEAL (Singleton, Jenkins and Hodson, L.JJ.), March 17, 18, 1953.]

*Income Tax—Profits—Profits from letting machinery and plant—Railway wagons—Charge under Case I, not Case VI, of sched. D—Finance Act, 1936 (c. 34), s. 22 (2).**

A The taxpayers' trade consisted mainly of letting railway wagons, road transport vehicles, and various kinds of plant and machinery on hire and on hire-purchase. On Jan. 1, 1948, the whole of the ten thousand railway wagons, which they had used for letting on simple hire, vested in the Transport Commission under the Transport Act, 1947, and that trading activity ceased. It was found as a fact by appeal commissions that the letting of wagons on simple hire did not constitute a separate trade.

B HELD: the provision in s. 22 (2) of the Finance Act, 1936, that profits arising " . . . from the letting of any machinery the value of which is not taken into account for the purpose of assessment to income tax under sched. A shall be deemed to be profits chargeable to income tax under Case VI of sched. D " applied only to non-rateable plant and machinery the value of which was required not to be taken into account in ascertaining the annual value of property under s. 22 (1) and not to all non-rateable plant and machinery, and, therefore, the letting of the railway wagons on simple hire did not fall to be assessed as a separate trade under Case VI of sched. D, and to be treated as having been discontinued on Jan. 1, 1948.

C FOR THE FINANCE ACT, 1936, s. 22 (2), see HALSBURY'S STATUTES, Second Edn., Vol. 12, p. 364.

D Cases referred to:

(1) *Shaw v. Great Western Ry. Co.*, [1894] 1 Q.B. 373; 70 L.T. 218; 58 J.P. 318; 8 Digest 53, 351.

(2) *Crawford v. Hudson (R. S.), Ltd.*, (1935), 19 Tax Cas. 434; Digest Supp.

E APPEAL from an order of HARMAN, J., dated Oct. 8, 1952, dismissing an appeal by the taxpayers from a decision of the General Commissioners of Income Tax for the Upper Strathforth and Tickhill division in the county of York confirming assessments made on the taxpayers to income tax for the years 1947-48 and 1948-49.

F The taxpayers were a limited company whose objects were to carry on a number of trades or businesses including " purchasing, taking on lease or licence, hiring or otherwise acquiring (a) wagons, carriages, locomotives, engines and vehicles of all kinds " and " to sell, let on hire, lease or licence . . . supply and deal with all or any of the things hereinbefore specified." Their business consisted mainly in acquiring railway wagons and road transport vehicles and various kinds of plant and machinery and letting them on hire-purchase or on simple hire. They had upwards of ten thousand railway wagons which were being used for simple hire immediately before Jan. 1, 1948, when all those wagons became vested in the Transport Commission by virtue of the Transport Act, 1947, and after that date the taxpayers did not let railway wagons or any other type of property on simple hire.

G The taxpayers contended before the commissioners that they had carried on two trades and that one of these was discontinued on Jan. 1, 1948, as a result of the operation of the Transport Act, 1947, and that it was wrong to bring into the computation of the taxpayers' profits for three months of 1947-48 and for 1948-49 the profits of the discontinued trade. The commissioners found as a fact that there was only one trade. On appeal, the taxpayers took the further point that by virtue of s. 22 (2) of the Finance Act, 1936, the profits arising from the trade of letting plant and machinery, including

* See now the Income Tax Act, 1952 (c. 10), s. 474 (2).

railway wagons, were taxable under Case VI of sched. D instead of as profits of a trade under Case I, and that their notional trade in respect of the letting out of wagons recognised by s. 20 (2) of the Income Tax Act, 1945 (a trade separate from any other trade assessable under Case I of sched. D) came to an end on Jan. 1, 1948, and there was a permanent discontinuance of such notional trade under the Income Tax Acts. HARMAN, J., dismissed the appeal, and the taxpayers appealed to the Court of Appeal.

Cyril King, Q.C., Senter, and A. P. L. Barber for the taxpayers.
Millard Tucker, Q.C., and Sir Reginald Hills for the Crown.

SINGLETON, L.J.: I will ask JENKINS, L.J., to give the first judgment.

JENKINS, L.J., stated the facts, said that whether there were two businesses or only one was a question of fact, held that there was evidence on which the commissioners could find that there was one business, and continued: After the hearing before the commissioners, the taxpayers gave notice to the Solicitor of Inland Revenue of their intention to raise a new point before the judge. The nature of the new point was set out in a notice in these terms:

"Pray take notice that at the hearing of this appeal a new point, not before the appeal commissioners, will be raised by counsel for the [taxpayers], namely, that under s. 22 (2) of the Finance Act, 1936, the profits of the [taxpayers] from the letting of [their] hired wagons fell to be assessed under Case VI of sched. D to the Income Tax Act, 1918; that s. 20 and s. 22 of the Income Tax Act, 1945, constitute statutory recognition of that position; that the notional trade of the [taxpayers] in respect of the letting out of wagons recognised by s. 20 (2) of the Income Tax Act, 1945 (viz., a trade separate from any other trade carried on by [them], the profits and gains of which were properly assessable under Case I of sched. D to the Income Tax Act, 1918) came to an end on Jan. 1, 1948, and that there was a permanent discontinuance of such notional trade of wagon letting within the meaning of the Income Tax Acts on that date, and that, accordingly, the decision of the appeal commissioners that the [taxpayers'] wagon letting did not constitute a separate trade within the meaning of the Income Tax Acts and was not permanently discontinued within such meaning on such date is wrong and cannot be sustained."

The main argument of counsel for the taxpayers, if I understood him correctly, was that, on its true construction, s. 22 (2) of the Finance Act, 1936, had the effect of making the business of letting plant and machinery of all kinds, including such things as railway wagons, a source of profit taxable, no longer as trade in the ordinary way under Case I of sched. D, but under Case VI of sched. D as a source of profit not chargeable to tax under any other schedule. He claimed that his contention to that effect was reinforced by the sections of the Act of 1945 referred to in the notice I have just read. In effect, he said that, once he could get hire received by means of the simple letting of railway wagons out of sched. D, Case I, and into Case VI, he reached by another road the same result as if he had succeeded in making good that two separate businesses were carried on by the taxpayers, for on this view of the case the wagons would have been recognised by the relevant taxing enactment as a separate source of revenue, and, that separate source of revenue having gone, it would follow that in the years under appeal there was no income from it which could properly be made the subject of tax.

To appreciate the nature of the argument under s. 22 (2) of the Act of 1936, it is necessary to consider the circumstances in which that enactment was passed. Counsel for the taxpayers has warned us against straying from the narrow path of construction into the morass of speculation concerning the

A was made and to deduce from that consideration the defect or omission in the existing law which it was designed to correct. That is surely a legitimate aid to construction, as was recognised in *Shaw v. Great Western Ry. Co.* (1): see the observations of WRIGHT, J. ([1894] 1 Q.B. 382, 383).

B Down to 1936, when s. 22 (2) of the Finance Act, 1936, came into operation, the annual value of lands, tenements, hereditaments and heritages for the purposes of tax under sched. A was ascertained on the basis of the notional rent which a hypothetical tenant would be prepared to pay for them. In estimating that rent, all things attached to the hereditament, such as fixed plant and machinery, were taken into account. An actual tenant paying rent for the hereditament was entitled to deduct from it the tax, for which he was liable in the first instance, up to the amount of the tax assessed on the hereditament, or the amount representing tax at the appropriate rate on the rent payable by him, whichever was the less. Until 1925, when the Rating and Valuation Act, 1925, came into force, the valuation for rating purposes pursued the same course, and fixed plant and machinery was taken into account for the purposes of arriving at rateable value just as it was for the purposes of the sched. A assessment. By the Rating and Valuation Act, 1925, s. 24 (1), as now amended D by the Local Government Act, 1948, s. 70 and sched. I:

E “For the purpose of the making or revision of valuation lists . . . the following provisions shall have effect with respect to the valuation of any hereditament other than a hereditament the value of which is ascertained by reference to the accounts, receipts or profits of the undertaking carried on therein:—(a) All such plant or machinery in or on the hereditament as belongs to any of the classes specified in sched. III to this Act shall be deemed to be a part of the hereditament; (b) Subject as aforesaid, no account shall be taken of the value of any plant or machinery in or on the hereditament.”

F Schedule III to the Act was later replaced by the Plant and Machinery (Valuation for Rating) Order, 1927 (S.R. & O., 1927, No. 480). The effect of s. 24 (1) in conjunction with sched. III, and subsequently in conjunction with the order of 1927, was to divide fixed plant and machinery into two classes, of which one (comprising inter alia plant used for the provision of power) was to be included in the valuation as forming part of the hereditament, while the other (comprising inter alia machinery used for manufacturing purposes) was G to be excluded from the valuation. That enactment produced a serious discrepancy between the sched. A annual value ascertained in the way I have indicated, and the rateable value ascertained as prescribed by s. 24 (1) of the Act of 1925. This discrepancy occasioned much inconvenience and difficulty, for the practice had been for the sched. A assessments to follow the rateable value. Attention was called to that difficulty in *Crawford v. R.S. Hudson, Ltd.* (2). H Those were the circumstances in which s. 22 of the Finance Act, 1936, was enacted. It provides:

“(1) No account shall be taken of the value of non-rateable machinery in ascertaining the annual value—(a) of any property in Great Britain according to the general rule of No. 1 of sched. A; or (b) of any property whatsoever for the purpose of r. 5 of the Rules Applicable to Cases I and II of sched. D, or for the purpose of s. 18 of the Finance Act, 1919. (2) The

profits arising to any person from the letting of any machinery the value of which is not taken into account for the purpose of assessment to income tax under sched. A shall be deemed to be profits chargeable to income tax under Case VI of sched. D. (3) In this section—(a) the expression ‘property’ means lands, tenements, hereditaments and heritages; (b) the expression ‘machinery’ includes plant, machines, tools and appliances; (c) the expression ‘non-rateable machinery’, in relation to any property, means machinery of any description the value whereof is not taken into account for the purposes of rating under the relevant rating enactment, or would not be so taken into account if that enactment had effect with respect to the valuation of the property; (d) the expression ‘relevant rating enactment’ means—(i) in relation to property in England or outside the United Kingdom, s. 24 (1) (b) of the Rating and Valuation Act, 1925 . . .”

Considering the section as a whole, and considering it in the light of the contemporary state of the law, it seems reasonably plain that the intention underlying the section was to assimilate the method of ascertaining the annual value of a hereditament for the purposes of sched. A to the method introduced for rating purposes by s. 24 (1) of the Act of 1925 by excluding non-rateable machinery from the valuation, and to provide consequentially under Case VI of sched. D for the taxation of the profits arising from the letting of non-rateable machinery, which, *ex hypothesi*, would no longer be included in, or be reflected by, the annual value on which the sched. A tax was assessed.

I think that counsel for the taxpayers would so far find nothing in what I have said from which he would dissent, and would agree that that is the primary purpose of the section, but he says that does not harm his case, which depends on the natural meaning of sub-s. (2). He says that, whatever the object in view when the change in the law was made, s. 22 (2), according to the natural and ordinary meaning of the language used, has the effect of making the letting of machinery of all kinds, including loose chattels such as railway wagons, a subject of assessment under Case VI of sched. D and no longer assessable under Case I of that schedule as the profits of a trade. The effect of so construing s. 22 (2) would be far-reaching. In every case in which any trader, as part of his trading activities, hired out plant or machinery to other persons, his hiring operations would be excluded from his trade in the income tax sense and taxed specially as a separate source of income under Case VI of sched. D. It is difficult to foresee the whole extent of the consequences of this interpretation, but they would plainly be revolutionary. The words on which counsel for the taxpayers relies are “from the letting of any machinery”. He says that there is no ground for limiting them to non-rateable machinery, since they are apt to include machinery of all kinds and should be so construed. The words “the value of which is not taken into account”, he says, exactly fit his case, for such things as railway wagons are not taken into account for the purposes of assessment to income tax under sched. A. He further relies on the change of language and points out that, whereas sub-s. (1) speaks of “non-rateable machinery”, sub-s. (2) substitutes the expression

“the value of which is not taken into account for the purpose of assessment to income tax under sched. A.”

Putting all those considerations together, he says that sub-s. (2), taken alone and construed according to its plain terms, produces the result for which he contends, and that, if the language is apt to produce that result, then—*ruat caelum*—effect must be given to that result.

I cannot accept counsel’s argument. I think one is bound to read sub-s. (2) in its context, and, read in its context, it seems to me to be reasonably plain that the enactment is directed to sched. A assessments, and to altering the

extent to which fixed plant and machinery are to be included in sched. A assessments, or in the annual value of land, tenements and hereditaments, for income tax purposes. One gets that in clear terms from para. (a) of sub-s. (1), which refers to the sched. A ascertainment of annual value, and from para. (b) of the sub-section, which refers to the annual value of premises on which a business is carried on, which traders are entitled to exclude from their profits under Case I of sched. D. The context thus seems to me to be strongly against the taxpayers' construction. This is not the context in which one would expect to find a provision making a radical alteration in the law of the kind for which he contends.

But the matter does not rest there. It seems to me that the natural meaning of s. 22 (2), according to the language used and construing it with due regard for the context, is that it is providing for the taxing of non-rateable machinery which, owing to the alteration in the basis of the sched. A valuation, would no longer be automatically subject to tax on the annual value ascertained in accordance with sched. A. The word "letting" seems to me in this context to suggest the letting of some hereditament. That is, perhaps, a slight indication. Then there is the phrase

"any machinery the value of which is not taken into account for the purpose of assessment to income tax under sched. A."

I attach no importance to the change there from the expression "non-rateable machinery". It may be said that the two phrases are interchangeable, but the description of the machinery in sub-s. (2) as "machinery the value of which is not taken into account . . ." rather than as "non-rateable machinery" is at that point appropriate, inasmuch as sub-s. (2) makes provision for taxing the profits of letting it, and does so for the very reason that under s. 22 (1) that machinery is not taken into account for the purposes of assessment to income tax under sched. A. Further, the words "is not taken into account" in sub-s. (2) invite the reader to refer back to the words at the beginning of the section: "No account shall be taken of the value of non-rateable machinery", and so on. I think that strongly indicates that the machinery "the value of which is not taken into account" in sub-s. (2) is machinery the value of which is not taken into account by reason of the provisions of sub-s. (1).

I think another indication is to be found later in sub-s. (2). It is dealing with machinery "the value of which is not taken into account for the purpose of assessment to income tax under sched. A . . ." and goes on to say that the profits of the letting of such machinery "shall be deemed to be profits chargeable to income tax under Case VI of sched. D". But the profits derived from the letting of machinery of the various kinds which counsel for the taxpayers says are included in sub-s. (2) were, as the law stood when s. 22 was passed, the subject of assessment as profits of a trade under Case I of sched. D. So, if machinery of that kind was being referred to, it seems to me the language of sub-s. (2) would be inappropriate, for machinery of that kind was not and never had been taken into account for sched. A purposes. It had nothing whatever to do with sched. A. Profits derived from hiring it would be taxable as profits of a trade under Case I of sched. D. So the reference here, without explanation, to Case VI of sched. D is inapposite if the intention was to tax under that Case the profits of letting machinery of a kind never theretofore taxed under sched. A, and the profits of letting which were and had always been chargeable to tax under Case I of sched. D. But, if the section refers only to non-rateable machinery, all is clear. Sub-section (2) is, in effect, saying this: "As the result of the change in the law made by sub-s. (1), certain machinery will no longer be taken into account for the purposes of assessment to income tax under sched. A, and, therefore, would, but for this enactment, escape tax altogether. To prevent that result, the profits arising from the

letting of such machinery 'shall be deemed to be profits chargeable to income tax under Case VI of sched. D', that being the case which sweeps up all income not taxed under any other schedule."

For these reasons, I find myself unable to accept the argument of counsel for the taxpayers on s. 22 (2) of the Act of 1936. Indeed, it seems to me to be reasonably plain that its intention and effect are as contended for by the Crown. As regards counsel's further argument based on s. 20 and s. 22 of the Income Tax Act, 1945, I hope he will not think me disrespectful to it if I content myself with saying that, after giving the best attention to it that I could, I can find nothing in those sections to lead me to form any different opinion as regards the construction of s. 22 (2) of the Act of 1936. Accordingly, I am of opinion that the learned judge reached a right conclusion on this point also and that the appeal fails on both points and should be dismissed.

HODSON, L.J.: I agree.

SINGLETON, L.J.: I agree.

Appeal dismissed.

Solicitors: *Drury, Hopgood & Co.*, agents for *Pashley & Hodgkinson*, Rotherham (for the taxpayers); *Solicitor of Inland Revenue* (for the Crown).

[*Reported by F. A. AMIES, ESQ., Barrister-at-Law.*]

LESLIE MAURICE & CO., LTD. v. WILLESDEN CORPORATION.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Jenkins and Hodson, L.JJ.), March 26, 27, 1953.]

Housing—House unfit for human habitation—Notice to execute works—Reasonable expense—Material date for consideration of reasonableness—Housing Act, 1936 (c. 51), s. 9 (1), (3), s. 15 (1)—Middlesex County Council Act, 1944 (c. xxi), s. 260 (1), (2).

On June 27, 1952, Willesden Corporation served a notice under s. 9 (1) of the Housing Act, 1936, on the agents of the lessees of a house at Kilburn, in the county of Middlesex, requiring them under that sub-section and under s. 260 of the Middlesex County Council Act, 1944, to execute certain repairs which would, in the opinion of the authority, render the house fit for human habitation. On July 14, 1952, the agents, on behalf of the lessees, appealed against the notice to the county court under s. 15 (1) of the Housing Act, 1936, on the ground that the work ordered could not be carried out at a reasonable expense having regard, inter alia, under s. 260 (2) (a) of the local Act, to the length of the unexpired period of the lease. On Aug. 21, 1952, the lessees entered into a contract for the purchase of the freehold reversion of the house. On Oct. 28, 1952, the appeal came on for hearing in the county court and was adjourned. On Oct. 30, 1952, the sale to the lessees of the freehold reversion was completed. On Dec. 1, 1952, the county court judge concluded the hearing of the appeal and quashed the notice of June 27, 1952, treating the freeholders still as lessees and holding, inter alia, that, in view of the length of the unexpired period of the lease, the estimated expense of the repairs would not be reasonable. On appeal by the local authority,

HELD: (i) since the authority, by their notice of June 27, 1952, had relied on both s. 9 (1) of the Housing Act, 1936, and s. 260 of the Middlesex County Council Act, 1944, the "defence" under s. 260 (2) (a) of the latter Act was available for the whole of the required works, and, in spite of its reliance on both sections, the notice was not deceptive or otherwise bad as to its form.

(ii) the "defence" relied on under s. 260 (2) (a) involved a question of reasonableness which must be determined by the county court judge on the facts as he found them at the date of the hearing of the case; on Oct. 28, 1952, the lessees had become entitled to the freehold reversion, and on Dec. 1, 1952, they were the freehold owners of the property, and the length of the unexpired period of the lease was no longer a valid consideration; and, therefore, the notice of June 27, 1952, should be allowed to stand.

FOR THE HOUSING ACT, 1936, s. 9 and s. 15, see HALSBURY'S STATUTES, Second Edn., Vol. 11, pp. 457, 465.

APPEAL by Willesden Corporation against an order dated Jan. 16, 1953, made by His Honour JUDGE SIR HENRY BRAUND at Willesden County Court.

- B Leslie Maurice & Co., Ltd. (the "lessees' agents") were the managing agents for Connaught Estates, Ltd., the holders of the remainder of a ninety-nine years' lease, dated Sept. 25, 1884, of No. 39, Chaplin Road, Willesden. A notice, dated June 27, 1952, was served under the Housing Act, 1936, s. 9 (1), by the town clerk to the Willesden Corporation on the lessees' agents as "the person having control of the house" stating (i) that the corporation (acting by the council) was satisfied that the house was unfit for human habitation in certain respects; (ii) that the council was not satisfied that it was incapable at reasonable expense of being rendered fit for human habitation; (iii) that, in pursuance of s. 9 (1) of the Housing Act, 1936 and s. 260 of the Middlesex County Council Act, 1944, the council required the execution of certain works, set out in a schedule, which would, in the opinion of the council, render the house fit for human habitation. On July 14, 1952, the lessees' agents appealed to the county court under s. 15 (1) of the Act of 1936, stating, as the grounds of appeal, that the work ordered could not be carried out at a reasonable expense having regard to (a) the estimated cost of the work and the value which it was estimated the house would have when the work was completed, (b) the length of the lease, (c) the expenditure incurred in repairs during the three years preceding the date of the notice, and (d) the neglect of the tenant, and they also said that the notice was incorrect in form and that they were not the persons "having control of the house" within s. 9 (1). On Aug. 21, 1952, Connaught Estates, Ltd., entered into a contract for the purchase of the freehold reversion to the house. On Oct. 28, 1952, the appeal came before the county court judge, and evidence was given that Connaught Estates, Ltd., were negotiating for the purchase of the freehold, and that, although the contract had been signed, the date for completion was not known. The hearing was adjourned. On Oct. 30, 1952, the sale of the freehold to Connaught Estates, Ltd., was completed. On Dec. 1, 1951, the hearing of the appeal was concluded. The learned judge found that the cost of the work to be done would be £350, that this was a reasonable expense within s. 9 (3) of the Housing Act, 1936, having regard to the value of the house as a freehold, but that, considering the house to be a leasehold held under a lease with only thirty-one years to run, the sum of £350 was not a reasonable expense, and, as the notice of June 27, 1952, required the work to be done under both the Housing Act, 1936, and the private Act of 1944 without discrimination, the considerations under s. 260 (2) of the Act of 1944, which included regard being had, in the case of leasehold property, to the unexpired period of the lease, should be applied to all the required work. The learned judge, therefore, quashed the order, and the local authority appealed.

Heathcote-Williams, Q.C., and *N. R. King* for the local authority.

John Stephenson for the agents of the lessees.

SIR RAYMOND EVERSHED, M.R.: By s. 9 of the Housing Act, 1936, it is provided:

"(1) Where a local authority . . . are satisfied that any house . . .

is in any respect unfit for human habitation, they shall, unless they are satisfied that it is not capable at a reasonable expense of being rendered so fit, serve upon the person having control of the house a notice requiring him, within such reasonable time . . . as may be specified in the notice, to execute the works specified in the notice and stating that, in the opinion of the authority, those works will render the house fit for human habitation . . . (3) In determining for the purposes of this Part of this Act whether a house can be rendered fit for human habitation at a reasonable expense, regard shall be had to the estimated cost of the works necessary to render it so fit and the value which it is estimated that the house will have when the works are completed."

In the event, which is not this case, of the local authority not being satisfied that it is capable at a reasonable expense of being rendered so fit, then certain other provisions of the Act operate. The person described as "the person having control of the house" is defined by s. 9 (4) as being the person who receives the rackrent of the house, whether on his own account or as agent, or who would so receive it if the house were let at a rackrent. For the purposes of this appeal, there is no question that the agents of the lessees of the house in question satisfy the requirements of the definition and are "the person having control" of the premises in suit.

If the matter rested solely on this Act, it is, I think, clear from the terms of s. 9 (3) that the question for determination, namely, whether the house can be rendered fit for human habitation at a reasonable expense, is one which has to be determined in what has been called an objective way, that is, without regard to any particular circumstances affecting the person who is in control of the premises and the interest which he has. But the matter does not rest on that section alone, for we are concerned in this case with certain premises at No. 39, Chaplin Road, N.W.2, which are situate within the county of Middlesex, so that to them the Middlesex County Council Act, 1944, also applies. Section 260 (1) of that Act reads:

"For the purposes of Part II of the Housing Act 1936 [Part II comprehends s. 9] any dwelling-house . . . the person having control of which fails to keep such dwelling-house sufficiently repaired and painted and the interior surface of the walls thereof sufficiently papered or distempered with washable distemper of a suitable quality so as to prevent the dilapidation thereof and so as to secure reasonable amenities for the occupier or occupiers shall be deemed to be a house not in all respects fit for human habitation and the powers of the local authority under the said Part II shall apply in respect of such dwelling-house accordingly."

The effect of that sub-section appears to be that as regards a house in Middlesex, whatever otherwise might be thought to be the effect of its condition, if there has been a failure to maintain it in the way which that sub-section indicates, it is treated as a house not fit for human habitation, with the consequence, first, that the local authority is bound, if it is not satisfied that it is incapable of being rendered fit at reasonable expense, to serve a notice under s. 9 (1) of the Act of 1936, and, further, that in that notice they must state their opinion that the works which the notice specifies will render the house fit for human habitation. Section 260 (2) provides:

"On an appeal to the county court by the person having control of a dwelling-house upon whom the local authority have served notice under s. 9 of the Housing Act 1936 in consequence of his failure to comply with the provisions of this section the county court judge shall take into consideration . . ."

four items, one being the length of the unexpired portion of the lease if the person on whom the notice is served is a lessee or agent for a lessee. It will be

noticed that s. 260 does not itself give any new or distinct power to a local authority to serve a notice. Section 9 of the Act of 1936, as I follow it, works automatically, given the state of facts which is deemed to constitute a want of fitness for human habitation under s. 260 (1) of the Middlesex Act, but it must be added that, if for any reason it appears that the grounds on which the notice is served are referable to s. 260 (1) of the Middlesex Act, the county court judge, if there be an appeal to him in accordance with the provisions of s. 15 (1) of the Act of 1936, must take into consideration these other matters which are not purely objective to the premises, but relate to the particular circumstances of the lessee or other person on whom the notice is served.

In the present case the local authority served a notice on the agents of the lessees the substance of which was this:

- B "Take Notice: (i) That the corporation of Willesden (acting by the council and hereinafter referred to as 'the council') are satisfied that the above mentioned house is unfit for human habitation in certain respects; (ii) That the council are not satisfied that it is incapable at reasonable expense of being rendered fit for human habitation; (iii) That in pursuance of s. 9 (1) of the Housing Act, 1936, and s. 260 of the Middlesex County Council Act, 1944, the council require you within a period of forty-two days ending on Aug. 8, 1952, to execute the following works, which will in the opinion of the council render the house fit for human habitation, namely:—[as specified on the attached schedule]."

There then follow a number of items which may, I think, fairly be described as similar to the specified items commonly seen in a notice of dilapidations. I observe that the form of notice has paid close attention to the obligations imposed on the local authority by s. 9 of the Act of 1936. There is no power to serve notice save under s. 9, but it will be observed that in the third paragraph of the notice there is a specific reference to s. 260 of the Middlesex Act.

- E It is plain that, at any rate to a very large extent, it would be virtually impossible to sever the works called for under s. 260 of the Middlesex Act from the rest of what was required to be done. Take the example, which I mentioned during the argument, of the landing and staircase. The first paragraph is:

- F "Examine the ceiling and take down all broken or loose plaster; re-plaster to a smooth even surface; cut out and stop all cracks and prepare, line and whiten the ceiling. Strip, cleanse, stop and either re-paper or colour-wash the walls."

- G Save that some part of the work specified is in its nature decorative, what I have read seems to me to cover work which could not, or, at any rate, might not, be properly referable exclusively to s. 260, and the same is true substantially as to the whole document. In the county court, the learned judge spent some time in considering whether this notice, by failing to distinguish in the schedule that part of the work which was attributable exclusively to the Middlesex Act from the rest, was defective or deceptive or both. He found it unnecessary to express a final conclusion on that matter, because, treating himself as able and bound (and I think in this respect he was right) to take into consideration, as regards the whole of the work specified, all the matters indicated in s. 260 (2), or such of them as the agents of the lessees here relied on, he came to the conclusion that it was not reasonable to spend the money that would have to be spent in making this house fit for human habitation, and so he made an order quashing the order which the local authority had made for doing the work.

In this court, the first point taken on behalf of the local authority was, as I have followed it, that the county court judge should have limited his consideration of the matters which are mentioned in s. 260 (2) of the Middlesex Act to such of the works required to be done as were exclusively related to failure

to comply with that Act, and that the judge should have found, either on his own initiative or (I gather) on the application of the lessees' agents, which were those items. Alternatively, the local authority went the length of saying that none of the items in the schedule was shown to have been attributable to any defect arising under the Middlesex Act, and, therefore, these defences should have been wholly disregarded. I qualified my statement of the point by the words "as I have followed it", for I am exceedingly doubtful if I have. If I have failed to understand it, I concede that it is my fault, but the point, I regret to say, remains substantially incomprehensible to me. The local authority served a notice in which they called on the lessees' agents, the persons having control, to do a certain quantity of work. They required them to do that in pursuance of both the Act of 1936 and the Middlesex Act. Evidence was before the county court judge that at any rate some of what they were called on to do was in the nature of decorative repair, *prima facie* falling within the Middlesex Act. No attempt was made to challenge that evidence in cross-examination. No attempt was made by the local authority to suggest that some part of this work or the whole of it had nothing to do with s. 260. Nor, indeed, could they do so, for they had by their notice in effect stated that for the whole of the work they relied on both the Act of 1936 and the Middlesex Act indifferently.

In my judgment, on this form of proceeding the lessees' agents were entitled to raise all the defences open to them under s. 260 (2) in respect of the whole of the claim for the whole of the requirements. Alternatively, if it is said that the judge should have found that none or some only of the works was or were attributable to s. 260, there was, in my judgment, no evidence on which he could so find. I, therefore, reject this argument on the part of the local authority. I think the short answer to it is that, on the matter as it was constituted by the authority's own notice, all the defences available under s. 260 (2) were available to the lessees' agents for the whole of the required works. I repeat that I have a fear that I may have failed to apprehend some nicety in the argument and not have done justice to it. I, therefore, express my view with this qualification, that in the circumstances it is not necessary to express a final and definite opinion on it, since, I think (for reasons which I will approach in a minute), that the local authority is entitled to succeed on other grounds.

It will be convenient here to deal with another matter which counsel for the lessees' agents raised, namely, that, on the face of it, this notice was bad, a point which attracted the county court judge, though he has not finally expressed a conclusion on it. Again, I am not sure that I apprehend this point either. I have already stated that the effect of the Middlesex Act seems to me to be that, given a certain state of facts, Middlesex houses are deemed to be unfit for human habitation and thereon the local authority is bound to serve a notice under the Act of 1936. If they serve a notice alleging that the house is unfit for human habitation and calling on the person in control to do specified works, and leave it at that, the notice on the face of it would appear to me to be good, though it may be open to the challenge that it is not then apparent whether the local authority is relying on any failure to comply with the Middlesex Act, and, therefore, the person served would be left in doubt whether he could, or to what extent he could, rely on what I will call the special defences under that Act. Another kind of case may be easily imagined, where, apart from failure to comply with s. 260, there was no ground, or no ground which seemed sufficiently convincing to the local authority, for asserting that a house was unfit for human habitation. In such a case, if the sole point taken was that there was failure to comply with the requirements relating to amenity, it would obviously be (to say the least) highly desirable, and might otherwise be deceptive, so to state on the face of the notice, and certainly it would be desirable to avoid serving a notice which referred on

the back of it, in printed language, only to the sections of the Act of 1936. But, whatever might be the circumstances in other cases, it seems to me that in the present case the local authority I assume rightly and it seems to me obviously fairly, said in terms: "All these repairs which we call on you to do we require by virtue of the Acts of 1936 and 1944 indifferently". The only practical effect is that the whole of the special defences were rendered available to the person having control for the whole of the subject-matter of the schedule.

A That being the form of the notice, it seems to me that there can be no quarrel with it. It was, in my judgment, a compliance with the statutory requirement and it was in no respect deceptive. With all respect, therefore, to the learned county court judge, I am unable to share the misgivings he felt as regards this notice. If the authority were trying to exclude the special defences from some particular matter in the schedule, there might be an objection that they should have made that point clear on the notice. The answer is, not having done so and having applied s. 260 indifferently to everything, the special defences were open on everything.

I come to the remaining point, which is curious and one which I have found, I confess, rather troublesome. At the date when the notice was served on the lessees' agents, namely, on June 27, 1952, their principals, who, I understand, are Connaught Estates, Ltd., held only an unexpired period of some thirty-one years of a term of years in the premises. In August, 1952, Connaught Estates, Ltd., agreed to buy the freehold reversion, and on Aug. 21, 1952, a binding contract was entered into between the vendor and Connaught Estates, Ltd., the sale and conveyance of the freehold reversion being completed on Oct. 30, 1952. The agents' appeal first came before the county court judge on Oct. 28, after the date of the contract but before that of completion. The hearing was resumed on Dec. 1, 1952, when indubitably the interest of Connaught Estates, Ltd. was no longer that of lessees, but was that of absolute freehold owners. The question of merger is irrelevant. I assume the lease did merge, but, whether it did or whether it did not, once they had acquired an absolute contractual right to the freehold reversion, the lease ceased to be a relevant consideration. I gather that there was no concealment in this respect from the county court judge, but, nevertheless, he dealt with the case on the footing that Connaught Estates, Ltd., remained lessees with a term of thirty-one years left to run.

What is the date on which the county court judge, as enjoined by s. 260 (2) of the Middlesex Act, is to take into consideration what I have called the special defences? It is said by counsel for the agents with force that the right answer is the date on which the person having control of the house is served and that subsequent changes in title and so on do not matter. I have come to the conclusion that that submission ought to be rejected. The county court judge was not determining some particular question of fact in the ordinary sense, as (for example) whether a forfeiture had been incurred at a particular date. What he had to consider was a matter which has many counterparts in other branches of the law—whether something or another was "reasonable"—in this case whether the house could be rendered fit for human habitation at a reasonable expense. If a judge has to consider reasonableness, *prima facie* it would appear to me that he should consider all the relevant circumstances at the date when he hears the case. I think that in the present instance there are other grounds supporting that view—for example, the second special defence (though it has no relevance in the present case) is expressed to be "the period for which the dwelling-house is likely to continue occupied". The next is "the expenditure incurred by the person having control of the house during the preceding three years". The last is "whether the condition of the dwelling-house is or is not due to the wilful default or neglect of the tenant". If those are added to the first of the special considerations, which

is the length of the unexpired period of the lease, the general impression left on my mind is that the right time to consider all these things is when the judge has to make up his mind: "Aye or no, can this house now, when I am going to make an order, be put into a state fit for human habitation at reasonable expense?" One example was given. Supposing some particular calamity fell on the house between the date of the notice and the date of the hearing, or suppose there was some change of tenant, so that one who had been in the past scrupulous was replaced by one who was not scrupulous in looking after the premises. In those circumstances, when should the matter be considered? I think, in the absence of any other guide in either Act, that here, as in (for example) rent restriction cases, the standard of reasonableness is left to the county court judge to determine on all the facts as he finds them at the date when he hears the case.

At the date when the county court judge finally heard this case—indeed, on both dates—the length of the lease had become irrelevant, but it is clear to my mind that it was solely the fact that there were only thirty-one years and no more left of this lease which caused the judge to conclude adversely to the local authority. In a long and careful judgment he first considered the figures of income and outgoings and he showed that, given that the person having control of the house was the freeholder, there should be a profit of £50 a year, or a little less, shown in the foreseeable or immediately foreseeable future by excess of rents recoverable over the necessary expenditures, including a sum which he allocated towards repairs. He said, in effect, as I follow the judgment, that to spend £350 (which is what he found would have to be spent to comply with this notice) to produce that result would be a reasonable thing to do, but he then took the comparable figures on the basis that the interest of the person having control was merely a term of thirty-one years. In that event, when allowance had been made for amortisation and so forth, all the lessees would get out of it would be, at best, £16 a year, which he held to be so meagre a return, to use his own language, as to lead him to the conclusion that the expenditure of the money would not be reasonable in the circumstances.

Looking at the case as a whole, the right and just answer is that the order made by the learned judge ought to be set aside because at the relevant date, namely, when he heard the matter, Connaught Estates, Ltd., were absolute freehold owners, and, accordingly, the notice of June 27, 1952, which was quashed, should resume its validity and effect.

JENKINS, L.J.: I agree.

HODSON, L.J.: I also agree.

Appeal allowed.

Solicitors: *Sharpe, Pritchard & Co.*, agents for *R. S. Forster*, town clerk, Kilburn (for the local authority); *A. Rawlence* (for the lessees' agents).

[Reported by F. GUTTMAN, ESQ., Barrister-at-Law.]

HOOK v. CUNARD STEAMSHIP CO., LTD.

[WINCHESTER ASSIZES (Slade, J.), March 12, 13, 20, 25, 1953.]

False Imprisonment—Merchant ship—Member of crew—Right of master, at common law, to arrest and confine.

A The master of a merchant ship is justified at common law in arresting and confining in a reasonable manner and for a reasonable time any sailor or other person on board his ship only if he has reasonable cause to believe, and if he does in fact believe, that the arrest and confinement are necessary for the preservation of order and discipline, or for the safety of the vessel or persons or property, on board.

B On the issue of damages for false imprisonment, *Walter v. Alltools, Ltd.* (1944) (171 L.T. 371), followed.

AS TO THE RIGHT OF THE MASTER OF A SHIP TO IMPRISON A PERSON ON BOARD HIS SHIP, see HALSBURY, Hailsham Edn., Vol. 33, p. 43, para. 75.

Cases referred to:

- C (1) *Christie v. Leachinsky*, [1947] 1 All E.R. 567; [1947] A.C. 573; [1947] L.J.R. 757; 176 L.T. 443; 111 J.P. 224; 2nd Digest Supp.
 (2) *Aldworth v. Stewart*, (1866), 4 F. & F. 957; 14 L.T. 862; 176 E.R. 865; 41 Digest 670, 5008.
 (3) *The Lima*, (1837), 3 Hag. Adm. 346; 166 E.R. 434; 41 Digest 233, 728.
 (4) *Walter v. Alltools, Ltd.*, (1944), 171 L.T. 371; 2nd Digest Supp.

ACTION for damages for false imprisonment.

- D The plaintiff entered the service of the defendants, the Cunard Steamship Co., Ltd., in 1909. By a contract in writing, dated Apr. 1, 1949, the defendants agreed to employ him as a lounge steward for two years from the date of the contract, and on June 24, 1950, when the defendants' ship, R.M.S. Queen Elizabeth, left Southampton for New York, he was serving as a steward in the first class passenger lounge of the ship. Up to that time his character and reputation were unblemished. Among the first class passengers in the ship were Dr. Greenberg and his wife, their daughter Linda, aged ten years, and their son, aged six years. On the evening of June 25, Captain Cove, the commanding officer of the ship, instructed the staff captain to investigate a complaint by Dr. Greenberg. His daughter, Linda, alleged that an indecent assault had been committed against her in the lounge that evening, and, in the presence of, among others, the staff captain, the chief steward, the master at arms and Dr. Greenberg, she identified the plaintiff as the person responsible, but no one told the plaintiff at the time what was alleged against him. Dr. Greenberg was about to strike the plaintiff, but the staff officer intervened and told the chief steward that the plaintiff was to work in the pantry for the rest of the voyage away from the passengers. Dr. Greenberg then said that he wanted the plaintiff put under lock and key. The plaintiff was taken away before he could say anything, and was confined for the night in a cabin, with a sentry outside the door. On the same evening, Dr. Greenberg told Captain Cove that, in his opinion, the plaintiff was mentally unbalanced and would be a danger to the other children in the ship, as well as to Linda, if he were left to go about the ship. Dr. Greenberg demanded that the plaintiff should be kept under restraint and said that, if this were not done, he would consider it his duty to inform the parents of other children among the passengers of the facts. He also stated that, when the ship arrived in New York, he would have the plaintiff arrested and prosecuted. On the following morning the plaintiff was brought before the captain. He denied the accusation made against him, and the chief steward told the captain of his long service and good record. There was no evidence in corroboration of Linda's story, and a statement signed by Dr. Greenberg which was before the captain, and which

purported to be her account of the incident, was inconsistent with the account which she had given in the presence of the staff captain, which account was taken down at the time by the master at arms and was also before the captain. The captain ordered the plaintiff to be kept under restraint in the isolation hospital for the remainder of the voyage and until after the first class passengers had disembarked at New York. The two doctors of the ship, having examined the plaintiff on the captain's orders, reported that he seemed normal. Early on June 29, the Queen Elizabeth reached New York, the first class passengers completed their disembarkation by 9 a.m., and the plaintiff was set free between 9 and 10 p.m. On the return voyage the plaintiff was given administrative duties in the catering department. There was a large number of child passengers on that voyage. On July 6, after the Queen Elizabeth reached Southampton, the plaintiff was discharged from his employment in the ship, and on Nov. 7, 1950, the defendants dismissed him from their employment.

By the writ and statement of claim the plaintiff claimed damages not only for false imprisonment, but also for breach of contract and wrongful dismissal. Before the action came into court the defendants paid into court the full amount of the claim for damages for breach of contract and wrongful dismissal, and the plaintiff accepted that sum. By their amended defence, the defendants maintained that the arrest and imprisonment of the plaintiff was lawful. After saying that the action was taken on the authority of the master following a complaint to him by Dr. Greenberg, they went on to say:

"The said action was reasonable and proper and in the interest of preserving good order in the ship in that the said complaint appeared to be well-founded, the said Dr. Greenberg threatened to do violence to the plaintiff and expressed his fear that the plaintiff might do violence to the child, the nature and force of the accusation justified the plaintiff being required to submit to medical examination and/or observation and rendered it highly undesirable that he should continue his duties. Further or alternatively the master had reasonable cause to believe and did believe that the said arrest and imprisonment was necessary for the preservation of order in the ship and the safety of child passengers by reason of the matters hereinbefore mentioned and the risk of a repetition of the conduct complained of."

At the hearing of the action, the captain gave the following reasons, inter alia, for his action in keeping the plaintiff in confinement: (a) that there might be some truth in Dr. Greenberg's assertion that the plaintiff was mentally unbalanced and might be a danger to the passengers, (b) that, if Dr. Greenberg carried out his threat of informing other passengers, it might create a state of alarm in the ship amongst the passengers and loss of order amongst the ship's company, and (c) that it might be more comfortable for the plaintiff, in view of Dr. Greenberg's threatening attitude toward him. The captain went on to say that, in navigating a big passenger ship with due regard to the safety and comfort of the passengers, he could not ignore the possibility of adverse circumstances arising at any time, and that he had to take steps to see that through them no harm came to his ship or to his passengers. SLADE, J., found that the plaintiff was mild-mannered, disciplined and reliable. In connection with the finding that the plaintiff was not informed of the charge against him before he was put under restraint, the learned judge referred to *Christie v. Leachinsky* (1).

Skelhorn for the plaintiff.

Molony for the defendants.

SLADE, J., stated the facts, and continued: In the first place, I have to ask myself: In what circumstances does the law recognise the right of the master or anyone deputed by him to imprison someone who is on board the

ship which he is commanding when the ship is on the high seas? I am, of course, dealing only with the right at common law, as opposed to the statutory right under the Merchant Shipping Acts in circumstances which do not arise in this case. There is very little authority on the point. In HALSBURY'S LAWS OF ENGLAND, Hailsham ed., vol. 33, p. 43, para. 75, the law is stated in this way:

- A "The master of a merchant ship is justified at common law in arresting and confining in a reasonable manner and for a reasonable time any sailor or other person on board his ship, if he has reasonable cause to believe that such arrest or confinement is necessary for the preservation of order and discipline or for the safety of the vessel or the persons or property on board."
- B I think that that statement requires to be amplified, and that, not only should the master of the ship have reasonable cause to believe in the necessity of the confinement for any one of the purposes stated, but he should, in fact, believe that the confinement is necessary for that purpose: that is to say, that the confinement must comply not only with the objective but also with the subjective requirements in that respect.
- C The word "necessary" or "necessity" is, I think, vital. That requirement derives some support from a direction given to the jury in *Aldworth v. Stewart* (2), which was cited by counsel for the plaintiff. In that case a passenger on board a passenger ship was imprisoned for insolence to the captain, the justification pleaded by the captain being that it was necessary for the due preservation of discipline. CHANNELL, B., in summing-up to the jury, said (14 L.T. 862):
- D "It was undoubtedly necessary that the captain of a ship should be intrusted with considerable authority, and it was true as a general proposition that the captain had some authority over the passengers as well as over the crew. But this authority was based upon necessity, and was limited to the preservation of necessary discipline and the safety of the ship. It was true that the captain was not bound to wait for actual mutiny, and he might arrest any movements towards it on the part of the passengers or crew. But then there must be some act calculated, in the apprehension of a reasonable man, to interfere with the safety of the ship or the due prosecution of the voyage."
- E That is the objective test. Counsel for the defendants cited a passage from the judgment in *The Lima* (3), where SIR JOHN NICHOLL said (3 Hag. Adm. 349):
- F "The maritime law and the legislature have always considered this valuable class of persons, the British mariners, as highly claiming encouragement and protection; but, on the other hand, the maintenance of order, discipline, and the authority of the commanding officer on board, are essential to the safety of navigation, and the great commercial interests of the country."
- G What, therefore, is the authority of the commanding officer on board? In the view which I take of this case it becomes unnecessary for me to decide whether the right, whatever it is, is limited to the master or commanding officer of the ship, or whether he is in any circumstances entitled to delegate it.
- H I will, therefore, apply it to the master of a ship. To justify the imprisonment of the plaintiff, based on the justification as pleaded in this case, I hold that the defendants must prove, in accordance with the standard of proof which arises in a civil action, namely, the preponderance of probability, first, that the master, Captain Cove, had reasonable cause to believe that the arrest and confinement of the plaintiff were necessary for either (a) the preservation of order in the ship, or (b) the safety of one or more of its passengers (I say "one or more" so as to include not only Linda but Dr. and Mrs. Greenberg and the

little son), and, secondly, that the master, in fact, believed that the arrest and confinement were necessary for either of those purposes. The parties have agreed in this case that I am to treat the arrest and confinement alleged in the statement of claim as being the single tort of false imprisonment.

Again, it is necessary to underline the word "necessary". The question which I have to decide is not: Did Captain Cove believe the accusation against Hook to be true? The answer to that is, of course, that he did, and that Dr. Greenberg did. Nor is the question: Had he reasonable grounds for believing the accusation to be true? I am prepared to accept that he had. The question is: Had he reasonable grounds for believing that the imprisonment of the plaintiff was necessary either for the preservation of order in the ship or for the safety of one or more of its passengers. That, as I have said, is the objective test. I have no hesitation whatever in arriving at the conclusion that the plaintiff's imprisonment was in ~~no~~ way necessary and that there were no reasonable grounds for believing it to be necessary for either of those purposes. It is true that, on the return voyage, Dr. Greenberg could no longer make the wild threats and the extravagant statements which he had previously made, because he would not be there to make them, but, if there were grounds for believing that the plaintiff was really the sort of ogre that he was painted as being, I cannot see, if he remained at large, why the children should have been any more safe on the return voyage than they were on the outward voyage.

That is sufficient to dispose of the defence, but, as the case may go further, I feel it desirable that I should express my view on the second question, and I find as a fact that neither the master nor the staff captain, in fact, believed that the arrest and confinement of the plaintiff were necessary for either of those purposes or at all. I acquit them entirely of any malice in the sense of ill will or spite towards the plaintiff. On the contrary, I am satisfied that they felt considerable concern for him, a trusted servant of so long standing with their company and under a two years contract with the company. But, in spite of their disclaimers, I am satisfied that they did not order the confinement of the plaintiff, and the continuation of the confinement, because they, in fact, believed that it was necessary for any of the purposes which I have mentioned, but that they did it to placate Dr. Greenberg, and, by placating Dr. Greenberg, to avoid what Captain Cove described as "unwelcome publicity". [HIS LORDSHIP reviewed the evidence in support of his conclusion, and continued:]

No one in this action has ever ventured to suggest that there was any justification for the accusation made by the child, Linda, against the plaintiff, and it is fortunate for the defendants that I, not sitting with a jury, am able to make it clear that there is no vestige of ground, nor has any vestige of ground been suggested by the defendants, for casting the slightest aspersion on the plaintiff's character. I am, therefore, able to vindicate him in this court, and it is not necessary for me to vindicate him by visiting a heavy sum of damages on the defendants for their conduct in this matter as a jury might well have done, that being the only way in which they could have made it clear that that is no stain of any kind on his character. On the issue of damages, I am required by the decision of the Court of Appeal in *Walter v. Alltools, Ltd.* (4) to bear in mind that in an action for false imprisonment, as was said by LAWRENCE, L.J. (171 L.T. 372):

"The general principle . . . is that any evidence which tends to aggravate or mitigate the damage to a man's reputation which flows naturally from his imprisonment must be admissible up to the moment when damages are assessed. A false imprisonment does not merely affect a man's liberty, it also affects his reputation. The damage continues until it is caused to cease by an avowal that the imprisonment was false."

[After reviewing the evidence in regard to the plaintiff's dismissal from the

defendants' service, HIS LORDSHIP assessed the damages to which the plaintiff was entitled in respect of the false imprisonment at the sum of £250.]

Judgment for the plaintiff.

Solicitors: *Waller, Chesshire & Co.*, Southampton (for the plaintiff); *Lampert, Bassitt & Hiscock*, Southampton, agents for *Hill, Dickinson & Co.*, Liverpool (for the defendants).

[Reported by CONRAD OLDHAM, Esq., Barrister-at-Law.]

LEWIS v. CARMARTHENSHIRE COUNTY COUNCIL.

[CARMARTHENSHIRE WINTER ASSIZES (Devlin, J.), March 6, 31, 1953.]

B *Negligence—Schoolmaster—Child at nursery school—Permitted to run on to highway—Injury to vehicle driver in avoiding child—Liability of education authority.*

A child, aged four years, while at a nursery school, was made ready to go out for a walk and was left with another child in a classroom. The child left the classroom and ran on to the highway, causing the driver of a lorry to swerve violently so that the lorry struck a telegraph post, as a result of which the driver was killed. On a claim by the wife of the driver against the defendants as the education authority,

C HELD: any person who allowed a young child to stray into a busy street should anticipate, not only that the child might be injured, but also that other users of the road might be injured; in the circumstances the defendants owed a duty of care to the deceased and were in breach of that duty; and, therefore, the plaintiff was entitled to damages.

Hay (or Bourhill) v. Young ([1942] 2 All E.R. 396), applied.

D AS TO THE DUTY TO TAKE CARE, see HALSBURY, Hailsham Edn., Vol. 23, pp. 568-587, paras. 823-840; and FOR CASES, see DIGEST, Vol. 36, pp. 12-21, Nos. 33-101, and Digest Supps.

E Cases referred to:

(1) *Hay (or Bourhill) v. Young*, [1942] 2 All E.R. 396; [1943] A.C. 92; 111 L.J.P.C. 97; 167 L.T. 261; 2nd Digest Supp.

(2) *Haynes v. Harwood*, [1935] 1 K.B. 146; 104 L.J.K.B. 63; 152 L.T. 121; Digest Supp.

F (3) *Glasgow Corpn. v. Muir*, [1943] 2 All E.R. 44; [1943] A.C. 448; 112 L.J.P.C. 1; 169 L.T. 53; 107 J.P. 140; 2nd Digest Supp.

(4) *Hambrook v. Stokes Brothers*, [1925] 1 K.B. 141; 94 L.J.K.B. 435; 132 L.T. 707; 36 Digest 123, 819.

(5) *Cuttress v. Scaffolding (Great Britain), Ltd.*, [1953] 1 All E.R. 165.

ACTION for damages for negligence.

G On Apr. 19, 1951, between 12.15 and 12.30 p.m. a child named David Morgan, aged four years, was at a nursery school at Ammanford and in the charge of the defendants, the school authority. The nursery school was in a building situated behind the junior school which adjoined College Street, a main street and a busy thoroughfare with plenty of traffic. The mistress in charge of the nursery school took David Morgan and another child into a classroom to get them ready for a walk. She left them in the classroom while she went to the toilet, but when she got outside she found that another child had fallen and cut itself and she was occupied for about ten minutes in attending to this other child. While the mistress was away, the two children left the classroom and David Morgan reached the main street, along which the deceased was driving a lorry. David Morgan ran into the road, putting himself in imminent peril of death or injury, the deceased swerved his lorry violently to avoid him, the lorry hit a telegraph post, and the deceased was killed. The deceased was a married

man with three children, aged thirteen, ten and two years. The wife of the deceased now sued the defendants for damages, alleging that the death of her husband was due to the negligence of the defendants or their servants. The defendants denied negligence, and, alternatively, said that, in any event, they owed no duty to the plaintiff's husband.

G. P. Thomas for the plaintiff.

N. G. L. Richards for the defendants.

Cur. adv. vult.

MAR. 31. **DEVLIN, J.**, read the following judgment. In my opinion, on the facts of this case the defendants, to succeed, must provide a satisfactory explanation of how the child came to be on the highway. The school premises front on College Street, and a lane which opens on College Street runs down one side of them. If you stand in College Street facing the school, the lane will be on your right. You will look across the junior school yard to the junior school itself (ages seven to eleven). The infants' school (ages five to seven) and nursery school (ages three to five) are together in another building situated behind the junior school and separated from it by another yard which is used as the infants' playground. The school premises are separated from the main street and the lane by palings. The main entrance is by a gate off College Street into the junior school yard. You can walk down a passage-way between the junior school buildings and the lane boundary into the infants' yard, and so into the nursery and infants' school, or you can get direct into the infants' yard from the lane by a side gate. The side gate has a latch; the main gate is just pushed to. The infants' and nursery school building has a door in the middle that leads from the infants' yard into a small vestibule. From this a door on the right leads to the infants' classroom, and one on the left to the nursery classroom. On the side of the nursery classroom opposite to this door there is another door leading through a cloakroom into a small yard or play-pen, railed off from the infants' yard, for the nursery school. Thus, the nursery school unit, to which David Morgan belonged, was self-contained both for work and play, and, in the ordinary routine, there can be no danger of the children escaping into the street during school hours. They are brought to and fetched from the vestibule by their mothers or someone from their homes.

The routine for the nursery school is that at 12.15 p.m., after lunch, the children go out into the play-pen until 1 p.m. Two junior children come into the classroom to lay out mattresses on which the nursery children rest after their play. The mistress in charge of the nursery school is Miss Morgan. She is no relation to the child, David Morgan. She does not supervise the children in the play-pen. Another mistress, Miss Rees, does that. It is Miss Morgan's habit, during this period, to go for a walk in the town and to take two of the nursery children with her. David had been hoping for this treat for some time past, and on the morning of this day his mother, when she brought him to school, had asked Miss Morgan that he should have it. Miss Morgan decided to take him and another child of about the same age. So, at 12.15 p.m. the others being out in the play-pen, Miss Morgan got the two children ready in the classroom, and made ready herself. Then she went out to the toilet which is off the play-pen just beyond the cloakroom. As she got out she found that a little child in the play-pen had fallen and cut itself. She took it into the cloakroom and attended to it. This occupied about ten minutes. Then she decided to take it to the headmistress in case a doctor ought to see it. After that she went back into the classroom. There was no one there, and she was crossing the vestibule when she saw David Morgan who had been brought back by a bystander after the accident.

It is one thing to leave children alone in a classroom if the worst that is likely to happen is that they get into a bit of mischief or fall down and hurt themselves, and another thing if there is any chance of their getting out into

the street. Should Miss Morgan have anticipated that? There was a latch on the door into the vestibule, but it could be opened by a small child. The outer door into the infants' yard might well have been open. But, Miss Morgan told me, the infants would then be playing in their yard under the supervision of a mistress, and, moreover, the side gate into the lane was usually kept locked. So the children would have to cross not only the infants' yard, but the junior school yard as well, where the children were playing under the supervision of a mistress, and get out by the main gate. The chance of this happening is so slight as to be negligible unless there is carelessness on the part of the two mistresses out in the yards. This evidence, if correct, in my opinion, completely exonerated Miss Morgan herself, but called for an explanation from the other two mistresses. Miss Price, the infants' headmistress, was called and said that the infants were not then in the yard, but were at dinner until 12.30 p.m., and were still at dinner when David Morgan was brought back. She said also that the side gate had not been kept locked since the war.

I accept that evidence. I am satisfied that the children must have got out across the empty infants' yard and through the side gate. Miss Morgan's duties gave her no concern with the infants, but they were in the same small building, and I find it difficult to believe that she was ignorant of their dinner-hour or that she could really have thought that the side gate was usually kept locked. In view of this conflict of evidence I wish that I had heard more than I have about the circumstances in which these children were left alone. It is true that the substance of Miss Morgan's story is not challenged. The plaintiff has not at her disposal any material on which she could challenge it. What happened during the relevant period is exclusively within the knowledge of the defendants. Until the trial the plaintiff's advisers have only the sketchy knowledge of the defendants' case that is afforded by answers to interrogatories. In these circumstances, and particularly when the burden lies on the defendants to account for the happening of an untoward event, it does not do to be economical in witnesses and niggardly in the information laid before the court. The omissions in the evidence which have occurred would have been more serious if the defence had been less confined. But I think it emerged quite clearly from Miss Morgan's evidence that the defence was that there was nothing to prevent Miss Morgan from calling to David and the other child to come out into the play-pen, or from asking Miss Rees to keep an eye on them, or from keeping an occasional eye on them herself from the cloakroom, or at least from telling the junior children not to leave them alone. The defence is, I think, that none of these things needed to be done, and is confined to the bare point that there was nothing wrong in leaving the two children alone for ten minutes in the classroom, at any rate when the two juniors were there as well—nothing wrong, that is, in the sense that Miss Morgan could have foreseen that any harm of the sort that was actually done could come of it. Thus, the hurt child is the explanation rather than the justification of Miss Morgan's conduct. Her conduct, it is said, needs no justification, and, on this view, the defence would be just as cogent if she had left the children for some trivial purpose of her own. If she had foreseen the possibility of escape, she could have prevented it, but the possibility did not occur to her, and the cardinal question is, therefore, whether she ought to have anticipated that two four-year olds, left in the position of David and the other child, might leave the classroom and get out into the street.

I have not found the question at all easy to answer. I think this to be a border-line case. Three matters weigh with me. The first is Miss Morgan's own opinion that Miss Rees could not safely attend to the hurt child herself because it would have meant leaving the others alone in the play-pen. That points to a very high standard of care. If Miss Rees could not, from the cloakroom, give adequate supervision to the children in the play-pen, should Miss

Morgan have left the children in the classroom quite unsupervised? The second is the significant difference between leaving a child who is happily and safely employed and a child who is expectant and unoccupied. David was dressed up with nowhere to go. No doubt, he was an obedient child, but I doubt whether a sense of obedience or disobedience played much part in his acts. He had not been told to stay where he was, and ten minutes is a long time for a child of four. He might have thought that she had gone out some other way and that he must follow and catch up. He might have opened the door to look for her and been tempted out, fearful lest he might miss his treat. Thirdly, Miss Morgan had taken on herself personally the particular care of the children, and her duty was to them. It is not, I think, unfair to regard her as, for the time being, their nurse rather than a schoolmistress. I think that constant "minding" is a second nature to those in charge of the very young.

As I am considering now only carelessness and not the extent of the duty, I can ask myself how the matter would have been regarded if the children themselves had been run over. Would a nurse who had for ten minutes turned her back on her charges all ready to go out for a walk have been held free from blame? I confess that, at first, I was tempted to think that this was the sort of thing that might happen to anyone, and that the dereliction, if there was one, was almost too slight to be blameworthy. But that it may happen to anyone is not the decisive test. Even the most careful are occasionally careless. There are few users of the road, for example, who can say that they have never fallen short of the standard of care which the law demands. Fortunately, the results are not often serious. Tragic consequences light up small errors. On the whole, I have come to the conclusion that Miss Morgan ought not to have been unmindful of these children, and that she ought to have foreseen the possibility that they might go out on their own.

The second point in issue, whether any duty was owed to the deceased, gives me no difficulty. I think that any person who allows a young child to stray into a busy street ought to anticipate not only that the child may be injured but that other users of the road may be injured in just the way that the deceased was injured in this case. It is said that there is no precedent for a claim of this sort. But the principle is clear. It is expressed in *Hay (or Bourhill) v. Young* (1), to which I was referred. *Haynes v. Harwood* (2) is also near to the point. In assessing the damages, I have to consider that the plaintiff inherited £900, which were her husband's savings, but she might have expected to have benefited from them in any event. I cannot in this case exclude the possibility of re-marriage. I think, therefore, that the sum which it would be appropriate to award is £3,000. I shall give £200 to each of the older children and £500 to the youngest, and the rest to the wife. Of course, there has to be added to that sum the funeral expenses.

Order accordingly.

Solicitors: *J. C. Williams & Roberts*, Carmarthen, agents for *T. Llewellyn Jones*, Neath (for the plaintiff); *Le Brasseur, Davis & Son*, Newport (for the defendants).

[Reported by MISS M. D. CHORLTON, Barrister-at-Law.]

R. P. C. HOLDINGS, LTD. v. ROGERS.

[CHANCERY DIVISION (Harman, J.), February 9, 10, 11, 12, 13, 16, March 27, 1953.]

Easement—Right of way—Extent—User for all purposes while dominant tenement agricultural—Change of character of dominant tenement.

A In 1950 the defendant acquired a field abutting on a golf course of which the plaintiffs were the lessees and occupiers. The defendant claimed a right of way for all purposes across the plaintiffs' land to and from his field, or, alternatively, a way sufficient for the passage of caravans, vehicles and persons to and from his field during and in connection with its user as a camping ground. On the facts and evidence, the court found that the defendant had proved that a right of way over a defined track had

B been established by prescription at common law, but that it had been confined to user in connection with agriculture. On the question whether the right extended to the passage of caravans, vehicles and persons to and from the field in connection with its user as a camping ground,

C HELD: the extent of the right of way was one of fact, but it could not be concluded from the mere fact that while the field was purely agricultural the way was used for all purposes connected therewith that the right was general and exercisable for purposes connected with the use of the field as a camping ground; the way was limited to agricultural purposes; and, therefore, its use in the manner proposed would constitute an unjustifiable increase in the burden of the easement.

D *Cowling v. Higginson* (1838) (4 M. & W. 245), *Williams v. James* (1867) (L.R. 2 C.P. 577) and *Wimbledon & Putney Commons Conservators v. Dixon* (1875) (1 Ch.D. 362), applied.

AS TO RIGHTS OF WAY CLAIMED BY PRESCRIPTION, see HALSBURY, *Hails- ham Edn.*, Vol. 11, p. 330, para. 583; and FOR CASES, see DIGEST, Vol. 19, pp. 57-61, Nos. 326-344.

E Cases referred to:

(1) *Cowling v. Higginson*, (1838), 4 M. & W. 245; 7 L.J.Ex. 265; 150 E.R. 1420; 19 Digest 112, 717.

(2) *Ballard v. Dyson*, (1808), 1 Taunt. 279; 127 E.R. 841; 19 Digest 109, 690.

(3) *Williams v. James*, (1867), L.R. 2 C.P. 577; 36 L.J.C.P. 256; 16 L.T. 664; 19 Digest 107, 683.

F (4) *Wimbledon & Putney Commons Conservators v. Dixon*, (1875), 1 Ch.D. 362; 45 L.J.Ch. 353; 33 L.T. 679; 40 J.P. 102; 19 Digest 15, 37.

(5) *Allan v. Gomme*, (1840), 11 Ad. & El. 759; 9 L.J.Q.B. 258; 113 E.R. 602; 19 Digest 113, 735.

(6) *Kain v. Norfolk*, [1949] 1 All E.R. 176; [1949] Ch. 163; [1949] L.J.R. 592; 2nd Digest Supp.

G (7) *Campbell v. Wilson*, (1803), 3 East 294; 102 E.R. 610; 19 Digest 65, 368.

ACTION for a declaration that the defendant was not entitled to enter on or cross the plaintiffs' land in order to gain access to the defendant's land, and an injunction to restrain the defendant from so entering on or crossing or procuring any other person to enter on or cross the plaintiffs' land, or, alternatively, an injunction to restrain the defendant from entering on or crossing or procuring any other person to enter on or cross the plaintiffs' land otherwise than for obtaining access to or egress from the defendant's land for agricultural purposes. The defendant counterclaimed for a declaration that the defendant and his successors in title were entitled to a full right of way whether on foot or by vehicles and for all purposes and for all persons authorised by the defendant to pass and re-pass over a defined portion of the plaintiffs' land.

D. C. Walker-Smith and *J. L. Arnold* for the plaintiffs.

Edwards, Q.C., and *Lindner* for the defendant,

Cur. adv. vult.

Mar. 27. **HARMAN, J.**, read the following judgment. The plaintiffs, as lessees and occupiers of some golf links on the shore between Deal and Sandwich, sue the defendant, owner of a field some seven acres in extent abutting on the shoreward side of the links in trespass. The defendant justifies, claiming to have a right of way for all purposes or, alternatively, a way limited but sufficient for his purposes across a corner of the links to the old public highway between Deal and Sandwich. The locus in quo is sufficiently shown on the plan attached to the pleadings, the portion of the links in lease to the plaintiffs being coloured pink, the old highway running across the links in green, the alleged right of way in blue and red and the defendant's property in yellow. The issues are whether, contrary to the plaintiffs' contention, the defendant has a right of way at all, and if he has one whether it is sufficient to justify the use which he has made and proposes to make of it.

The links now leased to the plaintiffs, or a part of them, have been in use for over half a century as a golf course known as the Royal Cinque Ports which has become very well known and is a course of the first rank. So far as was proved before me, the earliest lease was dated Apr. 18, 1916, and was made between the Earl of Guilford, as tenant for life of his family's settled estates, and certain trustees for the golf club, and is a demise of the land at present let to the plaintiffs for a term of twenty-one years for the purposes of a golf links. The same subject-matter is now in lease to the plaintiffs for a term of seven years from Apr. 6, 1949, by an instrument expressed to be supplemental to the lease of 1916 and on the like terms. The plan on the lease of 1916 shows the ancient highway known as Old Deal Road passing from north to south across the demised property, entering it at the north end at a place called Dickson's Corner, where there was, apparently, at one time a gate which has long since disappeared. Old Deal Road passes across the fairway of the eleventh hole of the golf course, and though not much used by the public, being merely a sandy track long superseded by a modern highway, this was, no doubt, some inconvenience to the golfers. Accordingly, at a date uncertain, but some time past, the club caused to be erected notices near Dickson's Corner to the north, and at the point where the old highway enters the parish of Soulden to the south, inviting the public to use a more westerly track which did not impinge on the course. This track followed the blue line shown on the plan attached to the statement of claim from Dickson's Corner to where it meets the red line, and it follows that, so far as the plaintiffs are concerned, they cannot complain of the passage by the public over it, though it seems unlikely that the lessor's rights would be affected. This track approaches to within sixty yards of the defendant's field, and the crucial point is whether the defendant, having travelled along it to the end of the blue line, may then diverge on to the red line and thus reach the gate into his field. In so doing he cannot claim to be acting as a member of the public, and can only justify his passage by claiming, as he does, to be exercising a private right of passage between Dickson's Corner and the gate into his field.

The defendant purchased his property in 1950 with the avowed object of using it as what is called a camping site, and of exploiting it so as to earn him a living by inviting members of the public who are prepared to bring with them caravans or tents to install themselves there. The defendant has, apparently, obtained the licences necessary to this activity. He has obtained leave to have on the field any number of caravans up to one hundred and sixteen, and in addition tents, and has built, again under licence, a block of buildings for sanitary purposes. There are already on the field certain buildings erected by his immediate predecessors in title, the Young Men's Christian Association (hereinafter called "the Y.M.C.A."), in connection with a camp run by them on the field during the ten years preceding 1939. The defendant proposes to conduct a shop on the field for the convenience of his licensees. It is clear

that his proposals, if carried into effect, will entail a great deal of traffic on the track in question, not only by cars with their caravans in tow entering or leaving the site, but by the passage to and fro of the persons inhabiting the caravans and by tradesmen and visiting friends. There is no other means of access to the field, except, perhaps, by the footpath running along the seaward side of the bank bounding its eastern side by means of which the high road can be reached by a devious route. It is not surprising that those in control of the golf club view these proposals with concern. The track, though it does not cross the course, passes within a few yards of one of the match tees, and the frequent passage of traffic along it might, I suppose, be thought to be the enemy of that concentration for which, I am told, every golfer strives.

During the summer of 1952 a score or so of caravans were to be found on the field, but they, of course, were only the harbingers of the sixty or seventy which the defendant said he anticipated in a normal summer. They used the red and blue track to come and go. The defendant claimed a right of way by all the means open to him, but at the hearing his counsel rightly abandoned all statutory claims for the good reason that no user could be proved in the years immediately before the issue of the writ. He relied at the trial either on the doctrine of lost grant or on prescription at common law. It was admitted that the state of Lord Guilford's title made it impossible to presume a grant after 1899. It also emerged during the trial that, down to 1929, the defendant's field was used merely for agricultural purposes.

Before turning to the oral evidence, I will review the defendant's paper title. This is taken back by means of an examined abstract to 1884, when this land, together with other farming land to the west of it, was acquired by one Georgiana Collett. She continued to own the land so acquired until 1918, when she sold the defendant's field, then known, I think, as the nine acres and numbered on the ordnance map 172, to one James Marsh. This and the subsequent documents of title were proved before me. The vendor's conveyance was expressed to be

"subject to a right of way sixteen feet wide along the north-western side of the land hereby conveyed for the owners and occupiers for the time being of the adjoining land of the vendor with or without horses carts carriages sheep or cattle to go from and into such adjoining land into and from the road or way on the north-east side of the land hereby conveyed."

James Marsh held field No. 172 for about a year, when he conveyed it to Edward William Marsh, the same right of way being reserved. Edward William Marsh continued to hold it till March, 1929, when he sold to the Y.M.C.A. That body sold to one Harry Jones in August, 1950, who in turn sold seven of the nine acres to the defendant in 1951. The reservation of the recited right of way appears in all these documents. [His LORDSHIP considered the documents of title, and the oral evidence, and continued:] At any rate back to the beginning of this century, and for some years before, there was a track into the defendant's field leading to Dickson's Corner used from time to time for agricultural purposes by the owners or occupiers of Mrs. Collett's farms including field No. 172. I find also on the evidence that there was at all times a visible track over the way. [His LORDSHIP referred to a statutory declaration which had been admitted in evidence and which was based on memories of the locality going back to 1880.] When the existence of a way is spoken to over a period extending as far back as living memory goes, and there is nothing to show that there must have been a time when it did not exist, a case of prescription at common law is made out, and there is no need to have recourse to the artificial doctrine of a modern lost grant.

It was insisted at the Bar on the plaintiffs' behalf that it is not competent for the court to come to such a conclusion unless concrete evidence is adduced proving user of the way for some continuous period of twenty years, and it

was said that if the periods to which the witnesses spoke be compared and tabulated, it will be found that no continuous period of twenty years is covered. This consideration might be relevant when considering the doctrine of lost grant, but it seems to me to have nothing to do with claims to prescription at common law where the court is asked to infer an immemorial user from evidence going back as far as living memory will run. Whether the memories in question cover continuous or discontinuous periods is beside the point.

Accordingly, in my judgment, the defendant does succeed in proving a right of way over this track. The user proved, however, has from the nature of the place been confined to use in connection with agriculture. The more extensive user between 1929 and 1939 by the Y.M.C.A. must be attributed to permission, and not to a claim of right, and it is not suggested that user by the military who occupied the field during the war tells either way. If, then, the right be confined to agricultural purposes, the defendant must fail, for, in my judgment, it is clear enough that this will not justify the use of the track in connection with what is virtually a large lodging-house. It is true that the field will remain a field, and may be used as one in the winter, but during the summer months, if the defendant's enterprise should prove successful, it will be the dwelling-place of scores, and at times hundreds, of people, many of whom will have motor cars besides their caravans. The way will also be in constant use by the vans of tradesmen supplying the needs of the campers. In my judgment, therefore, the defendant in order to succeed must show himself to be entitled to a general right of way for all purposes. The question whether he has such a right appears to me to be the only point in the case presenting any difficulty.

This is a point which is by no means without authority. Both sides relied on three cases to which I must now make some reference. The first of them is *Cowling v. Higginson* (1). That was a common law action for trespass, the defence being that of a right of way under the Prescription Act, 1832, "for horses, carts, wagons, and carriages, at their free will and pleasure", and the case is reported on the application for a new trial after verdict. What happened at the trial was as follows (4 M. & W. 248):

"At the trial before COLERIDGE, J., at the last Spring Assizes at Liverpool, it was admitted that there was a right of way for farming purposes over the locus in quo, to a farm, of one of the fields of which, called the Little Marl Field, the defendant was the occupier; but the plaintiff's counsel contended that there was no right of carting coals, which was the purpose for which the defendant had used the road; and it was proved by the plaintiff that no coals had been raised under that farm for the last seventy years; that about seventy years ago there had been coal raised there, but that they were carted from the pit along a different road; that Tildesley, to which the road led, was then a very small village, consisting of merely a few houses; that there were then other coal pits nearer than those on the defendant's farm; and that there was a gate across this road, the key of which was kept by a tenant of the plaintiff's ancestor. The defendant's counsel then objected, first, that the issue was, whether there was a right of way for horses, carts, and carriages; and that since it was admitted that such right existed, the verdict ought to be for the defendant; and that if the plaintiff relied on the defendant's using the road for mining purposes, and that he had no such right, he ought to have new assigned: and secondly, that a right of road for farming purposes, and with horses, carts, and carriages, proved a right for all purposes. The learned judge, after consulting PATTESON, J., decided both points in favour of the plaintiff; and the defendant's counsel not claiming to have any question left to the jury, the learned judge directed them to find a verdict for the plaintiff,

giving leave to the defendant to move to enter a verdict if the court should be of a contrary opinion . . .”

During the course of the argument of counsel showing cause, LORD ABINGER, C.B., and PARKE, B., made the following observations. LORD ABINGER, C.B., said (*ibid.*, 252):

- A “The extent of the right must depend upon the circumstances. If a road led through a park, the jury might naturally infer the right to be limited; but if it went over a common, they might infer that it was a way for all purposes. Using a road as a footpath would not prove a general right; nor proof that a party had used a road to go to church only. Some analogy should be shown between farming and mining purposes. I do not agree with the opinion of CHAMBRE, J., in *Ballard v. Dyson* (2), but think
- B that of the rest of the court preferable.”

PARKE, B., said (*ibid.*):

“If they show they have used it time out of mind, for all the purposes that they wanted, it would seem to me to give them a general right.”

Judgment for a new trial was delivered by PARKE, B., in these terms (*ibid.*, 256):

- C “I am clearly of opinion that the defendant is not entitled to succeed on the question as to the new assignment . . . Under a plea of prescription of a way, it was necessary to show a user of it for all purposes time out of mind, according to the usual terms in which such a plea is pleaded. If it is shown that the defendant, and those under whom he claimed, had used the way whenever they had required it, it is strong evidence to show
- D that they had a general right to use it for all purposes, and from which a jury might infer a general right. In this particular case, I think the user is evidence to go to the jury that the defendant had a right to a way for all purposes for twenty years. As to the effect of such evidence, it is unnecessary to offer any opinion. If the way is confined to a particular
- E purpose, the jury ought not to extend it, but if it is proved to have been used for a variety of purposes, then they might be warranted in finding a way for all. You must generalise to some extent, and whether in the present case to the extent of establishing a right for agricultural purposes only, is a question for the jury.”

- F So far, then, it seems that the question of the user is a question to be left to the jury who may infer the extent of the right from the circumstances, and may from the fact that the way has been used for all purposes for which it has been required infer a general right.

- The next case is *Williams v. James* (3). This was a case about excessive user, the plaintiff alleging that the defendant had used an admitted right from one field in order to carry hay from another. BOVILL, C.J., in his judgment,
- G said (L.R. 2 C.P. 580):

- “In all cases of this kind which depend upon user the right acquired must be measured by the extent of the enjoyment which is proved. When a right of way to a piece of land is proved, then that is, unless something appears to the contrary, a right of way for all purposes according to the ordinary and reasonable use to which that land might be applied at the
- H time of the supposed grant. Such a right cannot be increased so as to affect the servient tenement by imposing upon it any additional burthen.”

The learned Chief Justice then deals with the facts of the case before him. WILLES, J., in his judgment, said (*ibid.*, 582):

“I agree with the argument of Mr. Jelf that in cases like this, where a way has to be proved by user, you cannot extend the purposes for which the way may be used, or for which it might be reasonably inferred that

parties would have intended it to be used. The land in this case was a field in the country, and apparently only used for rustic purposes. To be a legitimate user of the right of way, it must be used for the enjoyment of the nine acre field, and not colourably for other closes. I quite agree also with the argument that the right of way can only be used for the field in its ordinary use as a field. The right could not be used for a manufactory built upon the field. The use must be the reasonable use for the purposes of the land in the condition in which it was while the user took place."

Here, again, the question is said to be one for the jury, but the judges agreed that the finding must be limited to the use for which it might reasonably be inferred that the persons concerned could have contemplated. This is a difficult conception in a case such as *Williams v. James* (3) where the right is by prescription at common law, that is to say, from time immemorial.

The third case is that of *Wimbledon & Putney Commons Conservators v. Dixon* (4), where the headnote reads as follows (1 Ch.D. 362):

"The immemorial user of a right of way for all purposes for which a road was wanted in the then condition of the property, does not establish a right of way for all purposes in an altered condition of the property where that would impose a greater burden on the servient tenement. Where a road had been immemorially used to a farm not only for usual agricultural purposes, but in certain instances for carrying building materials to enlarge the farmhouse and re-build a cottage on the farm, and for carting away sand and gravel dug out of the farm: *Held* (affirming the decision of JESSEL, M.R.), that that did not establish a right of way for carting the materials required for building a number of new houses on the land."

JAMES, L.J., said in his judgment (*ibid.*, 367):

"The question between the parties is whether Mr. Dixon is entitled to convert a piece of land forming part of an estate or farm called Warren Farm, and hitherto uncultivated, into sites for several houses, and to use, for the purpose of bringing materials for their erection, and for all purposes connected with the houses when built, a right of way which the owners and occupiers of the farm have from time immemorial enjoyed over land of the plaintiffs. The right which Mr. Dixon claims under his landlord, Mr. Drax, is an unlimited right of way for all purposes over the plaintiffs' land to and from every portion of the land constituting the Warren Farm, after the whole of the farm has been laid out for building purposes and turned into a town, if he should be minded and able so to convert it. As far as we have any evidence before us, the farm in respect of which this right is claimed has been substantially in its present state from time immemorial, during which it is to be assumed that the right of way has been exercised, that is to say, there were a farmhouse, farm lands, and a piece of woodland."

The learned lord justice then goes on to say that there have been no considerable changes, and that the way has been used for ordinary agricultural purposes, and he adds (*ibid.*):

"That is insufficient, as it seems to me, to enable us to draw the inference of fact that the extended right claimed by Mr. Dixon ever existed."

The learned judge went on to say (*ibid.*, 368):

"I said when this case was first opened, that I was strongly of opinion that it was the settled law of this country that no such change in the character of a dominant tenement could be made as would increase the burden on the servient tenement. The dicta and observations, which are entitled to very great weight, of LORD ABINGER and PARKE, B., in the

cases which have been referred to, inclined me at first to think that the opinion I had formed was wrong. But when we consider those remarks in connection with the very clear language of the Court of Queen's Bench in *Allan v. Gomme* (5), and of BOVILL, C.J., and WILLES, J., in the case of *Williams v. James* (3), I am satisfied that the true principle is the principle laid down in these cases, that you cannot from evidence of user of a privilege connected with the enjoyment of property in its original state, infer a right to use it, into whatsoever form or for whatever purpose that property may be changed, that is to say, if a right of way to a field be proved by evidence of user, however general, for whatever purpose, qua field, the person who is the owner of that field cannot from that say, I have a right to turn that field into a manufactory, or into a town, and then use the way for the purposes of the manufactory or town so built."

MELLISH, L.J., in his judgment, said (*ibid.*, 370):

"The question of law is this: Assuming that it is made out that Mr. Drax and his tenants have used this way, not exclusively for agricultural purposes, but for all purposes for which they wanted it, in the state in which the land was at the time of the supposed grant—at the time when the way first began—and assuming that there has been no material alteration in the premises since that time, does that entitle Mr. Drax to alter substantially and increase the burden on the servient tenement by building any number of houses he pleases on this property and giving to the persons who inhabit those houses a right to use the way for all purposes connected with the houses. I certainly was under the impression when this case was opened that the owner of the dominant tenement could not increase or alter the burden on the servient tenement in any such way as that."

His Lordship then deals with *Cowling v. Higginson* (1) and *Williams v. James* (3). He concludes by saying (*ibid.*, 371):

". . . in my opinion the true rule is that stated by BOVILL, C.J., that when a right of way to a piece of land is proved, then that is, unless something appears to the contrary, a right of way for all purposes according to the ordinary and reasonable use to which that land might be applied at the time of the supposed grant."

BAGGALLAY, L.J., commenting on the decision of PARKE, B., in *Cowling v. Higginson* (1), says (*ibid.*, 373):

"I think the judgment of PARKE, B., in the case of *Cowling v. Higginson* (1) has been interpreted so as to extend its application beyond what that learned baron intended. It is true that in one part of the judgment he uses this expression . . ."

and he then quotes the words of PARKE, B., which I have read. BAGGALLAY, L.J., continues (*ibid.*):

"Those words taken by themselves point in the direction of Mr. Miller's argument; but I think those wide words are qualified by this further statement: 'If the way is confined to a particular purpose, the jury ought not to extend it; but if it is proved to have been used for a variety of purposes, then they might be warranted in finding a way for all'."

The learned lord justice then discusses the facts in the light of that statement.

It seems to me as a result of these three authorities that the question of the extent of the right is one of fact which I as a jurymen have got to determine, but that I am not to conclude from the mere fact that while the property was in one state the way was for all purposes for which it was wanted, therefore, that is a general right exercisable for totally different purposes which only came into existence at a later date. Sitting as a jurymen I can feel no doubt

that the way here was a way limited to agricultural purposes, and that to extend it to the use proposed would be an unjustifiable increase of the burden of the easement. I was pressed to hold that the right was general because of the use of the word "carriages" in the reservation to Mrs. Collett, and the case of *Kain v. Norfolk* (6) was cited. That was a case of express grant, and, in my judgment, has no relevance for the present purposes. I observe also that the word "carriages" was used in the plea in *Cowling v. Higginson* (1) where a limited right was found. As to the user by the Y.M.C.A. I was pressed to hold that it must be deemed to be adverse user because all user is *prima facie* adverse and for this *Campbell v. Wilson* (7) was cited. On this footing it was argued that the burden of proving leave and licence was on the plaintiffs, who must, therefore, plead it specially and as they had contented themselves with a mere joinder of issue they could not be heard to set up this plea now. It is enough for me to say that I reject this proposition.

I am, therefore, of the opinion that the defendant has failed to justify his course of conduct, and that an injunction ought to go against him. It would, however, in my judgment, be right to limit the relief granted so as to make it clear that there does exist the limited right to which I have alluded.

Judgment accordingly.

Solicitors: *Ashurst, Morris Crisp & Co.* (for the plaintiffs); *Kingsford, Dorman & Co.*, agents for *Girling, Wilson & Bailey*, Margate (for the defendant).

[Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.]

DRIVE YOURSELF HIRE CO. (LONDON), LTD. v. STRUTT AND ANOTHER.

[QUEEN'S BENCH DIVISION (Lynskey, J.), March 9, 10, 11, 30, 1953.]

Rent Restriction—Sub-tenancy—Covenant by sub-tenant not to assign without consent of both superior landlord and tenant—Assignment with consent of tenant only—Enforcement of covenant by superior landlord—Breach or non-performance of obligation—Assignment of whole of dwelling-house without landlord's consent—Rent and Mortgage Interest Restrictions (Amendment) Act, 1933 (c. 32), sched. I (a), (d)—Sub-tenant deemed to become tenant of landlord on determination of tenant's interest—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (c. 17), s. 15 (1), s. 15 (3).

By a lease dated Oct. 27, 1931, the predecessor in title of the plaintiffs demised to the first defendant a dwelling-house within the Rent Restrictions Acts for a term of twenty years expiring on Nov. 11, 1951. This lease contained a covenant by the first defendant not to assign, under-let or part with possession of the premises without the consent in writing of the landlord, and on Apr. 20, 1932, with his written consent, the first defendant sub-let the premises to D.S. for a period of years expiring on Nov. 10, 1951. The consent of the superior landlord was given on condition that the under-lease should contain a covenant by the under-lessee (D.S.) not to assign, let, or part with possession of the premises without his warrant or that of his successors in title, and, in accordance with this, the sub-lease contained a covenant by D.S. not to assign etc. without the written consent of the first defendant and of the superior landlord. The power of re-entry and determination for breach of covenant was reserved only to the first defendant. On Jan. 27, 1937, with the written consent of the superior landlord and the first defendant, D.S. assigned her sub-lease to W.E., Ltd., subject to the performance by W.E., Ltd., of the covenants in the original sub-lease. This consent was given on terms that the assignment to W.E., Ltd., was for the use and occupation by

the second defendant (who was in fact the beneficial owner of W.E., Ltd., which had been formed to administer his estates in order to save taxation) with a proviso that the licence was restricted to the particular assignment authorised. On Nov. 18, 1952, a resolution was passed to wind-up W.E., Ltd., and it was desired to assign the unexpired portion of W.E., Ltd.'s term to the second defendant. After some correspondence between the solicitors of the first and second defendants it was decided that there was no need to obtain the consent of the plaintiffs, who, by that time, had become the superior landlords, and on Feb. 28, 1951, the first defendant executed a licence allowing W.E., Ltd., to assign to the second defendant, the assignment being executed on May 21, 1951. After the expiration of the under-lease on Nov. 10, 1951, and of the head lease on Nov. 11, 1951, the second defendant continued in occupation of the premises. In an action for possession of the premises,

Held: (i) the superior landlord was not a party to the under-lease and no term was to be implied in it that the first defendant had agreed to enforce the covenant therein that there should be no assignment without the consent of the superior landlord; it was for the first defendant to enforce the covenant or not, as she thought fit; and, therefore, the assignment by W.E., Ltd., to the second defendant was valid, with the result that he was lawfully in occupation as a sub-tenant on Nov. 10 and 11, 1951.

(ii) the effect of s. 15 (1) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, was to continue the second defendant's sub-tenancy after Nov. 10, 1951, as against the first defendant and thereafter as against the superior landlords (the plaintiffs) when the first defendant's tenancy came to an end on Nov. 11, 1951; the words in s. 15 (3): "Where the interest of a tenant . . . is determined . . . for any other reason" included determination by effluxion of time; and, as the second defendant had become a statutory tenant under s. 15 (1), he must, under s. 15 (3), be deemed to have become the tenant of the plaintiffs on the same terms as he would have held from the first defendant if her tenancy had not determined.

(iii) the assignment by W.E., Ltd., to the second defendant without permission of the plaintiffs did not amount, within the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, sched. I (a), to a breach or non-performance of any obligation of the sub-tenancy owed to the plaintiffs; nor did such assignment constitute an assignment without the consent of the "landlord" within sched. I (d) as the second defendant's landlord at the material time was the first defendant and not the plaintiffs; and, therefore, no order for possession would be made.

FOR THE INCREASE OF RENT AND MORTGAGE INTEREST (RESTRICTIONS) ACT, 1920, s. 15 (1) and s. 15 (3), and FOR THE RENT AND MORTGAGE INTEREST RESTRICTIONS (AMENDMENT) ACT, 1933, sched. I (a) and (d), see HALSBURY'S STATUTES, Second Edn., Vol. 13, pp. 1017, 1019, and pp. 1059, 1060 respectively.

Cases referred to:

- (1) *Williamson v. Williamson*, (1874), 9 Ch. App. 729; 43 L.J.Ch. 738; 31 L.T. 291; 31 Digest, Replacement, 436, 5633.
- (2) *Mackusick v. Carmichael*, [1917] 2 K.B. 581; 87 L.J.K.B. 65; 117 L.T. 372; 31 Digest, Replacement, 417, 5459.
- (3) *Gunter v. Davis*, [1925] 1 K.B. 124; 94 L.J.K.B. 352; 132 L.T. 538; 31 Digest, Replacement, 723, 8066.
- (4) *Rossoff v. Lipovitch*, [1925] 1 K.B. 628; 94 L.J.K.B. 355; 132 L.T. 789; 31 Digest, Replacement, 722, 8054.

ACTION for possession of a dwelling-house within the Rent Restrictions Acts.

Belcourt for the plaintiffs.

Hyamson for the first defendant, Emily Strutt.

M. Waters for the second defendant, James George Grenville Dugdale.

Cur. adv. vult.

Mar. 30. **LYNSKEY, J.**, read the following judgment. The plaintiffs are claiming possession of a first floor flat, No. 1, Chester Close, formerly No. 1, Chester Street, London, S.W.1. The first-named defendant was the lessee of the premises under a lease, dated Oct. 27, 1931, and made by the plaintiffs' predecessor in title, which demised the premises to her for twenty years, from Nov. 11, 1931. The lease contained a covenant to deliver up the premises on the expiration of the said term and the first defendant had failed to do so. The claim against the second defendant, as set out in the statement of claim, was that he was in wrongful occupation of the said premises, as from Nov. 11, 1951, and continued in such wrongful occupation.

The first defendant, by her defence, says:

"(4) This defendant, with the licence in writing dated Apr. 2, 1932, of the plaintiffs' predecessor in title, Arthur Samuel Roberts Payne, created a sub-lease of the said premises on Apr. 20, 1932, in favour of one Dorothy Sykes, initially for a term of ten years from Apr. 1, 1932, but later extended by a further deed indorsed on the said sub-lease and dated Nov. 21, 1932, so as to make the sub-term expire on Nov. 10, 1951. (5) Afterwards and during the said sub-term, the residue thereof was lawfully assigned by the said Sykes to Wroxall Estates, Ltd., on or about Jan. 27, 1937, and by Wroxall Estates, Ltd., to the defendant Dugdale, in or about the month of February, 1951. The defendant Dugdale resided in the said premises and was a tenant entitled to the protection of the Rent and Mortgage Interest (Restrictions) Acts, 1920 to 1939. Upon the expiry of the said sub-term, on Nov. 10, 1951, he was entitled to and did retain possession of the said premises as statutory tenant under the said Acts, for one day as against this defendant, as his immediate landlord, and, after expiry of this defendant's term, on Nov. 11, 1951, against the plaintiffs as reversioners. (6) This defendant has not, since Nov. 11, 1951, retained possession of the said premises and she has not, since that date, claimed, and does not claim, any right to the possession thereof or any interest therein. She was, on Nov. 11, 1951, prevented by the operation of the Rent Restrictions Acts in favour of the defendant Dugdale, from delivering up possession of the said premises to the plaintiffs."

The second defendant, by his defence, says:

"(2) By an under-lease, dated Apr. 20, 1932, and a deed of extension of lease, dated Nov. 21, 1932, indorsed thereon and both made between the first-named defendant of the one part and Dorothy Sykes of the other part, the flat now known as No. 1, Chester Close, but in the under-lease described as No. 1, Chester Street, in the county of London (being the premises referred to in para. 1 of the statement of claim) were demised unto the said Dorothy Sykes, from Apr. 1, 1932, until Nov. 10, 1951, at the yearly rents and upon the terms and conditions therein contained. (3) The rateable value of the said flat, on Apr. 6, 1939, did not exceed £100, and accordingly the Rent and Mortgage Interest (Restrictions) Acts, 1920 to 1939 apply thereto. (4) By a deed of assignment, dated Jan. 27, 1937, and made between the said Dorothy Sykes of the one part and Wroxall Estates, Ltd. of the other part, the said Dorothy Sykes assigned all her interest in the said flat to Wroxall Estates, Ltd., for the residue then unexpired of the term created by the said under-lease and extended by deed as aforesaid. (5) By a deed of assignment, dated May 21, 1951, and made between the said Wroxall Estates, Ltd., of the one part and

the second named defendant of the other part, the said Wroxall Estates, Ltd., assigned all its interest in the said flat to the second-named defendant for the residue then unexpired of the term created by the said under-lease and extended by deed as aforesaid. (6) The said term duly expired on Nov. 10, 1951, on and since which date the second-named defendant was, and has continued, in personal occupation of the said flat."

A The plaintiffs asked for further particulars of the alleged lawful assignment to the second defendant and these were given, by the first defendant, in the following terms:

B "The validity of the said assignment is to be inferred from the facts hereinafter mentioned. The said assignment was, so far as this defendant is aware, duly made in proper form. This defendant gave consent thereto by a licence in writing dated Feb. 28, 1951. This defendant does not claim to have obtained the plaintiffs' consent before giving such licence and says that it was not necessary for her to do so. This defendant will refer, in that connection, to a letter dated Jan. 1, 1951, written by her solicitors to Messrs. Child & Child, the solicitors for Wroxall Estates, Ltd. This defendant is not aware whether Wroxall Estates, Ltd. obtained the consent of the plaintiffs to the assignment of their sub-lease to the defendant Dugdale, and is not, for the purpose of her defence, alleging that they did, but says that, although Wroxall Estates, Ltd., were, by the terms of the sub-lease, of which they were assignees, under an obligation to this defendant to obtain the consent of the plaintiffs before assigning the sub-lease to the defendant Dugdale, any failure on their part to do so (if failure there was) does not affect the validity or lawfulness of the assignment quoad the plaintiffs."

By their amended reply, the plaintiffs say that the assignment by Wroxall Estates, Ltd. to the second defendant was unlawful in being made without the plaintiffs' consent and in breach of an express or implied agreement contained in, or to be inferred from, the licence to sub-let by the first defendant not to consent to the assignment of the sub-lease without enforcing the covenant in the sub-lease requiring the sub-lessee to obtain the plaintiffs' consent to any assignment of the sub-lease. The plaintiffs further said in their amended reply that if, contrary to their contention, the Rent Acts apply to the occupancy of the second defendant, the court has power and jurisdiction under those Acts to make an order for possession on the ground that it would be reasonable to make such an order having regard to the obligations of the tenancy and/or under-lease being broken or not performed, or the purported assignment by Wroxall Estates, Ltd., to the second-named defendant, being made without the consent of the plaintiffs. The plaintiffs' title to the reversion of the lease, as successors in title to Arthur Samuel Roberts Payne, was admitted by both defendants.

H The questions, therefore, which I have to consider are: (i) Was the second defendant in lawful occupation of the premises on Nov. 11, 1951? (ii) If so, was he a tenant to whom the premises had been lawfully sub-let? If the answers to both these questions were in the affirmative, with the result that the Rent Acts would apply to the occupancy of the second defendant, further questions would arise, namely: (iii) Had there been a breach or non-performance of the obligations of the lease or the sub-lease? (iv) Had the premises been let without the consent of the landlords?, and (v) Would it be reasonable to make an order for possession in all the circumstances?

It was admitted by all parties that the plaintiffs' predecessor in title, A. S. R. Payne, had leased the premises to the first defendant for twenty years from Nov. 11, 1931, at a rental of £150 per annum. The lease contained a covenant by the first defendant

" . . . not to assign, under-let or part with the possession of any part of the demised premises without the written consent of the landlord, such consent however not to be unreasonably withheld in the case of a respectable and responsible person."

The lease contained power of re-entry by the landlord on any breach of covenant, and power to the landlord thereby to determine the lease. On Apr. 20, 1932, the first defendant granted a sub-lease to Mrs. Dorothy Sykes, for a term of ten years from Apr. 1, 1932, and this was later extended, by a further deed indorsed on the sub-lease, so as to make the term expire on Nov. 10, 1951, at a rental of £200 a year. This sub-lease was made with the written consent of the then owner of the reversion, A. S. R. Payne. This document was dated Apr. 19, 1932, and was a consent to the under-lease by the first defendant to Mrs. Dorothy Sykes, but was on the terms that

"such under-lease to contain a covenant by the under-lessee not to assign, let or part with the possession of any part thereof without the warrant of myself or those claiming under me, provided that this licence is restricted to the particular under-lease hereby authorised and, save as aforesaid, the covenant in the said lease contained against assignment or under-lettings shall remain in full force and effect."

The sub-lease contained a covenant by Mrs. Sykes

"not to assign, under-let or part with possession of the demised premises, or any part thereof, without the written consent of the landlady [that is Miss Strutt] and the superior landlord, such consent not to be unreasonably withheld in the case of a respectable and responsible person."

The superior landlord, Mr. Payne, was not a party to this sub-lease. The power of re-entry and determination of the sub-lease for breach of covenant was reserved only to the landlady, Miss Strutt.

On Jan. 27, 1937, Mrs. Sykes assigned the sub-lease to Wroxall Estates, Ltd., on the usual terms that the assignment was subject to the payment of the rent reserved and the performance and observance of the covenants on the part of the lessees and to the conditions contained in the sub-lease. A written consent, dated Jan. 26, 1937, to this assignment was signed, not only by the first defendant, but also by Mr. A. S. R. Payne, and was on the terms that

"the assignment to Wroxall Estates, Ltd., was for use and occupation by Commander James George Grenville Dugdale [the second defendant] of Wroxall Abbey in the county of Warwick"

with a proviso that the licence was restricted to the particular assignment thereby authorised. The consideration for the assignment was £1,000 paid to Mrs. Sykes and I am satisfied, on the evidence, that this sum was paid personally, by the second defendant, and thereafter, although the rent was paid by Wroxall Estates, Ltd., it was debited to the second defendant personally. Wroxall Estates, Ltd., was a private limited company formed to manage estates belonging to the second defendant which were said to be of the value of £70,000. The real reason for the company's existence was to reduce the incidence of taxation, including, possibly, death duties. By 1951, owing to changes in the law, the company no longer served its purpose and counsel's opinion was taken and the question of winding-up the company was considered, although it was not until Nov. 18, 1952, that the resolution to wind-up the company was passed.

The assigned sub-lease of the premises, No. 1, Chester Close, although in the company's name, had always been treated by the company as belonging to the second defendant personally. To make the position clear a minute was passed and recorded in the company's minute book and dated Oct. 24, 1938. The terms of the minute are:

"With regard to 1A, Chester Street and 25, Chester Mews, the secretary

reported that this leasehold property was, on Jan. 27, 1937, assigned to the company on the instructions of Commander Dugdale, who had paid the purchase money for it and who had stated that the property was assigned to the company as his nominee and that, consequently, the costs relating to the property had been debited to Commander Dugdale and the property had never been treated in the company's accounts as belonging to the company beneficially, it was resolved that it be recorded that this property, as from the date of the assignment mentioned above, has been held by the company as nominee for Commander Dugdale."

A

When the question of winding-up the company was being considered in early 1951, Mr. Standing, a director of Wroxall Estates, Ltd., said in evidence, and the second defendant agreed, that the sub-lease of the premises, No. 1, Chester Close, should be assigned by the company to the second defendant before the company was wound-up so that it would not be considered as part of the company's assets. I find some difficulty in accepting the recollection of Mr. Standing and the second defendant on this point in view of the letter of Messrs. Child & Child to the first defendant on Nov. 30, 1950, indicating a then intention of transferring the sub-lease to the second defendant. The effect of such an assignment might be to give the protection of the Rent Acts, on the termination of the lease, to the occupancy of the second defendant, a protection which would not be given to the company.

B

C

On Nov. 30, 1950, the solicitors for the second defendant wrote to the first defendant informing her that

D

"Your tenants, Wroxall Estates, Ltd., wish to assign the lease to their managing director, Mr. James Dugdale . . . Do you know whether, under your own lease, it is necessary for you to obtain the permission of your own landlord to an assignment of an under-lease? If so, it will be necessary to get the permission of the Drive Yourself Hire Co. (London), Ltd., who we understand are the superior landlords."

The first defendant replied to that letter:

E

"I do not think it is necessary for me to get permission for me to grant an assignment of 1A, Chester Street; I've no reason against Mr. Dugdale having the lease."

Later Miss Strutt consulted her solicitors and they wrote, on Jan. 1, 1951, to the second defendant's solicitors:

F

"There appears to be no necessity to obtain the permission of our client's superior landlords to grant your clients, Wroxall Estates, Ltd., a licence to assign the lease to Mr. Dugdale."

The licence to assign was subsequently drafted by the first defendant's solicitors and amended by the second defendant's solicitors and signed by the first defendant on Feb. 28, 1951. That licence consented to Wroxall Estates, Ltd., assigning the unexpired residue of the term of the under-lease, as extended, to the second defendant. On May 21, 1951, there was a purported assignment of the residue of the term of the under-lease, by Wroxall Estates, Ltd., to the second defendant, and this assignment was in the usual form and duly executed by the company and the second defendant. Thereafter the second defendant continued to occupy the premises, when in London, as his London residence. The consent of the plaintiffs to the assignment to the second defendant was never requested and they were not informed that the assignment had taken place. Wroxall Estates, Ltd., continued to pay the rent on behalf of the second defendant to the first defendant and there is no evidence that the first defendant was ever informed that the assignment had actually been executed. On Nov. 10, 1951, the date of the expiration of the under-lease, and, on Nov. 11, 1951, the date of the expiration of the head-lease, the second defendant was still in occupation of the premises and has retained such possession ever since.

G

H

I will now deal with the first question I have to consider, namely: Was the second defendant in lawful possession of the premises on Nov. 10, 1951. That he was in lawful occupation of the premises seems quite clear. The terms of the licence to assign, dated Jan. 26, 1937, signed by both Miss Strutt and Mr. Payne, consent to the assignment of the sub-lease to Wroxall Estates, Ltd., "for the use and occupation of the second defendant."

But was he in such occupation lawfully as a sub-tenant? This must depend primarily on whether the assignment to him was a valid assignment, being made as it was without the consent of the plaintiffs, although with the consent of the first defendant.

The original lease of Oct. 27, 1931, by Payne to Miss Strutt, contained, as I have already pointed out, a covenant on the part of Miss Strutt not to under-let without consent. The licence of Mr. Payne to Miss Strutt to create the under-lease to Mrs. Dorothy Sykes was a conditional one. The condition was that such under-lease was to contain a covenant by the under-lessee not to assign, let, or part with the possession of the premises without the warrant of the superior landlord or those claiming under him. The under-lease to Mrs. Sykes, in fact, contained the covenant not to assign, under-let or part with the possession of the premises without the written consent of the landlady, Miss Strutt, and the superior landlord. The sub-lease, therefore, was in compliance with the terms of the licence. It seems clear that Mr. Payne, as the superior landlord, desired and intended to retain control of any assignment of the sub-lease by the sub-lessor and to prevent such assignment without his consent, but by the terms of his licence and the covenant in the sub-lease, did he succeed in doing so?

The sub-tenant is not a party to the superior lease and the superior landlord is not a party to the sub-lease. The sub-lessee's covenants are with the sub-lessor and can only be enforced by her: *Williamson v. Williamson* (1) (9 Ch. App. 732, 736). If the sub-lessor chooses not to enforce the covenant requiring the sub-lessee to obtain the superior landlord's consent, the superior landlord cannot enforce this covenant in the sub-lease. Consequently, if the superior landlord desires to exercise a control over future dealings by the sub-lessee, he can, in general, only do so by making his licence for the under-lease expressly conditional on the insertion therein of a provision restricting the under-lessee from assigning without the superior landlord's consent and by requiring his lessee, that is, the under-lessor, to bind himself or herself to enforce the covenant, or by making it a term of the licence that he, the superior lessor, is a party to her under-lease containing such a covenant: see *FOA'S LANDLORD AND TENANT*, 7th ed., p. 257, note "e", and *Mackusick v. Carmichael* (2) ([1917] 2 K.B. 586). In this case, the superior landlord was not made a party to the sub-lease and did not expressly require the sub-lessor to bind herself to enforce the covenant by the sub-lessee.

It was argued, on behalf of the plaintiffs, that I should imply such a term from the licence by Mr. Payne, on Apr. 19, 1932, to Miss Strutt to create the sub-lease and the granting, by Miss Strutt, of the sub-lease under the licence. It was said that, as Miss Strutt had granted the sub-lease on the terms of the licence, she impliedly agreed to enforce the covenant in the sub-lease that there should be no assignment without the superior landlord's consent. This does not seem to me to be a necessary implication and would, of course, impose serious obligations on Miss Strutt. It might compel her to re-enter for breach of covenant and to determine the sub-lease when the superior landlord refused his consent, although the proposed assignee was, in her view, a suitable and a proper person, and might compel her to lose the benefit she had obtained from the sub-lease at the increased rent. I am of opinion that I ought not to imply such a term. It is not necessary to give business efficacy to the licence and to the grant of the sub-lease. If Miss Strutt had agreed to such a term

it might have been very unbusinesslike on her part so to do. The result is that, in my view, it was for Miss Strutt to enforce the covenant in the sub-lease not to assign without the consent of the superior landlord, or not, as she thought fit. If she thought fit to consent to an assignment of the sub-lease without the consent of the superior landlord, such an assignment would appear to have been quite valid and lawful.

While it is quite clear that Miss Strutt consented to the assignment of the lease from Wroxall Estates, Ltd., to the second defendant, I have to consider whether she did so without requiring Wroxall Estates, Ltd., to obtain the consent of the plaintiffs. The letter written to her by the second defendant's solicitors on Nov. 30, 1950, in terms only inquired if it was necessary, under the terms of the head-lease, for Miss Strutt to obtain the permission of the superior landlords to her consent to an assignment of the under-lease. Miss Strutt's reply of Dec. 4, 1950, answers this question in the negative. Miss Strutt's solicitors' letter of Jan. 1, 1951, on the other hand, states:

"There appears to be no necessity to obtain the permission of our client's superior landlords to grant your clients, Wroxall Estates, Ltd., a licence to assign . . . to Mr. Dugdale."

This was a statement, general in terms, that no permission from the superior landlords was necessary. At this time, Miss Strutt's solicitors were in correspondence with the superior landlords, or their representatives, on the question of outside repairs and, judging from their letter of Feb. 27 to the plaintiffs, they had the terms of the under-lease before them. Their letter of Mar. 27, 1951, to the second defendant's solicitors makes this equally clear. On behalf of the plaintiffs, it was contended before me that all Miss Strutt, or her representatives, were saying was that no consent was required from the superior landlord by the terms of the head-lease and that she did not consent to the assignment of the sub-lease to the second defendant on the terms that the sub-lessors need not obtain the consent of the superior landlord. Miss Strutt did not give evidence before me and no evidence was called on her behalf. I have, therefore, to decide what is the proper inference to be drawn from the correspondence. If the only letter was that from Miss Strutt of Dec. 4, 1950, I should have been left in some doubt, but, in view of the letter of her solicitors, Messrs. Farrer & Co., of Jan. 1, 1951, and of the fact that they had the terms of the sub-lease before them and that they drafted the licence to assign and agreed its terms in a formal way with the second defendant's solicitors, I am satisfied that Miss Strutt and her advisers were prepared to, and did consent to, the assignment of the sub-lease from Wroxall Estates, Ltd., to the second defendant, without requiring the company to obtain the consent of the plaintiffs to the assignment. In the result, I am of opinion that the sub-lease was lawfully assigned by Wroxall Estates, Ltd., to the second defendant, and that thereafter the second defendant was lawfully in occupation as a sub-tenant of the premises.

That brings me to the second question, namely, whether the second defendant was a sub-tenant to whom the premises had been lawfully sub-let, within the meaning of s. 15 (3) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920. The premises were originally lawfully sub-let to Mrs. Dorothy Sykes, who assigned her interest to Wroxall Estates, Ltd., who in turn assigned, as I have found lawfully, that interest to the second defendant. The premises were not actually sub-let to the second defendant. By s. 12 (1) (g) of the Act of 1920, the expressions "tenant" and "tenancy" in the Act include sub-tenant and sub-tenancy and the expression "let" includes sub-let. By s. 12 (1) (f) of the same Act the expression "tenant" includes any person deriving title under the original tenant. As a result of these two provisions, the word "sub-tenant" in s. 15 (3) of the Act includes any person lawfully deriving

title under the original sub-tenant, and would, therefore, include the second defendant.

If this be right, I now have to consider whether s. 15 (3) of the Act of 1920 applies to the circumstances of this case. That section provides:

“Where the interest of a tenant of a dwelling-house to which this Act applies is determined, either as the result of an order or judgment for possession or ejectment, or for any other reason, any sub-tenant to whom the premises or any part thereof have been lawfully sub-let shall, subject to the provisions of this Act, be deemed to become the tenant of the landlord on the same terms as he would have held from the tenant if the tenancy had continued”.

If that sub-section had stood alone, it would not appear to apply to the facts of this case as the second defendant's sub-tenancy expired on the day before the first defendant's tenancy expired. In construing s. 15 (3) of the Act of 1920 one must have regard to the provisions of s. 15 (1), which provides that a tenant (which by virtue of s. 12 (1) (g) includes a sub-tenant) who, by virtue of the provisions of this Act, retains possession of any dwelling-house to which this Act applies shall, so long as he retains possession, observe and be entitled to the benefit of all the terms and conditions of the original contract so far as the same are consistent with the provisions of this Act. The effect of s. 15 (1) operates, in my view, to continue the sub-tenancy of the second defendant as against the first defendant for Nov. 11, 1951, and thereafter as against the superior landlords, the plaintiffs. Reading the two sub-sections together, in my view, the words “determined . . . for any other reason” in s. 15 (3) include determination by effluxion of time, and, further, a sub-tenant who becomes a statutory tenant under s. 15 (1), is entitled to the benefit conferred on sub-tenants by s. 15 (3). The benefit conferred by s. 15 (3) would, therefore, enure for the benefit of a sub-tenant retaining possession of a dwelling-house to which the Act applies so long as he retains possession.

It is admitted that the premises are premises to which the Rent Acts apply, and it is, of course, obvious that the sub-tenant is retaining possession of those premises. In my view, therefore, the second defendant must be deemed to have become the tenant of the plaintiffs, on the same terms as he would have held his sub-tenancy from Miss Strutt if her lease had not determined, and to be entitled to the protection which the Rent Acts give to his occupancy.

Further questions now arise whether an order for possession should be made, notwithstanding the fact that the occupancy of the second defendant is protected by the Rent Acts. Before dealing with these further questions it is necessary for me to decide whether, on the pleadings as they at present stand, it is open to the plaintiffs to ask for an order for possession if the Rent Acts apply.

A preliminary objection was made by the second defendant that the plaintiffs, in their statement of claim, only claimed possession of the premises on the ground that the second defendant was in wrongful possession of the premises and on the basis that no claim, or other proceedings, would arise in the action out of the Rent Acts or any provisions thereof. The plaintiffs proceeded in this way in reliance on the decision of McCARDIE, J., in *Gunter v. Davis* (3) and notwithstanding the provisions of s. 17 (1) and s. 17 (2) of the Act of 1920. On Apr. 7, 1952, the plaintiffs applied to remit this action to the county court, but this was resisted by the second defendant on the ground that the claim was not a claim within the terms of s. 17 and the master refused to remit the action. On May 19, 1952, on the summons for directions, the master, apparently, took a different view and made an order remitting the action to the county court. Against this order the second defendant appealed to DONOVAN, J., in chambers, who reversed the order of the master. On Feb. 3, 1953, the plaintiffs applied for leave to amend their reply by including therein

what, in effect, was a claim for an order for possession under the provisions of the Rent Acts if, contrary to the plaintiff's contention, the Rent Acts applied to the occupancy of the second defendant. The second defendant resisted this application on the ground that the amendment sought would be a departure from the statement of claim as raising a new ground of claim in the reply, contrary to the provisions of R.S.C., Ord. 19, r. 16. The master allowed the amendment, and, after the amendment was made, the second defendant applied to the master, on Feb. 17, 1953, to strike out the amendment as a departure, but the master refused this application. Thereupon the second defendant appealed to PARKER, J., in chambers, against the master's refusal. This appeal was heard on Feb. 25, 1953, the day before the case was in the list for hearing, and PARKER, J., made no order, leaving the question to be raised at the trial. The second defendant took the objection before me as a preliminary point.

The plaintiffs' contention was that there was no departure as their claim for possession was under their common law right to possession, and, even although the Rent Acts applied, the provisions of those Acts were simply restrictive of their common law rights and any order for possession, even under the provisions of the Rent Acts, was made by virtue of those common law rights. I cannot accept this contention. In my view, the law, if I may say so with respect, was correctly stated by SCRUTTON, L.J., in *Rossoff v. Lipovitch* (4) ([1925] 1 K.B. 636), as follows:

"It is contended on behalf of the landlord that the claim to recover possession is a claim arising, not out of the Rent Restrictions Acts, but out of the common law. That contention is, to my mind, not merely very technical, but also inaccurate . . . It is not, in my opinion, accurate to say that the claim in the present case arises out of the common law . . . The original common law right to possession has been modified by the Rent Restrictions Act in the case of houses to which the Act applies, and a claim for the possession of such a house cannot any longer be made under the common law, for the common law has gone."

In my view, a claim for possession of premises to which the Rent Restrictions Acts apply is not a claim made at common law, but a claim made under the provisions of those Acts. It follows from this that the plaintiffs' reply raises a new ground of claim in addition to that contained in the statement of claim and is irregular. I indicated however, at the trial, that, should I be of opinion that the reply was irregular, I would give the plaintiffs leave to amend their statement of claim by including, in their statement of claim, an alternative claim for possession under the Rent Restrictions Acts. I give that leave now, but I will deal with the question of costs after this judgment.

I have now to consider the claim for possession under the Rent Restrictions Acts. Section 3 (1) of the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, provides that no order or judgment for the recovery of possession of any dwelling-house to which the principal Acts apply or for the ejectment of a tenant therefrom shall be made or given unless the court considers it reasonable to make such an order or give such a judgment, and the court has power to do so under the provisions set out in sched. I to the Act. By sched. I the court has power to make such order or give such judgment if (a) any rent lawfully due from the tenant has not been paid, or any other obligation of the tenancy (whether under the contract of tenancy or under the principal Acts), has been broken or not performed, and (d), as amended by the Rent and Mortgage Interest Restrictions Act, 1939, s. 3 (1) and sched. I, the tenant, without the consent of the landlord, has at any time after Sept. 1, 1939, assigned or sub-let the whole of the dwelling-house.

On behalf of the plaintiffs it was submitted that an obligation of the sub-tenancy had been broken or not performed. The alleged breach or non-performance was the assignment by Wroxall Estates, Ltd., to the second defendant

without obtaining the written consent of the plaintiffs, the superior landlords. For reasons already stated, I am of opinion that there was no breach of the covenant in the sub-lease not to assign or part with the possession of the premises without the consent of the landlady and the superior landlord. The first defendant consented to this assignment to the second defendant and did not require Wroxall Estates, Ltd., to obtain the consent of the superior landlords, the plaintiffs, as a term of her consent. Although there was no breach of this covenant there was, in one sense, a non-performance of that covenant. I have to consider whether such a non-performance, although it does not amount to a breach of obligation under the tenancy, can still be a non-performance within the meaning of para. (a) of sched. I to the Act of 1933. The words of para. (a) "other obligation of the tenancy" must mean obligations imposed by the tenancy under which the tenant holds at the time of the non-performance of the obligation. In this case the tenancy under which Wroxall Estates, Ltd., held, and the second defendant held, was the sub-tenancy, and, even after Nov. 11, 1951, the second defendant still held on the terms of that sub-tenancy, so far as they were applicable. There was, therefore, no failure of performance of which the plaintiffs could take advantage, as there was no failure of performance of any obligation owed to the plaintiffs. Apart from this view, I am of opinion that the words "not performed" in para. (a) of the schedule refer to a non-performance which amounts to a breach of obligation under the tenancy and that the words "has been broken or not performed" mean no more than an active or passive breach of obligation, a breach either by action or by inaction. In the result, the plaintiffs have failed to satisfy me that I have power under para. (a) of the schedule to make an order or a judgment for possession of the premises in question.

There next comes the plaintiffs' contention that I have power, under para. (d) of the schedule, on the ground that the tenant, without the consent of the landlord, has at a time after Sept. 1, 1939, assigned or sub-let the whole of the dwelling-house. It is quite true and it is admitted that Wroxall Estates, Ltd., assigned their interest in the sub-lease and thereby assigned the whole of the dwelling-house to the second defendant without the consent of the plaintiffs, but were the plaintiffs the landlords of Wroxall Estates, Ltd., at the time of such assignment? In my view, they were not. The landlord of Wroxall Estates, Ltd., at that time, was the first defendant, Miss Strutt, and she in fact gave her consent to the assignment. I must, therefore, reject the plaintiffs' contention on this ground also.

The final question, whether I consider it would be reasonable to make such an order if I was satisfied that I had, by reason of para. (a) or para. (d) of sched. I to the Act of 1933, power to make such order or give such judgment, does not arise. In case, however, another court may differ from me and consider this question does arise, and as it is a matter for my discretion, I will state my views on the question and the facts I find in relation thereto.

[His LORDSHIP then considered whether, if he were wrong in the view which he had taken of the provisions of sched. I, it would have been "reasonable" to make an order, and came to the conclusion that in all the circumstances it would have been reasonable to make an order for possession.]

Judgment for the defendants.

Solicitors: *Merton Naydler* (for the plaintiffs); *Farrer & Co.* (for the first defendant); *Child & Child* (for the second defendant).

[Reported by MICHAEL MALONEY, Esq., Barrister-at-Law.]

**METROPOLITAN WATER BOARD v. HERTFORD
CORPORATION.
HERTFORD CORPORATION v. METROPOLITAN WATER
BOARD.**

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Jenkins and Romer, L.JJ.),
March 2, 3, 31, 1953.]

A *Water Supply—Rating of undertaking—Assessment on “profits basis”—Indirectly productive hereditament—Water intake—Departure from usual method of calculation on profits basis—Special circumstances—Altitude of hereditament—Rating and Valuation Act, 1925 (c. 90), s. 22 (1) (b).*

B A water board occupied under statutory powers as part of their undertaking a hereditament consisting of an intake from the River Lea with screen, fender, gauge house and keeper's living accommodation, sluice house and store hut, a natural spring of water, about 1,950 yards of channel, land of about eight acres in area, bridges, iron post and rail fencing, and short lengths of forty-eight inch and thirty inch mains. Water from the River Lea flowed through the intake, and was then conveyed, by gravity, first along a channel and thereafter by an artificial watercourse known as the New River to filter-beds of the board, a total distance of about twenty-four miles. At the filter-beds the level of the filtered water ready to be pumped into supply was about sixty feet higher than the level at other waterworks of the board, which, for pumping purposes, was a substantial advantage. The same advantage could be obtained from an intake at any point on a stretch of a mile and one-third of the River Lea. There was no dispute between the parties but that (i) the method of assessment of the net annual value of the said hereditament for rating purposes was the “profits basis”, and (ii) the net annual value in cumulo of the hereditaments comprised in the undertaking of the board should be taken to be £1,706,016 (known as the “cumulo value” and being equivalent to the net revenue of all the hereditaments). The undertaking of the board extended into ninety-eight rating areas, and comprised some two hundred and fifty-five hereditaments.

E The hereditament in question was of the indirectly productive class, and, therefore, as part of the calculations on the profits basis it was as a general rule the practice to ascertain the net annual value thereof on the “contractor's basis”, i.e., by estimating its capital value and taking an appropriate percentage thereon (usually, in a case such as the present, the same as the percentage of all the hereditaments comprised in the undertaking represented by the cumulo value) as representing its net annual value. The board made a proposal to reduce an assessment by the rating authority of the rateable value of the hereditament. The Lands Tribunal came to the conclusion that it was “not practicable to ascertain a net annual value for the hereditament . . . truly relative to the . . . rental value of the whole undertaking purely by a process of estimating and comparing respective capital values”. The tribunal also gave effect to their view that the value of the hereditament was “enhanced by its fitness for assisting the board to achieve the saving in pumping height”.

G **H** **HELD:** (i) the application of the “profits basis” method of assessment involved as a matter of law the ascertainment of the aggregate net annual value of all the indirectly productive hereditaments comprised in the undertaking of the board and the allocation to the indirectly productive hereditaments in each rating area of their due proportion of that aggregate sum, and if the tribunal's conclusion meant that their method of calculation involved a departure from the normal treatment of indirectly productive hereditaments on the “profits basis” of assessment, without

any facts being found to justify such departure, the tribunal had erred in law.

(ii) the value to the board of the use to which the hereditament was actually put should not be taken into account, and it was not legitimate to attribute (as the rating authority in effect claimed should be done) a special value to the hereditament on account of the altitude of the intake, measured by reference to the pumping costs saved by the board by passing the water received through the intake into the New River and along it by gravity to the filter-beds, whence it could be distributed by gravity to consumers in certain parts of the board's area; the altitude of the hereditament was relevant only in the sense that it narrowed the range of hereditaments on the River Lea from which the board, seeking hereditaments on that river, would be likely to make their selection, so, to some extent, increasing the price which the hypothetical vendor would be likely to require, and which the board might reasonably be prepared to pay.

Metropolitan Water Board v. Chertsey Assessment Committee ([1916] 1 A.C. 337), applied.

Per JENKINS, L.J.: The "profits basis" has no statutory authority, and sets up no new standard of rateable value, the one and only standard (so far as is here material) being the rent at which the hereditament might reasonably be expected to let from year to year on the terms stated in the Rating and Valuation Act, 1925, s. 22 (1) (b). The "profits basis" is no more than an aid to the ascertainment of that rent in cases of a particular class. It lays down no inflexible code. The manner of applying its general principles, no doubt, admits of variation to suit the peculiarities of individual cases, and, no doubt, there may be cases in which there are special circumstances sufficing to justify its total exclusion. Nevertheless, the "profits basis" has behind it the sanction of long practice and of judicial approval over many years, and at the present time it may, I think, be said that as a matter of law it is *prima facie* the right method to apply in a case of this kind, the onus of showing special circumstances justifying a departure from it being on those who advocate such departure.

AS TO ASSESSMENT OF WATERWORKS, see HALSBURY, Hailsham Edn., Vol. 27, pp. 417-422, paras. 848-854; and FOR CASES, see DIGEST, Vol. 38, pp. 547-552, Nos. 899-924.

Cases referred to:

- (1) *Kingston Union v. Metropolitan Water Board*, [1926] A.C. 331; 95 L.J.K.B. 605; 134 L.T. 483; 90 J.P. 69; 38 Digest 547, 901.
- (2) *R. v. Mile End Old Town (Churchwardens & Overseers)*, (1847), 10 Q.B. 208; 16 L.J.M.C. 184; 9 L.T.O.S. 312; 11 J.P. 505; 116 E.R. 80; 38 Digest 552, 925.
- (3) *R. v. West Middlesex Waterworks*, (1859), 1 E. & E. 716; 28 L.J.M.C. 135; 32 L.T.O.S. 388; 23 J.P. 164; 120 E.R. 1078; 38 Digest 450, 171.
- (4) *Great Central Ry. Co. v. Banbury Union. Sheffield Union v. Great Central Ry. Co.*, [1909] A.C. 78; 78 L.J.K.B. 225; 100 L.T. 89; 73 J.P. 59; 38 Digest 543, 875.
- (5) *Metropolitan Water Board v. Chertsey Assessment Committee*, [1916] 1 A.C. 337; 85 L.J.K.B. 296; 114 L.T. 380; 80 J.P. 137; 38 Digest 551, 919.
- (6) *New River Co. v. Hertford Union*, [1902] 2 K.B. 597; 71 L.J.K.B. 827; 87 L.T. 360; 66 J.P. 724; 38 Digest 548, 909.
- (7) *Talargoch Mining Co. v. St. Asaph Union*, (1868), L.R. 3 Q.B. 478; 37 L.J.M.C. 149; 18 L.T. 711; 32 J.P. 501; 38 Digest 441, 129.

APPEALS by the Metropolitan Water Board and the valuation officer, Inland Revenue, Hertford, against a decision of the Lands Tribunal dated June 26, 1952.

- The board was the owner and occupier of a hereditament in the valuation list for the borough of Hertford described as "Chadwell Spring, portion of New River, gauge house, sluices, appurtenances and intake from River Lea," and assessed at: land covered with water £2,221 net annual value (£1,777 rateable value), and land not so covered £332 rateable value. On Mar. 30, 1950, the board made a proposal to reduce the assessment on the ground that the existing values were excessive. On Mar. 29, 1951, a local valuation court
- A of the South Middlesex Local Valuation Panel reduced the assessments to: land covered with water £677 net annual value (£542 rateable value), and land not so covered £241 rateable value. The Hertford Corporation, as rating authority, appealed against that decision to the Lands Tribunal. It was contended on behalf of the corporation (a) that the only lawful point of intake from the River Lea for the board was that fixed by the statute 12 Geo. 2, c. 32,
- B and that the point could not be altered except by Act of Parliament; (b) even if the board were not so tied, what had to be valued was the hereditament as actually existing, with all its capacities, advantages, disadvantages and limitations, and if the hereditament gave to the board an ability which no other hereditament could give to it, that must be taken into account; (c) the special fitness of the hereditament was that it provided access to water in large
- C quantities at a level which enabled the board by gravitation to supply water to filter-beds sixty feet above the level of such beds at any other works; (d) it was only at the intake that the head of water could be obtained, and it was there that the special fitness lay: there was no special fitness in the whole length of the New River which, although an open water course, was in effect nothing more than a carrying main; (e) the hereditament was the means to
- D the getting of the water from the River Lea so that it could be sold, and as such was rateable; (f) the right of the board in relation to the waters of the River Lea could be taken into account: that would not be valuing the right but would be seeking to consider what rent the board would be prepared to pay for the hereditament to enable them to exercise the right which they already possessed; (g) that in arriving at the amount of the net annual value
- E there was no rule of law to compel the tribunal to proceed by an ascertainment of its capital value; (h) if the tribunal should decide to adopt a method which involved the ascertainment of capital value, the special fitness of the hereditament for the purposes of the board's undertaking should be taken into account.
- It was contended on behalf of the board: (a) that as a matter of law the net annual value here in question must be determined (i) on the basis of the
- F effective structural or market capital value of the hereditament in Hertford, and (ii) by applying thereto an appropriate figure of percentage ascertained by comparing the net annual value of the board's undertaking in cumulo with the total effective structural or market capital value; (b) that the method adopted by the corporation was wrong in law and that a judgment of what was the annual value in the sense of the market value of the hereditament, or of
- G the annual value which the hereditament was worth as part of the whole, was irrelevant unless ascertained through its capital value; (c) that it was irrelevant whether the board in fact took a large quantity or only a small quantity of water at the intake; (d) that it must be assumed that the board's undertaking had been let all at once and as one entity, that the board had already become the tenant of the whole, that it was not necessary to consider the
- H value of the hereditament except as a pure matter of apportionment of a rent already ascertained, and that, when there had been ascertained the effective capital values of the assets in the whole undertaking and of those in Hertford, the apportionment to Hertford of an assessment out of the net annual value of the whole undertaking was a pure matter of arithmetic.

The argument on behalf of the valuation officer was substantially similar to that on behalf of the board. The tribunal placed a net annual value of

£1,200 (with a rateable value of £960) on the land covered with water and a net annual value (and rateable value) of £300 on land not so covered, and, therefore, allowed to that extent the corporation's appeal.

Harold Williams, Q.C., and C. E. Scholefield for the water board.

Rowe, Q.C., J. R. Willis, and Squibb for the corporation.

Maurice Lyell for the valuation officer.

Cur. adv. vult.

Mar. 31. **SIR RAYMOND EVERSHED, M.R.:** In this case I have had the advantage of seeing the judgment prepared by JENKINS, L.J., to which, I feel, I could not usefully add anything save to state my agreement with it. I am authorised by ROMER, L.J., to say that he also has had the like advantage, and desires to add nothing.

JENKINS, L.J., read the following judgment. These are appeals by the Metropolitan Water Board and the valuation officer from a decision of the Lands Tribunal concerning the assessment of a hereditament described as "Chadwell Spring, portion of New River, gauge house, sluices, appurtenances and intake from River Lea", being that part of the undertaking of the board which lies in the parish of Hertford in the borough of Hertford. The proceedings began with a proposal made by the board on Mar. 30, 1950, for the reduction of the assessment of the hereditament, which then appeared in the valuation list at a net annual value of £2,221 for land covered with water, with a rateable value of £1,777, and a net annual value (and rateable value) of £332 for land not so covered, to £274 net annual value and £219 rateable value for the land covered with water, and £241 net annual value (and rateable value) for the land not so covered. The corporation of Hertford and the valuation officer both gave notice of objection on the ground that the existing values were not excessive and should not be altered, but the valuation officer later amended his notice so as to concede that the values ascribed to the hereditament were excessive and that some alteration should be made in them. The board gave notices of appeal against these objections, and their appeals were heard on Mar. 19, 1951, by a local valuation court who, on Mar. 29, 1951, directed that the valuation list should be altered to show a net annual value of £677 for land covered with water, with a rateable value of £542, and a net annual value (and rateable value) of £241 for land not so covered. From this decision the corporation appealed to the Lands Tribunal, the appeal being contested by the board with the support of the valuation officer, who, however, did not contend for the full amount of the reductions claimed by the board.

The Case stated by the Lands Tribunal for the opinion of this court contains the following findings of fact:

"We found the following facts proved:—(a) The hereditament consists of an intake from the River Lea with screen, fender, gauge house with measuring device and keeper's living accommodation, sluice house and store hut, a natural spring of water known as 'Chadwell Spring', about 1,950 yards of channel, an area of land about eight acre, in extent, seven bridges, an iron post and rail fence alongside the New River and round Chadwell Spring and short lengths of forty-eight inch and thirty inch mains. (b) Water from the River Lea flows through the intake and is then conveyed by gravity first along a channel and thereafter by an artificial watercourse known as the New River to the filter-beds of the board at Stoke Newington, a total distance of about twenty-four miles. The board can usually take about 22½ million gallons a day at this intake, although in times of drought the amount so taken may fall to a much lower figure. It has been as low as 10.4 million gallons and, in times of flood, the amount abstracted has reached 32½ million gallons. The average abstraction, expressed in millions of gallons per day, was 18.8 for 1948-49 (Mar. 31),

- 14.9 for 1949-50 and 21.2 for 1950-51. The water taken from the river is joined by any water emerging from Chadwell Spring, which is an unreliable source of supply, has yielded little in recent years, and has been dry, almost invariably, in the summer months. In its course the New River passes eleven well stations where water is pumped and discharged into the river, thus augmenting the flow. By the time all the well stations have been passed the maximum capacity of the New River
- A is about forty-five million gallons a day and the water, flowing by gravity for the whole of its journey, is discharged on to the board's filter-beds at Hornsey or Stoke Newington. (c) At the Stoke Newington filter-beds the level of the filtered water ready to be pumped into supply is ninety-four feet above ordnance datum against sixteen feet at the board's Lea Bridge works and twenty-nine feet at the board's Walton works on the River Thames. Water for the high altitude neighbourhoods to the west of and near to Stoke Newington can, therefore, be pumped from the ninety-four feet level at Stoke Newington instead of the sixteen feet level at Lea Bridge, a saving of seventy-eight feet, or taking into account the board's main works on the River Thames an average saving of about sixty feet of pumping height. (d) So far as the altitude of the said intake on the River Lea at Hertford renders it possible for water to flow by gravity direct to the filter-beds at Hornsey and Stoke Newington, that advantage could, subject to the necessary statutory or other power existing in or being obtained by the board and subject to the construction of a new intake with ancillary structures, be obtained at any point on the stretch of the River Lea known as the Hertford-Ware Pound extending to one and one-third miles, but could not be obtained further downstream. (e) A plan of the hereditament is annexed hereto marked 'A' and forms part of this Case. The undertaking of the board consists of works, reservoirs, etc., where water is obtained, treated and stored, mains by which the water is conveyed and distributed to consumers and ancillary subjects such as offices, workshops, stores, dwelling-houses, etc. It extends into
- E seven counties and ninety-eight rating areas and comprises some 255 individual hereditaments. There is no dispute as to the net annual value in cumulo of the hereditaments comprised in the undertaking, all the parties having accepted for the purposes of this appeal that it should be taken to be £1,706,016. The controversy between the parties is as to the amount of the assessment which should be placed upon the hereditament in the borough of Hertford forming part of the undertaking."
- F

It is not in dispute that the method of assessment appropriate to the many and various rateable subjects comprised in the undertaking of the board is the method of assessment commonly called the "profits basis" which, though not enjoined by any statutory provision, has long been recognised in practice and judicially approved as *prima facie* the proper method of arriving at the net annual values for rating purposes of the hereditaments comprised in a public utility undertaking, such as that of the board, with many rateable subjects situated in many different rating areas.

G

The nature and objects of the "profits basis" are authoritatively expounded in *Kingston Union v. Metropolitan Water Board* (1), and particularly in the speech of VISCOUNT CAVE, L.C. ([1926] A.C. 338), and the method is also recognised and approved in the much earlier cases of *R. v. Mile End Old Town (Churchwardens & Overseers)* (2), and *R. v. West Middlesex Waterworks* (3). It can, I think, be described with sufficient accuracy for the present purpose as a special method of arriving at net annual values which involves as a general rule calculations of the following nature; (a) the ascertainment of the net revenue produced by the whole undertaking which is treated as representing the net annual value of the entire concern and is commonly known as the

H

"cumulo value"; (b) a division of the hereditaments comprised in the whole undertaking between those directly productive of revenue and those only indirectly so productive; (c) the ascertainment of the net annual value of the indirectly productive hereditaments by the method commonly referred to as the "contractor's basis", i.e., by estimating their respective capital values and taking an appropriate percentage thereon (now, I think, usually the same in a case of this kind as the percentage of the capital value of all the hereditaments comprised in the whole undertaking represented by the cumulo value) as representing the net annual value of all the indirectly productive hereditaments of the undertaking; (d) the deduction of the last-mentioned figure of net annual value from the cumulo value; (e) the apportionment to the indirectly productive hereditaments in each rating area of their individual net annual values ascertained as above, and (f) the allocation to the directly productive hereditaments in each rating area of their proper shares of the balance of the cumulo value in proportion to the amounts of revenue arising in the several rating areas.

The hereditament here in question is admittedly of the indirectly productive class, so that no question as to the allocation of the balance of cumulo value attributable to directly productive hereditaments arises in this case, but references to that essential feature of the "profits basis" method of assessment is necessary in order to appreciate the part played by the assessment of the indirectly productive hereditaments in the entire process, designed as it is to ensure that the hereditaments in each rating area, whether directly or indirectly productive, should be fairly assessed, and at the same time that the aggregate of all the assessments in all the areas should not exceed, but should as nearly as may be equal, the cumulo value.

As appears from the Case Stated, the following valuations were submitted to the tribunal by the corporation, the board and the valuation officer respectively. The corporation submitted a valuation of £5,000 as representing the net annual value of the hereditament ascertained in accordance with the Rating and Valuation Act, 1925, s. 22 (1) (b), without regard to the value of the undertaking in cumulo, but (apparently in recognition of the applicability of the "profits basis") reduced that figure by one-third, i.e., to £3,333

"to fit in with the cumulo and to fit in with a reduction from five per cent. to 3.32 per cent. on capital values estimated on a 1939 basis adopted on behalf of the valuation officer in the apportionment of the value in cumulo in the 1950 re-assessment of all the hereditaments comprised in the board's undertaking."

It should be noted that in submitting this valuation the corporation claimed to have taken into account, inter alia, that the intake was a point determined by statute of access to a supply of about 22½ million gallons of water a day, which was necessary to the board, and which would flow by gravity without any pumping to a point sixty feet above the height where elsewhere pumping would normally have to start, and also said that the value attributable to the intake had been regarded as "not being capable of being reliably estimated by a process of calculation or by reference to area of land and structural values but as a matter of skilled professional judgment". The corporation further described this valuation as intended to represent the value of the hereditament taking into consideration its special fitness for the board's purposes, and said that

"the special value had been regarded as lying in a small area of about two hundred and ten square yards of land, being the intake and the site of the gauge house and not in the channels on the hereditament any more than in the course of the New River all the way up to London."

The board submitted a valuation giving a net annual value (as defined by s. 22 (1) (b) of the Act of 1925) of £429 for land covered with water (with a

rateable value of £343) and £221 for land not so covered, making a total net annual value for the hereditament of £650. The board's calculation, as described in the Case Stated, is more explicit in its acceptance of the "profits basis". It begins with the agreed cumulo value of £1,706,016. It then expresses that figure as a percentage of the capital value of the entire undertaking arrived at by taking land at its estimated 1939 value and adding double the 1939 effective cost value for structures, plant and mains. The capital value thus estimated being £103,042,380, the resulting percentage is 1.656 per cent. The calculation then proceeds to apply the same percentage to the capital value (ascertained in the same way) of the indirectly productive assets (amongst them the hereditament now in question) included in the £103,042,380, presenting the result as the net annual value of all the indirectly productive hereditaments out of which the like percentage of the capital value of the particular hereditament now in question represents the net annual value of that hereditament.

The main matter of controversy in the board's calculation is the capital value placed on the hereditament in question. This appears to have been arrived at by taking the value of the land as agricultural land at £200 per acre, adding £456 per acre on account of certain natural channels (which made a total of £5,248 for the eight acres) and adding a further sum unspecified for buildings and other structures at double their estimated 1939 cost value. In the view of the board, there was no special fitness in the land apart from the natural channels, and, in particular, the altitude of the intake and consequent benefit of gravity in the conveyance by way of the New River of the water passing through it, was irrelevant.

The valuation officer submitted a valuation giving a net annual value of £677 (rateable value £542) for land covered with water and £228 for land not so covered, making a total net annual value of £905. Apart from the actual valuation of the hereditament in question his calculation proceeded on substantially the same lines as that of the board, except that, in arriving at his capital figure for the entire undertaking, he made no allowance for the increased cost value of buildings and other structures since 1939, so that his figure of capital value came out at £51,392,778 instead of £103,042,380, and the percentage resulting from the application of the cumulo value to his capital value was 3.32 instead of 1.656. His valuation of the hereditament in question was arrived at by taking £50 per acre for the land, adding the estimated 1939 cost value of buildings and other structures, and allowing for the special fitness of the hereditament generally a sum of £10,800 arrived at by what appears to be the somewhat arbitrary method of taking "a capital figure of £35 a yard for the first three hundred and sixty yards of channel instead of an ordinary figure of £5 a yard". The Case Stated thus summarises his views on the subject of special fitness:

"The land was regarded as being fit for its purpose but no fitter than almost all the other land of the undertaking, the intake would be useless without the channels behind it, the whole hereditament in Hertford would be worthless without the other twenty-four miles of New River, the whole of the New River would be worthless without the filter-beds and reservoirs of Stoke Newington, and those filter-beds and reservoirs would be worthless if mains did not lead to the water taps of the consumers."

The tribunal expressed its conclusions as follows in the Case:

"19. We were of opinion that the question in issue should be determined in accordance with the principle laid down in *Great Central Ry. Co. v. Banbury Union* (4) ([1909] A.C. 86) that, to quote LORD LOREBURN, L.C.: ' . . . each section is indispensable to the working of the system; and I think the resulting inquiry is, if the whole system were to be let at once, though it be in separate sections, how much of the rent that a tenant

would give for the whole is applicable to the particular section which is to be assessed?' We were further of opinion that in estimating the value of the Hertford section of the board's undertaking—to quote LORD SHAW OF DUNFERMLINE in *Metropolitan Water Board v. Chertsey Assessment Committee* (5) ([1916] 1 A.C. 357): ' . . . land and buildings should be taken account of just as they are, to the eye of a hypothetical tenant—that is to say, with all their advantages, fitnesses, facilities, and capacities '. 20. We came to the following conclusions: (a) The conditional rights, granted under a number of statutes, to take waters from the Thames and the Lea and exercised by the board for the purposes of fulfilling their statutory obligations with respect to the supply of water are rights in gross springing from the statutes and not from the ownership of lands and they are not rateable subjects. (b) The lands with the Chadwell Spring and the well stations to which we have referred are rateable subjects, as also are the various other lands with the buildings, works, fixed plant, mains, etc. which enable the board to take, convey, treat and store water and to distribute it to consumers. (c) The cumulo net annual value of the whole system of rateable subjects comprised in the board's undertaking represents, in principle, the rent which the board, with statutory obligations to fulfil and themselves owning and possessing the rights in gross to which we have referred, might reasonably be expected to pay for that system if they were not the owners. (d) In dealing with the above-mentioned proposals in Hertford and other rating areas there fell to be ascertained a net annual value for each separately rateable hereditament to represent the rent which the board might reasonably be expected to pay for it, subject to a condition that the total of all such net annual values would not exceed, or be less than, the cumulo. (e) The assessment of the hereditament in Hertford must not include the value of the board's statutory right to take water from the River Lea, nor may the actual user of the land or works for purposes authorised by statute be taken into account in arriving thereat, but, in our opinion, there should be taken into account (by way of enhancement of parochial rental values) the inherent advantage and fitness in the Hertford intake and channel which, in conjunction with the New River throughout its length, enables the board to bring to practical account a potentiality, due to altitude, of the waters of the River Lea at Hertford and so to achieve a saving, compared with water from other intakes, of sixty feet of pumping height. (f) It is not practicable to ascertain a net annual value for the hereditament in Hertford truly relative to the agreed rental value of the whole undertaking purely by a process of estimating and comparing respective capital values. Bearing in mind the agreed amount of the net annual value of the undertaking in cumulo and giving effect to our view that the value of the hereditament at Hertford is enhanced by its fitness for assisting the board to achieve the saving in pumping height at Stoke Newington to which we have referred, we decided to place a net annual value of £1,200 with a rateable value of £960 upon the land covered with water and a net annual value (and rateable value) of £300 upon land not so covered. To this extent we allowed the corporation's appeal. The question for the decision of the Court of Appeal is whether in so deciding we came to a correct determination in point of law."

These conclusions are claimed by the board and the valuation officer to be erroneous in law in two respects. First, it is said that, the "profits basis" method of assessment being admittedly applicable, the application of this method involves as a matter of law the ascertainment of the aggregate net annual value of all the indirectly productive hereditaments comprised in the undertaking of the board and the allocation to the indirectly productive hereditaments in each rating area of their due proportion of this aggregate sum,

for such ascertainment and allocation are indispensable to the attainment of the essential objects of the "profits basis" method, which are to ensure that the aggregate net annual value attributed to all the hereditaments (directly and indirectly productive) comprised in the entire undertaking does not exceed the cumulo value, and at the same time that, subject to this overriding limitation, the hereditaments (directly and indirectly productive) in each rating area are fairly assessed. It is said further that the proper, if not the only, way of achieving such ascertainment and allocation, so far as indirectly productive hereditaments are concerned, is (to take the instant case) by estimating the aggregate capital value of all the indirectly productive hereditaments in the entire undertaking, applying to that capital value an appropriate percentage which, it is claimed, should be the same as the percentage of the total capital value of the undertaking represented by the cumulo value, and attributing to the indirectly productive hereditament in question a net annual value equal to that percentage of its capital value. It is said that the tribunal in their conclusions did not follow this procedure, and that in failing to do so they committed an error in law. Secondly, it is contended that the tribunal erred in law in regarding the altitude of the hereditament as a factor enhancing its net annual value, or, at all events, in taking such altitude into account as enhancing such net annual value by reason of the actual use made of the hereditament by the board, that being, in the submission of the board and the valuation officer, the effect of the tribunal's conclusions on this point.

As to the first objection, it must be borne in mind that the "profits basis" has no statutory authority, and sets up no new standard of rateable value, the one and only standard (so far as is here material) being the rent at which the hereditament might reasonably be expected to let from year to year on the terms stated in s. 22 (1) (b) of the Act of 1925. The "profits basis" is no more than an aid to the ascertainment of that rent in cases of a particular class. It lays down no inflexible code. The manner of applying its general principles, no doubt, admits of variation to suit the peculiarities of individual cases, and, no doubt, there may be cases in which there are special circumstances sufficing to justify its total exclusion. Nevertheless, the "profits basis" has behind it the sanction of long practice and of judicial approval over many years, and at the present time it may, I think, be said that as a matter of law it is *prima facie* the right method to apply in a case of this kind, the onus of showing special circumstances justifying a departure from it being on those who advocate such departure: see *Kingston Union v. Metropolitan Water Board* (1), and in particular the speech of VISCOUNT CAVE, L.C., where he says ([1926] A.C. 340):

"My Lords, it is obvious that, in view of this long practice favourable to the profits basis, those who contend for the application of a different rule undertake a difficult task";

and that of LORD BUCKMASTER where he says (*ibid.*, 352):

"It does not follow that it has ever been laid down that such method is exclusive and must be of universal application. No such principle has, in my opinion, resulted from the decisions, but what does result is that a company undertaking the business of supplying water should *prima facie* be assessed upon this well-known plan, and it would lead to confusion and endless multiplication of difficulty if this were not done, but as regards a company which, either by reason of its special and peculiar statutory restrictions or by reason of any other fact, cannot be regarded in the same light as that of an ordinary water company, it is open to consider whether other methods of valuation may not properly be adopted. The special facts, however, on which any such alternative method is adopted should be found in the Special Case stated by quarter sessions, in order that it may be considered whether they are adequate to entitle a deviation from a well

recognised rule . . . It has been established by more than one authority, that notwithstanding such a fact the method for which the respondents contend can and should be applied, and if the quarter sessions intended to decide otherwise the decision would be wrong. It is at least open to argument that existing circumstances are such as to render the ordinary method of rating inapplicable, but such circumstances must be set out in a Special Case and made the subject of substantive argument before the courts."

As I have said, it is not disputed in this case that the "profits basis" should be applied, and the tribunal regarded it as applicable. But if the "profits basis" is to be applied it follows that the net annual values attributed to all the hereditaments (directly or indirectly productive) must not exceed the cumulo value, and it follows, further, that, in order to achieve this end consistently with a fair apportionment of the cumulo value amongst the hereditaments in the several rating areas, and, in particular, with the attribution of a fair proportion of it to the indirectly productive hereditament here in question, an aggregate net annual value must be placed on all the indirectly productive hereditaments in the undertaking, and a fair proportion of that net annual value must be attributed to this hereditament. There may be other ways of doing this, but the obvious way, and I should have thought *prima facie* the right way, is to estimate the aggregate capital value of all the indirectly productive hereditaments, compute the appropriate percentage thereon in the way contended for by the board and the valuation officer, and take that percentage of the capital value of this hereditament as constituting its net annual value. While saying in para. 20 (d) of the Case that

"In dealing with . . . proposals in Hertford and other rating areas there fell to be ascertained a net annual value for each separately rateable hereditament . . . subject to a condition that the total of all such net annual values would not exceed, or be less than, the cumulo",

and, again, in para. 21 that they have

"borne in mind the agreed amount of the net annual value of the undertaking in cumulo",

both of which statements are wholly consistent with the adoption of the procedure above described, the tribunal, as I understand their conclusions, have in the end not adopted it, and have given no reason for not doing so beyond the bare statement in para. 20 (f) of the Case stated that

"It is not practicable to ascertain a net annual value for the hereditament in Hertford truly relative to the agreed rental value of the whole undertaking purely by a process of estimating and comparing respective capital values."

I do not follow this. Obviously, if an annual value can be placed on the hereditament in question with all its "advantages, fitnesses, facilities, and capacities" there can be no impossibility in placing on it a capital value duly reflecting the benefit of all such special features. If what is meant is that no capital value which could reasonably be placed on this hereditament would produce an adequate net annual value for it on the application to such capital value (in common with the capital values of all the other indirectly productive hereditaments) of the appropriate percentage, then this seems to me to involve a departure from the normal treatment of indirectly productive hereditaments on the "profits basis" of assessment, without any findings of fact to justify such departure, and I think this does amount to an error in law. The conclusion of the tribunal on this point invites the inference that, notwithstanding their very proper statement in para. 20 (e) of the Case Stated to the effect that the actual user of the hereditament by the board for purposes authorised by statute should not be taken into account, they have in fact made some

addition to the annual value of the hereditament which is not attributable to the hereditament itself but is attributable to the specially advantageous use in fact made by the board of this hereditament in conjunction with the other parts of its undertaking, by reason of the altitude of the intake from the River Lea and the consequent saving in pumping costs in respect of water derived from that source. This would be clearly wrong, as appears from *Metropolitan Water Board v. Chertsey Assessment Committee* (5), but the inference that the tribunal may in the end have done it is supported by the latter part of para. 20 (e) of the Case Statement.

- A I have to some extent anticipated consideration of the second objection in dealing with the first. The question how far, if at all, the altitude of the hereditament should be taken into account in ascertaining its value must be answered in accordance with the principles stated by the House of Lords in the case
- B just cited of *Metropolitan Water Board v. Chertsey Assessment Committee* (5). In reading the speeches in that case, it must be borne in mind that the price actually paid for the land there in question, and the amount actually expended in the erection of buildings on it, were proved, and that their Lordships' observations were in part directed to the question (which they answered in the affirmative) whether such price and cost did not automatically include all
- C elements of special fitness proper to be taken into account, so that all that remained to be done was to apply the appropriate percentage to those figures. Here the actual figures of price and cost are not available, so that a proper estimate of the value of the hereditament with all its "advantages, fitnesses, facilities, and capacities" (to quote again LORD SHAW OF DUNFERMLINE's phrase in the *Chertsey* case (5) ([1916] 1 A.C. 357) must be made de novo.
- D Nevertheless, much of what was said by their Lordships in the *Chertsey* case (5) is, I think, directly in point. EARL LOREBURN said (*ibid.*, 346):

- "When these parties accepted cost price of some years ago as the basis, they might reserve a right to say that the land had become saleable for more money now by reason of a rise in prices or by reason of minerals having been found on it, if such had been the case, or of something else inherent in the land itself. But how could they say that something should be added either to the capital value or the annual value by reason of such things as its proximity to the river or its special fitness for some industrial purpose? All this had been included in the cost price. Or why should anything be added 'in respect of the user made of the intake', a phrase of which I do not grasp the meaning, beyond seeing clearly that this is not a rateable subject at all? Or how can it be said that anything should be added because the person who bought the land or who now owns it has a statutory right, personal to himself, of using it in a particular way, and drawing water through it from the Thames? For that does not make the land itself more valuable. It only makes the owner or occupier of it more able to make profits. You might as well say that a piece of land is more valuable because the tenant of it has a valuable patent which he works on the land."

- LORD ATKINSON after referring to a number of authorities and, in particular, citing with approval *R. v. Mile End Old Town* (2), and *R. v. West Middlesex Waterworks* (3), said (*ibid.*, 350):

- H "The contention of the respondents is that it is not merely the adaptability of the land for the purposes to which the appellants or their predecessors were empowered by statute to devote it which is to be taken into account, but the actual use of it when acquired and devoted to that purpose, almost as if their statutory powers, when put in action, were a rateable hereditament. The value of the user of the lands for the purpose authorised might be enormous. It might be estimated by the profits made by the sale of the water taken into their reservoirs and distributed

in altogether different taxable areas. And it would appear to me that the struggle of the respondents in the present case is, in fact, a struggle to get these works valued to some extent on the basis of receipts or profits made in a parish or parishes different from that in which the works to be valued are situated. It is urged on behalf of the respondents that the decision of the Court of Appeal in the case of *New River Co. v. Hertford Union* (6) is an authority in support of their contention, and much time was spent in the minute criticism of the judgment delivered by the Master of the Rolls in that case. If this be so, the decision is entirely out of harmony with a current of authority extending from the year 1847 down to the year 1914, and as the case is not a binding authority on this House, I would for myself say unhesitatingly that I decline to follow it; but it is perfectly plain to me that, correctly understood, the case is in entire harmony with the weighty authorities which preceded it, and gives no support whatever to the respondents' contention. No doubt, in the language employed by the learned lords justices, the distinction between the actual use and fitness for that use is not steadily kept in view, but the conclusion to which the reasoning of the judgment of the then Master of the Rolls leads up is succinctly stated by him at the end of his judgment in these words ([1902] 2 K.B. 611): 'I think the standard of structural value is not the true one to apply to such a case. There is an added element of value in this case by reason of the special fitness of the land for a particular profitable purpose'. That statement of the law is entirely consistent with the earlier authorities, and it is clear, I think, that the learned Master of the Rolls never intended to cover by the words 'special fitness' the actual user of the land or works for the authorised purposes."

The same learned lord (after referring to *Talargoch Mining Co. v. St. Asaph Union* (7)) said (*ibid.*, 353):

"This is the case upon which the Master of the Rolls based his judgment. It is a clear and emphatic authority that it is the adaptability, or special fitness, of a hereditament for the purpose to which it is to be put, and not its actual user for that purpose, that is to be taken into account as enhancing its value. The *Hertford* case (6), therefore, so far from being an authority in favour of the respondents' contention, is, like every other case which has been cited, in truth and fact a direct authority against it. In my opinion the contention is hopelessly unsound."

LORD PARKER OF WADDINGTON said (*ibid.*, 362):

"My Lords, great stress was laid by the respondents' counsel on the *Hertford* case (6), which they maintained was an authority to the effect that in applying the rule something must be added to 'value as land' and 'structural value'. I confess I have been unable to follow the reasoning of the learned judges who decided the *Hertford* case (6), but if and so far as it supports the proposition for which it is cited I cannot think it is good law. I am inclined to think that it is based on the same confusion of thought to which I have already referred. My Lords, the order of the Divisional Court, approved by the Court of Appeal, in this case is open to the same criticism. It expresses an opinion that in assessing the rateable value of the hereditaments in question there is, in addition to structural value and value as land, an element of value to be taken into consideration by reason of, *inter alia*, its proximity to the river and its special fitness for the purposes therein mentioned. If this only means that in valuing a hereditament you must take into account its position and its fitness or adaptability for all purposes for which it can be used, including that for which it is used, it is obviously correct, but taken in connection with this case its meaning really is that in applying the empirical rule you have to add something to the usual percentages on the

cost of the land and of the structure, which, for the reasons I have stated, appears to me to be wrong. My Lords, the order of the Divisional Court refers also to an additional element of value by reason of the 'user' made of the intake and the statutory right of the appellants to take water from the River Thames by means thereof. In these respects also the order is, in my opinion, wrong. It is true that in the *Hertford* case (6), COLLINS, M.R., mentions the 'user' of the hereditament in question as an element of value, but it appears that he employed this expression as meaning 'fitness for the purpose for which the hereditament was actually used'. In this sense the 'user' can legitimately be taken into account as an element of value, but the fact that any particular use is made of a hereditament is not otherwise material to its value. Again, the right of the appellants to take water from the River Thames being a right in gross and not appurtenant to the land, or passing with the land to any owner or occupier thereof, cannot enhance the value of the land. I do not think that the *Hertford* case (6), if it decides otherwise, can stand. So far as any statutory power of the appellants is relevant at all, it has already been taken into account in treating the appellants with their statutory powers as a possible tenant of the hereditament in question and proceeding to apply the rule on this footing. Moreover, even if either of these points were proper to be taken into account as a matter of valuation, this would be no reason for treating them as elements the value of which ought to be added when the annual value had been ascertained by an application of the rule."

Applying these observations to the present case, I think it follows that, in estimating the capital value of the hereditament by reference to which the hypothetical rent is to be calculated, it is right to take into account all such characteristics inherent in the hereditament itself as make it specially fit for the purpose for which it is actually used by the board, that being the purpose for which the board as hypothetical purchaser or tenant would presumably be seeking to buy or rent it. That purpose being the taking of water from the River Lea and passing it into the New River, the proximity of the hereditament to the River Lea and the New River and the presence on it of natural channels facilitating the passing of water from the one to the other are obviously characteristics which make it specially fit for the purpose in view. The relevance of altitude to the special fitness of the hereditament as such is less obvious. Altitude absolutely considered is of little materiality. It is only of importance when regarded in relation to the lay-out and levels of other parts of the board's works. But (as appears from the *Chertsey* case (5)) the actual value to the board of the use to which the hereditament is actually put must not be taken into account. It is thus not legitimate to attribute (as the corporation in effect claimed should be done) a special value to the hereditament on account of the altitude of the intake, measured by reference to the pumping costs saved by the board by passing the water received through the intake into the New River and along it by gravity to the filter-beds at Stoke Newington, whence it can be distributed (still by gravity) to the consumers in certain relatively low lying parts of the board's area. The amount of the water in fact received by the board through the intake, and what is in fact done with it by the board after it passes from the hereditament into the New River, are alike circumstances irrelevant to the value of the hereditament for the present purpose. They are in no sense elements of special fitness inherent in the hereditament itself, any more than the advantage the board in fact takes of the relative altitudes of the intake, the Stoke Newington filter-beds, and the premises of the consumers supplied by the latter. Accordingly, I am of opinion that the altitude of the hereditament is only relevant to the extent that, considered as one of the characteristics of the hereditament in point of situation, it makes the hereditament better suited to the board's purpose of taking water from

the River Lea and passing it into the New River in the general sense that it is more advantageous to a water undertaking to take water into their system at a high rather than a low level. In the result, therefore, I should describe the altitude of the hereditament as, in effect, relevant only in the sense that it narrows the range of hereditaments on the River Lea from which the board, seeking hereditaments on the River Lea for the purpose in view, would be likely to make its selection, and, by narrowing the range, increases to some extent the price which the hypothetical vendor would be likely to require, and which the board might reasonably be prepared to pay. It would be wrong, in my view, to measure this increase by reference to the loss the board would sustain if deprived of the advantageous use it, in fact, makes of the water received through the intake by reason of the lay-out and relative levels of other parts of its system.

Counsel for the board said that he was in this court bound to admit that (as mentioned by SIR RICHARD HENN COLLINS, M.R., in *New River Co. v. Hertford Union* (6) ([1902] 2 K.B. 608)) the point at which the board takes water from the River Lea is fixed by statute, nor (I think) did he, or could he in this court, dissent from the observation of SIR RICHARD HENN COLLINS, M.R. (ibid.), that this point "is presumably the point best adapted to their needs". That observation seems to me adequately to cover every element of special fitness inherent in the hereditament in point of situation, including, for what it is worth, the element of altitude.

The tribunal have not made it clear to what extent they have taken altitude into account, but in the final paragraph of the Case they say that they have given effect to their view that the value of the hereditament "is enhanced by its fitness for assisting the board to achieve the saving in pumping height to which we have referred". This seems to me to indicate that the tribunal have taken into account the advantageous use in fact made by the board of the altitude of the intake in conjunction with the lay-out and relative levels of other parts of their works, and for the reasons I have endeavoured to state I think this involves an error in law.

Accordingly, I would remit the case to the tribunal with directions: (i) unless they are of opinion that there are special circumstances justifying a different course, to ascertain the net annual value of the hereditament in accordance with the procedure indicated in this judgment; (ii) if they are of such opinion, to find and state the facts constituting the special circumstances on which their opinion is based, and to indicate the procedure they have adopted in ascertaining the net annual value of the hereditament; and (iii) to make such revision in their valuation as they find necessary having regard to the above directions and to the observations contained in this judgment as to the extent to which the altitude of the hereditament may properly be taken into account. Given a correct application of principles, the figures are, of course, entirely a matter for the tribunal. So is the percentage to be applied to capital value, though as to this latter point the parties seem to be agreed as to the way in which the percentage should be arrived at, and, as I have said above, that seems to me to be prima facie a proper way of arriving at it.

Appeals allowed.

Solicitors: *R. H. McDowell* (for the Metropolitan Water Board); *Sharpe, Pritchard & Co.*, agents for *Longmores*, Hertford (for Hertford Corporation); *Solicitor of Inland Revenue* (for the valuation officer).

[Reported by F. GUTTMAN, ESQ., Barrister-at-Law.]

BARNES v. JARVIS.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Lynskey and Parker, JJ.), April 16, 1953.]

Sunday Entertainment—"Musical entertainment"—*Imitations and "patter" by single performer accompanied by piano*—*Sunday Entertainments Act, 1932 (c. 51), s. 5.*

- A The respondent was charged under s. 51 (9) of the Public Health Acts Amendment Act, 1890, with allowing a theatre to be used for entertainment other than a musical entertainment as defined in the Sunday Entertainments Act, 1932, contrary to the terms of a licence issued to him in respect of that theatre under s. 51 (1) of the Act of 1890. The entertainment complained of consisted of various imitations, sketches, and dialogue of imaginary characters in various situations performed by one man on the stage, he being accompanied by a pianist playing music appropriate to the various situations portrayed and adapted to fit in with the performer's words, pauses and intonations.

- B HELD: the performance in question was not a musical entertainment within s. 5 of the Sunday Entertainments Act, 1932, i.e., "a concert or similar entertainment consisting of the performance of music", and, therefore, the respondent was in breach of the terms of the licence and was liable to the penalties prescribed by s. 51 (9) of the Act of 1890.

C FOR THE SUNDAY ENTERTAINMENTS ACT, 1932, s. 3 and s. 5, see HALSBURY'S STATUTES, Second Edn., Vol. 25, pp. 70 and 71.

- D CASE STATED by Blackpool justices.

- E At a court of summary jurisdiction sitting on Sept. 24, 1952, at Blackpool, the appellant, Harry Barnes, preferred informations against the respondent, Harold Jarvis, charging that on Sunday, June 29, and Sunday, July 6, 1952, he, being the holder of a licence issued by the justices under the Public Health Acts Amendment Act, 1890, s. 51 (1), for dancing, singing and music in respect of the Hippodrome Theatre, Blackpool, did on the said days commit a breach of a term and condition on which, under s. 51 (2), the licence was granted in that the theatre in question was used for an entertainment other than a musical entertainment as defined by the Sunday Entertainments Act, 1932, contrary to the terms and conditions of the licence and to the Act of 1890.

- F It was proved or admitted that the respondent was the holder of a licence granted under the Act of 1890 for the Hippodrome Theatre, condition 3 of which was in the following terms:

"The licensed premises shall not be used for public music, dancing, singing or other public entertainment of the like kind on Sunday except for musical entertainments as defined by the Sunday Entertainments Act, 1932, from 2.30 p.m. to 10 p.m."

- G On Sundays, June 29, and July 6, 1952, an entertainment was given twice nightly at the theatre, of which one of the items was a performance by one Al Read. His act started with a characterisation of two women gossiping, and contained among other things a caricature of a wife nagging at her husband to decorate a bedroom in preparation for the visit of his mother-in-law, a description in dialogue and mime of a decorator making an inspection of the house with derogatory remarks as to its state and construction, a comedy sketch depicting a newly married couple and the husband's visits to a public house, and finally an imitation of two drunken men in a public house inviting each other home for a night out. During this act Mr. Read was given musical accompaniment by a Mr. Broadbent who played a piano on the stage. It was proved that the musical score had been specially prepared beforehand by Mr. Broadbent so as to be appropriate to Mr. Read's script, that they had

rehearsed the act for two hours before the first performance, and that the pianist had to adapt his accompaniment to fit in with the words, inflexion, and voice of Mr. Read so as to provide "atmosphere" for the spoken word. At the end of his performance Mr. Read sang two songs accompanied by the full orchestra.

It was contended on behalf of the appellant that the performance of Mr. Read did not consist of "musical entertainment" within s. 5 of the Sunday Entertainments Act, 1932, but that it amounted to a variety entertainment with music played contemporaneously but not coordinated with the words as in a song or musical monologue. On behalf of the respondent it was contended that the act was a musical entertainment within s. 5, that the music and words had been carefully coordinated, and that the performance consisted of a recitation with music. The justices dismissed the informations, and the appellant appealed.

G. W. G. Jones for the appellant.

Nahum, Q.C., for the respondent.

LORD GODDARD, C.J.: This is a Case stated by justices for the county borough of Blackpool before whom the respondent was summoned for that he being

"the holder of a licence issued to him by the justices of the said county borough on Feb. 4, 1952, under s. 51 of the Public Health Acts Amendment Act, 1890, for dancing singing and music in respect of the Hippodrome Theatre, Church Street, Blackpool",

committed a breach of the condition on which it was granted because he used the premises in respect of which the licence was granted

"for an entertainment other than a musical entertainment as defined by the Sunday Entertainments Act, 1932."

The licence which had been granted to the respondent contained a condition that:

"The licensed premises shall not be used for public music, dancing, singing or other public entertainment of the like kind on Sunday except for musical entertainments as defined by the Sunday Entertainments Act, 1932 . . ."

The Sunday Entertainments Act, 1932, was an Act, to quote its long title,

" . . . to permit and regulate the opening and use of places on Sundays for certain entertainments and for debates, and for purposes connected with the matters aforesaid."

It was an Act somewhat to mitigate the rigours of the Sunday Observance Act, 1780, and in s. 3 of the Act, the marginal note of which is "Provision as to musical entertainments", it is provided:

"The power of any authority in any area to grant licences under any enactment for the regulation of places kept or ordinarily used for public dancing, singing, music or other public entertainment of the like kind, shall include power to grant such licences in respect only of musical entertainments on Sundays, and the power to attach conditions to any such licence shall include power to attach special conditions in respect of such entertainments on Sundays."

The first thing to observe, therefore, is that under s. 3 there was a distinction between public dancing and public singing and music, and obviously the intention of the Act is that music was to be the governing or predominant feature. There is power to attach special conditions in respect of musical entertainments on Sundays. By s. 5, "musical entertainment"

“ means a concert or similar entertainment consisting of the performance of music, with or without singing or recitation.”

The definition says “ with or without singing or recitation,” but observe that the entertainment must be a “ concert or similar entertainment ”. I agree that in applying a definition of this sort there may be cases which are on the line, and it may be difficult to decide whether or not a case falls on one side of the line or the other, but on the facts found by the justices in this case it seems abundantly clear that the performance given by Mr. Al Read was nothing but an ordinary music hall variety turn. To call his performance “ musical entertainment ” merely because he had somebody on the stage playing the piano at the same time as he was giving one of his comic “ turns ”, consisting of imitations, dialogues, and representations of two women nagging each other, two old ladies discussing their adventures, and things of that sort, is simply to call it something which it is not. One has to apply a certain amount of common sense in construing statutes and to bear in mind the object of the Act, and the object of the Act of 1932 is clearly to permit of there being given on Sundays public entertainment of the nature of what anybody would call a concert. If a music hall artist appears on the stage and gives an entertainment consisting of patter, that cannot by any stretch of imagination be called a musical entertainment in the nature of a concert merely because there is somebody at the back of the stage playing a piano or even an orchestra which plays so softly that the artist’s words can be heard above the music.

In my opinion, on the facts here the only conclusion to which the justices could properly have come if they had properly directed themselves as to the meaning of s. 3 and the definition in s. 5 of the Act of 1932 was that this was not a “ concert or similar entertainment ” in so far as, at any rate, this particular turn is concerned. The case must go back to the justices with a direction to convict.

LYNSKEY, J.: I agree.

PARKER, J.: I agree.

Appeal allowed.

Solicitors: *Gibson & Weldon*, agents for *Worden & Naylor*, Blackpool (for the appellant); *Denton, Hall & Burgin*, agents for *Blackhurst, Parker & Co.*, Blackpool (for the respondent).

[*Reported by* MICHAEL MALONEY, Esq., *Barrister-at-Law.*]

R. v. BASS.

[COURT OF CRIMINAL APPEAL (Lord Goddard, C.J., Byrne and Parker, J.J.),
March 24, 30, 1953.]

*Criminal Law—Evidence—Confession—Admission, to police officers while in custody, obtained without caution—Direction to jury—Judges' Rules, r. (3).
Criminal Law—Evidence—Police witness—Denial of collaboration in preparing notes—Refusal by court to allow jury to inspect notebooks.*

The appellant was convicted at quarter sessions of larceny and shop breaking, the only evidence against him consisting of answers made by him to two police officers who had interrogated him at a police station, which amounted to an admission of guilt. No caution was administered before the interrogation, which, it was admitted, took three-quarters of an hour with the door of the room in which it took place shut, and it was also admitted that, if the appellant had refused to enter the room to be questioned, the police officers would have forced him to do so, and, if he had tried to leave, they would have prevented him doing so. The deputy chairman found that the statements had not been obtained improperly and admitted them in evidence. In giving evidence at the trial the notes of the two police officers on which they relied for their accounts of the interview were almost identical, and, as they denied that they had collaborated in making the notes, counsel for the appellant asked the deputy chairman to allow the jury to see the notebooks, but the request was refused.

HELD: (i) in the circumstances the appellant was in custody when he made the statements to the police officers, and, as he had not been cautioned, the statements had been obtained from him in contravention of r. (3) of the Judges' Rules.

(ii) it was within the discretion of the judge at the trial to admit such a statement provided it had been made voluntarily: *R. v. Voisin* ([1918] 1 K.B. 531), applied; but, if such a statement was admitted, there must be a clear direction to the jury to reject it unless they were satisfied that it had been made voluntarily; and in the present case there had been no such direction, and, therefore, the conviction would be quashed.

(iii) further, in view of the vital importance of the credibility of the two police officers and in view of their denial of collaboration in the preparation of their notes, the jury should have been given an opportunity to examine the notebooks.

AS TO ADMISSIBILITY OF CONFESSIONS BY THE ACCUSED, see HALSBURY, Hailsham Edn., Vol. 9, p. 203, para. 291; FOR JUDGES' RULES, see STONE'S JUSTICES' MANUAL, 84th Edn., pp. 365-367; and FOR CASES, see DIGEST, Vol. 14, pp. 410-417, Nos. 4303-4357.

Cases referred to:

- (1) *R. v. Voisin*, [1918] 1 K.B. 531; 87 L.J.K.B. 574; 118 L.T. 654; 14 Digest 302, 3191.
- (2) *R. v. Thompson*, [1893] 2 Q.B. 12; 62 L.J.M.C. 93; 69 L.T. 22; 57 J.P. 312; 14 Digest 412, 4314.
- (3) *Ibrahim v. Regem*, [1914] A.C. 599; 83 L.J.P.C. 185; 111 L.T. 20; 14 Digest 411, 4308.
- (4) *R. v. Murray*, [1950] 2 All E.R. 925; [1951] 1 K.B. 391; 114 J.P. 609; 2nd Digest Supp.

APPEAL against conviction.

The appellant was convicted before the deputy chairman at the County of London Sessions of shop breaking and larceny and was sentenced to twelve months' imprisonment.

Rule (3) of the Judges' Rules states:

"Persons in custody should not be questioned without the usual caution being first administered."

F. P. Crowder for the appellant.

Sir John Cameron for the Crown.

Cur. adv. vult.

A Mar. 30. BYRNE, J., read the following judgment of the court. The court has already intimated that this appeal is allowed and the conviction quashed, and we now proceed to give our reasons.

The appellant was convicted at the London Sessions on an indictment in which he and two other men, who both pleaded Guilty, were charged with breaking and entering a shop and stealing a quantity of tea, cigarettes and chocolate. The case against the appellant rested entirely on answers he made to questions put to him by two police officers who interrogated him for about three-quarters of an hour at Paddington police station. Those answers amounted to a confession of guilt, but after the officers had been cross-examined and the appellant had given evidence as to the circumstances in which they were made, the learned deputy chairman held that they were admissible and that there was nothing improper in the way they had been obtained. A week before the interrogation at the police station, the two officers and two other officers armed with a search warrant had, in the presence of the appellant, searched his house, but had found nothing to connect him with the theft. Some days later, however, in consequence of information which they had received from the appellant's co-defendants and a police informer, the two officers decided to interview the appellant, and it was in response to a message left at his house that the appellant called at Paddington police station and the interview took place.

E The appellant, with the leave of the court, appealed against conviction on two grounds. The first ground is that the appellant's answers to the police officers should not have been admitted in evidence, first, because the circumstances in which they were obtained amounted to a contravention of r. (3) of the Judges' Rules, and, secondly, because they were made, not voluntarily, but as the result of a threat to withhold bail. The second ground of appeal is that the learned deputy chairman was wrong in refusing to allow the jury to see the officers' notebooks. The interview took place in the C.I.D. room at the police station.

F Counsel for the appellant, who appeared also in the court below, asked Detective-Constable Butler:

G "Q.—The truth of the matter was this, was it not, that you had no intention of cautioning him until you had wrung from him the admission you required? A.—I did not caution him until such time as he admitted the offence. Q.—Exactly. It took you three-quarters of an hour in one room with the door shut? A.—Yes. We may have discussed something else as well. Q.—Would you agree that, to all intents and purposes, he was under arrest? A.—No. Q.—If he had tried to go, would you have prevented it? A.—He did not try to go. Q.—If he had, you would have done? A.—Yes. Q.—If he had refused to go to the C.I.D. room, you would have taken him there by force? A.—Yes."

H There can be no doubt, having regard to that evidence, that the appellant was in custody, that he was questioned without being cautioned, and thus that there was a breach of r. (3) of the Judges' Rules. If the deputy chairman had held—as we think he should have done—that the statement was taken in contravention of the Judges' Rules, it would have been open to him in his discretion to have refused to admit it. On this matter he did not exercise any discretion because, erroneously as we think, he considered the rules had not been contravened.

That, however, is not an end of the matter, for this court has said on many occasions that the Judges' Rules have not the force of law, but are administrative directions for the guidance of the police authorities. That means that, if the rules are not complied with, the presiding judge may reject evidence obtained in contravention of them. If, however, as *R. v. Voisin* (1) shows, a statement is obtained in contravention of the Judges' Rules, it may nevertheless be admitted in evidence provided it was made voluntarily. The principle to be applied was laid down in *R. v. Thompson* (2), as approved in *Ibrahim v. Regem* (3). In the latter case, LORD SUMNER said ([1914] A.C. 609):

"It has long been established as a positive rule of English criminal law, that no statement by an accused is admissible in evidence against him unless it is shown by the prosecution to have been a voluntary statement, in the sense that it has not been obtained from him either by fear of prejudice or hope of advantage exercised or held out by a person in authority. The principle is as old as LORD HALE."

It is to be observed, as this court pointed out in *R. v. Murray* (4), that, while it is for the presiding judge to rule whether a statement is admissible, it is for the jury to determine the weight to be given to it if he admits it, and thus, when a statement has been admitted by the judge, he should direct the jury to apply to their consideration of it the principle as stated by LORD SUMNER, and he should further tell them that, if they are not satisfied that it was made voluntarily, they should give it no weight at all and disregard it. Unfortunately, the learned deputy chairman did not give a clear direction to the jury with regard to that aspect of the matter. He told them that they must be sure that it was a genuine confession and that they must decide whether the officers had threatened that the appellant would not be given bail unless he talked, but he omitted to tell them in plain words that, unless they were satisfied that it had been made voluntarily, they should reject it and, in view of the fact that it was the only evidence against the appellant, acquit him.

In one passage of the summing-up he said:

"There it is. The chief ground of complaint, it seemed to me, was that the young man was not cautioned earlier. After some thirty years' experience in the criminal courts of this country, there is nothing that I know of to prevent officers questioning a man in the way that they did and if I had thought that there was anything improper about it at all I would not have hesitated for one second to have said so and I should have ruled that statement out and that would have been the end of the case. But there it is; it is in and Mr. Crowder has got to admit that it is in because he has got to accept my ruling",

and that was followed by another passage in which he said:

"There was a long discussion and talk about the question of comparing notes, the question of whether they were made independently or whether they had been made in concert, and so on. The question of threats was raised: 'If you don't talk you won't have bail' and so on. It was put to the officers that Bass, when he went into the box, would swear that that threat was made and it is entirely a matter for you to decide whether you think that those police officers did utter that threat and that the defendant is telling the truth or whether you think that the officers are telling you the truth when they deny that any such threat was made. That is essentially a point for the jury; it is entirely a matter for you to consider. If the threats were made it would be most improper and that would be sufficient in itself to rule out the whole of those statements and I would not have any hesitation in doing it. It is one of those things we will not tolerate in this country, any attempt to extract admissions, 'wring them'—as we have heard with almost monotonous regularity—

'Did you wring from him . . .' and so on. Do you see any evidence of wringing from anybody? Perhaps 'obtaining' would be a better word and perhaps a more polite word. But there it is. Was there any wringing? Was there any threat uttered or was it just an ordinary questioning of a man who was under certain suspicion? That is what it comes to."

A The jury may well have thought, in view of those observations, that they were being asked to decide a matter which had already been decided by the learned deputy chairman. This was a case in which police officers, without any evidence, had interviewed the appellant, and without first administering a caution had obtained a confession from him and that confession was the only evidence that the prosecution had against him. If in the circumstances of this case the learned deputy chairman had, in the exercise of his discretion, refused to admit the confession we should not have been surprised. As, however, he admitted it, we feel that the vital question whether it was made voluntarily was not adequately left to the jury.

B With regard to the second ground of appeal, the matter stood in this way. The officers' notes were almost identical. They were not made at the time of the interview. One officer made his notes after the appellant had been charged, and the other officer made his an hour later. Counsel for the appellant suggested to the officers in cross-examination that they had collaborated. They denied that suggestion. This court has observed that police officers nearly always deny that they have collaborated in the making of notes, and we cannot help wondering why they are the only class of society who do not collaborate in such a matter. It seems to us that nothing could be more natural or proper, when two persons have been present at an interview with a third person, than that they should afterwards make sure that they have a correct version of what was said. Collaboration would appear to be a better explanation of almost identical notes than the possession of a superhuman memory.

D In view of the denial of collaboration, counsel for the appellant asked the learned deputy chairman to allow the jury to see the officers' notebooks, but he refused, and the following passage occurred:

E "Q.—You do not think that there is anything extraordinary—the jury will have the advantage of seeing those notebooks . . . (The deputy chairman:) That is if I allow it, Mr. Crowder. I am not disposed to let juries see police officers' notebooks. Sometimes they can contain matters of the highest confidential nature and I do not encourage it in the least; in fact, I like counsel to refer to only the few pages of the notebook affecting the particular case. I do not like them out of police officers' hands very long. I notice that you have had them in your hands now about half an hour or so. (Mr. Crowder:) Is your Lordship suggesting that I will alter them in any way? (The deputy chairman:) No. I am suggesting nothing of the sort. I was only suggesting the view I took about police officers' notebooks and I do not like them out of their hands. I have known cases where their notebooks have been taken away with notes that they made many months before and then they cannot remember them and they have been criticised for it. I do not like that. (Mr. Crowder:) My Lord, I would submit in this case that those officers, whose notes are the same, have in fact written them . . . (The deputy chairman:) I know—that they made them in collaboration. If I have heard that suggestion made once I have heard it made a hundred times, and my usual comment to the jury is 'Yes, if they collaborate, that is wrong; if there is a difference between the two officers' stories or accounts of an interview, that is wrong because there are discrepancies; so we must have the best of both worlds'. That is what I will tell the jury today. I think, if you do not mind, I would like that notebook handed back to the officer. (Mr. Crowder:) Certainly. I ask formally that both these

notebooks, as they have been used in evidence by the officers, be exhibited as exhibits in this case. (The deputy chairman:) Well, I refuse. I want them handed back to the officers as soon as possible."

Thereupon the notebooks were returned to the officers.

The desire of the learned deputy chairman to preserve the confidential nature of the notebooks could probably quite easily have been achieved with the assistance of a pin or a piece of sticking plaster so that only the relevant pages could have been read. Be that as it may, however, the jury should have been permitted to see the notebooks. The credibility and accuracy of the two police officers was a vital matter, for it was on their evidence and their evidence alone that the whole of the case against the appellant rested, and, as they had denied collaboration in the making of their notes, the jury should have been given the opportunity of examining them. Had this been the only ground of appeal, we might have considered applying the proviso, but, in view of the other matters with which we have dealt, we felt obliged to quash the conviction.

Conviction quashed.

Solicitors: *Philip Conway, Thomas & Co.* (for the appellant); *Solicitor, Metropolitan Police* (for the Crown).

[Reported by MICHAEL MALONEY, ESQ., *Barrister-at-Law.*]

R. v. WILLIAMS AND ANOTHER.

[COURT OF CRIMINAL APPEAL (Lord Goddard, C.J., Byrne and Parker, JJ.), March 30, 31, April 1, 1953.]

Criminal Law—Larceny—Defence—Intention to replace money—Larceny Act, 1916 (c. 50), s. 16 (1).

Criminal Law—Indictment—Count bad for duplicity—Larceny of aggregate of sums charged in other counts.

By s. 1 (1) of the Larceny Act, 1916: "A person steals who, without the consent of the owner, fraudulently and without a claim of right made in good faith, takes and carries away anything capable of being stolen with intent, at the time of such taking, permanently to deprive the owner thereof."

The appellants, who were husband and wife, were convicted of stealing money from a sub-post office, of which the wife was postmistress, the post office being carried on in conjunction with a general shop managed by the husband, and the evidence being that they took coins and notes from the post office till and put them into the shop till or into their own pockets. The jury found that in respect of two counts for larceny the appellants intended to repay the money and honestly believed they could repay it, and in respect of three counts that they intended to repay the money, but had no honest belief that they would be able to do so.

HELD: (i) the words "fraudulently and without a claim of right" in s. 1 (1) of the Larceny Act, 1916, meant that the taking must be intentional and deliberate, and not under the mistake that the property belonged to some other person; the appellants knew they had no right to take the money, which they knew was not theirs; the fact that they had a hope or expectation of replacing the money in the future was a matter which could go, at the most, to mitigation and did not amount to a defence; and, therefore, they were guilty of larceny.

Direction of CHANNELL, J., in *R. v. Carpenter* (1911) (76 J.P. 160), applied.

(ii) one of the counts for larceny would be quashed for duplicity in that it charged the larceny of a sum which was the aggregate of sums charged in other counts.

AS TO FRAUDULENT TAKING OF PROPERTY WITH INTENT TO DEPRIVE THE OWNER THEREOF PERMANENTLY, see HALSBURY, Hailsham Edn., Vol. 9, pp. 497-499, paras. 856, 857; and FOR CASES, see DIGEST, Vol. 14, pp. 885-888, Nos. 9721-9750.

Cases referred to:

- (1) *R. v. Holloway*, (1849), 2 Car. & Kir. 942; 18 L.J.M.C. 60; 12 L.T.O.S. 382; 13 J.P. 54; 175 E.R. 395; 15 Digest 888, 9748.
 A (2) *R. v. Carpenter*, (1911), 76 J.P. 158; 15 Digest 1005, 11,267.
 (3) *R. v. Kriz*, [1949] 2 All E.R. 406; [1950] 1 K.B. 82; [1949] L.J.R. 1535; 113 J.P. 449; 2nd Digest Supp.

APPEAL against conviction and sentence.

- The appellants, who were husband and wife, were convicted on Jan. 9, 1953,
 B before the deputy chairman at Monmouthshire Quarter Sessions of larceny and falsification of accounts, the husband being sentenced to two and a half years' imprisonment and the wife to eighteen months' imprisonment.

- The indictment contained eight counts, six charging the appellants with larceny and two with falsification of accounts, and the jury convicted on all the counts except one of larceny. They added riders to two counts for larceny
 C that the appellants intended to repay the money and honestly believed they could repay it, and to the remaining three counts for larceny that they intended to repay the money, but had no honest belief that they would be able to do so. The Court of Criminal Appeal quashed one of the counts for larceny for duplicity in that it charged the larceny of a sum which was the aggregate of sums charged in other counts.

- D *Buzzard* for the appellants.

R. C. Hutton and *A. L. Gordon* for the Crown.

- LORD GODDARD, C.J., delivered the judgment of the court in which he stated the facts and continued: The charge against the appellants was one of stealing the coins and notes by taking them from the post office till and either
 E putting them in the till belonging to the shop or into their pockets. We have to consider whether or not that amounts to larceny, considering that the appellants might quite properly have accounted to the Postmaster-General by paying over different coins of a like amount or notes representing the full amount of the takings. We have also to consider the question whether or not the fact that the jury found that in respect of two counts the appellants
 F intended to repay and had reasonable ground for believing that they could repay affords a defence, and in regard to the other counts whether the fact that they intended to repay, but had no reasonable ground for their belief, amounts to a defence. That would, of course, leave the conviction still untouched as regards the offences relating to falsification of accounts, as to which, as far as the court can see, there was no possible defence.

- G The definition of larceny in s. 1 (1) of the Larceny Act, 1916, is:

"A person steals who, without the consent of the owner, fraudulently and without a claim of right made in good faith, takes and carries away anything capable of being stolen with intent, at the time of such taking, permanently to deprive the owner thereof."

- H Doubts have arisen, which appear in some judgments and the text-books, as to what is the meaning of the word "fraudulently" in that sub-section. It is well known that the Larceny Act, 1916, which was a codifying Act, was never intended to alter the law. The question is: What is the meaning of the word "fraudulently", and does it add anything to the words "without claim of right"? It was, apparently, the opinion of PARKE, B., in *R. v. Holloway* (1), that the words "wrongful" and "fraudulent" meant without claim of right, but the first thing that should be remembered is that it is

undoubtedly the law that an innocent taking and a subsequent appropriation with knowledge that the property does not belong to the taker does not amount to larceny. The subsequent misappropriation or conversion will not turn an innocent taking into a felonious taking for the purposes of larceny. There must be first an intention permanently to deprive the owner of his property in the goods. There must also be an absence of a claim of right. If a person honestly believes that he has a right to the property, and the taking is in vindication of, or in exercise of, a bona fide claim of right, he is not acting feloniously. But sub-s. (1) says "fraudulently and without a claim of right", and counsel for the appellants rightly says that it is the duty of the court to give a meaning to every word in the section. He submitted that the word "fraudulently" means intending to act to the detriment of any person against that person's wishes. The court thinks that the word "fraudulently" does add, and is intended to add, something to the words "without a claim of right", and it means (though I am not saying that the words I am about to use will fit every case, but they certainly will fit this particular case) that the taking must be intentional and deliberate, that is to say, without mistake. You must know, when you take the property, that it is the property of another person and that you are taking it deliberately, not by mistake, and with an intention to deprive the person of the property in it.

A great part of the discussion in the court below took place because the defence was submitting that, if the appellants intended to repay and had reasonable grounds for repayment, that would be an answer. We have to point out, as has been pointed out more than once in the course of the argument, that we are here dealing with the case of coins, and there is no question that, having taken the coins or the notes from the till and used them in their own business, the appellants intended permanently to deprive the Postmaster-General of those coins and notes. Does it make any difference that they intended to replace them, which can only mean in this case that they hoped they would be able to replace them? It is one thing if a person with good credit and plenty of money uses somebody else's money which is in his possession—it having been entrusted to him or he having the opportunity of taking it—he merely intending to use those coins instead of some of his own which he has only to go to his room or to his bank to get. No jury would then say that there was any intent to defraud or any fraudulent taking, but it is quite another matter if the person who takes the money is not in a position to replace it at the time but only has a hope or expectation that he will be able to do so in the future, and, in considering whether this court is to give effect to the rider of the jury, we must bear in mind the pronouncement which is the locus classicus in this matter—CHANNELL, J.'s charge to the jury in *R. v. Carpenter* (2), referred to by this court in *R. v. Kritz* (3). The direction of the learned judge was given in relation to a charge of false pretences, but on this point about honest intention it is just as apposite in a case of larceny. CHANNELL, J., said (76 J.P. 160):

"If the defendant made statements of fact which he knew to be untrue, and made them for the purpose of inducing persons to deposit with him money which he knew they would not deposit but for their belief in the truth of those statements, and if he was intending to use the money so obtained for purposes different from those for which he knew the depositors understood from his statement that he intended to use it, then, gentlemen, we have the intent to defraud, although he may have intended to repay the money if he could, and although he may have honestly believed, and even had good reason to believe, that he would be able to repay it. You see it is the fraud in the mode of getting the money because you may by fraud get hold of money even if you mean to repay it, and thoroughly believe that you can repay it—you are still defrauding the man. You

are not defrauding him of the money if you eventually do repay it, but you are defrauding the man because you are giving him something different altogether from what he thinks he is getting, and you are getting his money by your false statement. In such a case as that the false statement would not be honestly made, and this question as to the intent to defraud substantially comes to this, whether or not the statements were honestly made."

A In the present case for "statements", we have to substitute "actions" because the money was taken and not obtained by statements. The appellants intended to use the money for purposes different from those for which they were holding it and for which the persons who paid the money intended it to be used, namely, for paying the Postmaster-General for stamps or postal orders, and for purposes different from those which their employer (the Postmaster-General) to their knowledge intended they should use it. ✓ Therefore, B it seems to the court that, by taking the actual coins and notes and using them for their own purposes, the appellants intended to deprive the Postmaster-General of the property in those notes and coins, and in so doing they acted without a claim of right and fraudulently because they knew they had no right to take the money which they knew was not theirs. The fact that they may have had a hope or expectation in the future of repaying that money C is a matter which at most can go to mitigation. It does not amount to a defence. Therefore, the appellants' own evidence shows that they were guilty of the larcenies with which they were charged.

D As the sentences of eighteen months and two and a half years' imprisonment were passed on the count we have quashed, the sentences on both the appellants on the other counts, namely, one month, twelve months, and twelve months, all concurrent, will stand, so each appellant will serve the same sentence.

Appeal dismissed.

Solicitors: *Registrar, Court of Criminal Appeal* (for the appellants); *Solicitor for the Post Office* (for the Crown).

[*Reported by G. A. KIDNER, ESQ., Barrister-at-Law.*]

BLOUNT v. THE WAR OFFICE.

[BIRMINGHAM ASSIZES (Ormerod, J.), April 1, 1953.]

F *Bailment—Gratuitous bailment—House requisitioned by War Office—Owner's property stored in strong room with consent of War Office—Requisition transferred to another authority—Theft of property from strong room—Liability of War Office—Defence (General) Regulations, 1939 (S.R. & O., 1939, No. 927, as amended), reg. 51 (1), (2).*

G *Requisition—Transfer of requisition—Power of competent authority—Defence (General) Regulations, 1939 (S.R. & O., 1939, No. 927, as amended), reg. 51 (1), (2).*

H In 1940 a house belonging to the plaintiff was requisitioned by the War Office under the Defence (General) Regulations, 1939, reg. 51. The War Office allowed the plaintiff to store certain articles in a strong room in the house, but did not know the nature or value of the articles. The room was locked and sealed by the plaintiff in the presence of representatives of the War Office. In 1944 the War Office transferred the requisition to the Ministry of Works, and, at a later date, the property came into the possession of the Ministry of Agriculture who used it for the accommodation of displaced persons. No proper attempt was made to keep these persons under control, and some of them broke into the strong room and stole a quantity of silver plate which the plaintiff had stored there.

HELD: (i) by allowing the plaintiff to store his goods in a room of the requisitioned premises the War Office became in control of the goods

notwithstanding that the room was locked; therefore, there was a voluntary bailment to them of the goods, in the way of a deposit, and the standard of care required of them as bailees was the reasonable care which a man would take of his own property; and they had not shown that degree of care.

(ii) the Defence (General) Regulations, 1939, reg. 51 (1) and (2), did not give to a requisitioning authority power to transfer a requisition to another authority; therefore, the War Office, having agreed to become voluntary bailees of the chattels which they allowed the plaintiff to leave on the requisitioned property, could not, without the plaintiff's consent, divest themselves of the responsibility for the bailment by transferring, or purporting to transfer, the requisition from themselves to another authority; and, accordingly, the War Office were liable to the plaintiff for the loss of the goods through the negligence of the Ministry of Agriculture.

Per curiam: Assuming that the War Office, as the competent authority within the meaning of reg. 51 (1) and (2), had the power to transfer the requisition to another authority, and that the contract of bailment was collateral to the requisition, they could not at the same time, without the plaintiff's consent, transfer their responsibility for the bailment of the goods.

AS TO GRATUITOUS BAILMENT, see HALSBURY, Hailsham Edn., Vol. 1, p. 727,* para. 1199, and pp. 733-735, paras. 1207-1209; and FOR CASES, see DIGEST, Vol. 3, pp. 59-64, Nos. 39-74.

ACTION for damages for the loss of silver plate and other articles of value.

The plaintiff was the owner of a house in Shropshire which was requisitioned by the defendants, the War Office, in August, 1940, under the Defence (General) Regulations, 1939, reg. 51. The house was first used by the War Office for the billeting of troops, and, shortly after the premises were requisitioned, the plaintiff had an interview with Major Ingleby, the officer in charge of the billeting, in regard to the storage of his furniture and effects. As a result of the interview the War Office gave permission to the plaintiff to store his furniture in two rooms on the ground floor which were then locked and sealed by the plaintiff in the presence of the representatives of the War Office. At the same time the plaintiff stored a large quantity of valuable silver plate and similar articles in a strong room opening out of the butler's pantry. This room, which was some ten feet by eight feet in area, had a strong inner door of iron and a strong outer door of iron and wood, and was obviously a strong room. In 1944 the plaintiff received a notice that the requisition of his premises had been transferred to the Ministry of Works. At a later period, and without any notice to the plaintiff, the premises came into the possession of the Ministry of Agriculture and were used by them for the accommodation of Latvian displaced persons. A warden was in charge of the premises for administrative purposes, but did not exercise any control in the way of discipline over the men accommodated there. On Feb. 21, 1951, after receiving a communication from the police, the plaintiff went to the premises and found that the strong room had been broken into, and that a large quantity of silver plate was missing. Investigation showed that some of the plate had been melted down and dealt with on the premises. Two of the Latvian displaced persons were charged with the theft of the articles, they pleaded Guilty, and were sentenced.

The plaintiff contended that there was a bailment of the goods by him to the War Office, that the War Office had been negligent as bailees, and that the loss which he had suffered was a result of their negligence. The War Office denied each of these contentions. In his evidence the plaintiff said that he had received permission from Major Ingleby to use the strong room for storing his effects, that he had locked and sealed the doors in the presence of representatives of the War Office, and that he had not specified the articles which

were being stored there, nor had he given to Major Ingleby, or to any other representative of the War Office, any estimate of the value of the articles. Major Ingleby, in his evidence, said that, to the best of his recollection, the strong room was not mentioned at the interview between him and the plaintiff when the premises were requisitioned, and that he never undertook to allow goods to remain in the strong room.

A *Bourke* for the plaintiff.

A. E. *James* for the War Office.

ORMEROD, J., stated the facts, and continued: The plaintiff brings this action on the ground that there was a bailment of these goods by him to the defendants, that the defendants were negligent as bailees, and that in consequence of their negligence he has suffered loss in that articles have been stolen. For the defence it was contended, first, that there was no bailment, in that there was never at any time any mention of the strong room during the taking over of the premises, and certainly no mention of the fact that there were articles of any kind in the strong room, and that, in those circumstances, if articles were left there, they were left by the plaintiff at his own risk and on his own account and the War Office could have no responsibility for them. C In the second place, the defendants contended that, even if there was a bailment, there was no negligence proved on their part as bailees, and that, therefore, they could not be held responsible for the loss of the goods. A further point, which was urged with some force, was that in any event the defendants could not be held responsible, because in 1944 they had transferred the requisition of the premises to the Ministry of Works, and that, therefore, D if there was any responsibility on the persons in possession of the premises for the custody of the goods, it was on the Ministry of Works, and not on the defendants, who had then discharged their whole responsibility to the Ministry of Works.

I have to decide, in the first place, whether or not in fact there was a bailment of the goods. [HIS LORDSHIP reviewed the evidence on the point, and continued:] E I am satisfied that I should accept the recollection of the plaintiff on this matter. I am satisfied that, although the specific value, and, indeed, the nature, of the goods, may not have been discussed between the plaintiff and Major Ingleby, the plaintiff informed Major Ingleby that he had goods stored in the strong room, and that Major Ingleby consented to the goods remaining there and to the strong room being locked and dealt with in the F way in which the other two rooms, in which the furniture was stored, were being dealt with. It was contended by counsel for the defendants that, even if that were the proper version of the facts, it would not constitute a bailment, because the goods remained in the constructive possession of the plaintiff in that, the rooms being locked, they were not under the control of the defendants, and, therefore, the goods could not possibly be said to be in their possession. G I cannot accept that view. I think that there is no substance in the contention. The power to requisition is a power to requisition land, and everything which is on the land in the way of buildings. In this case the land and buildings were requisitioned. It appears to me that in those circumstances the defendants, in allowing the plaintiff to store his goods in the two rooms and in the strong room, did in fact take possession of the goods, and if they took possession of the goods, then, clearly, they were bailees of the goods. The other question H which arises in the circumstances is the nature of the bailment. It was, in my opinion, a voluntary bailment, the type of bailment which is generally known as a depositum bailment.

The next question is whether there was negligence on the part of the defendants in the performance of their duty as bailees which resulted in the loss of the property. First, I have to consider what is the standard of care which is required from a bailment in these circumstances. As this is a voluntary

bailment, as I see it, I think it is clear that the standard of care which is required is the reasonable care which any man would take of his own property. The circumstances are that, for some months before the goods were stolen, the house was occupied by a number of displaced persons. They appear from time to time to have been rowdy and to have had no regard for locks and bolts. The evidence of the plaintiff, which was not disputed, was that on one occasion he found that the lock on the door of one of the rooms in which the furniture had been stored had been forced, and that it was even occupied by one of these displaced persons, who had put a bed in the room and had made it comfortable for himself. Although that incident did not concern the strong room, it is, I think, a clear indication of the regard which those in authority and those responsible for the building had for the building and for the goods which were stored in the room. According to the evidence of the police officer who was called to investigate the theft after it was discovered in February, 1951, it had occurred some time earlier, i.e., not immediately before it was discovered, and the appearances were that the strong room was being broken into and articles were being taken from it over a considerable period of time. In spite of that, it appears to have been a matter of months before these facts were discovered. I find it hard to believe that any reasonable man, who had valuable, or, indeed, any, property of his own stored in those circumstances, would leave it to the tender mercies of seventy or eighty displaced persons of that type without taking some precaution to see that the efforts which had been made to keep the property separate from the rest of the building were being of some effect. I am quite satisfied that there was no attempt to look after these goods when the building came, in some way or other, into the possession of the Ministry of Agriculture, that the Ministry were negligent, and that, as a result of their negligence, the goods were stolen and the plaintiff suffered this loss.

In those circumstances the plaintiff is entitled to succeed, unless there is substance in the contention of the defendants that, having transferred the requisition to the Ministry of Works in 1944, they had thereby divested themselves of all responsibility for the bailment which they undertook. The right to requisition the premises was derived from the Defence (General) Regulations, 1939 (S.R. & O., 1939, No. 927), reg. 51, which [as amended up to 1944] reads:

“(1) A competent authority, if it appears to that authority to be necessary or expedient so to do in the interests of the public safety, the defence of the realm or the efficient prosecution of the war, or for maintaining supplies and services essential to the life of the community, may take possession of any land, and may give such directions as appear to the competent authority to be necessary or expedient in connection with the taking of possession of that land . . . (2) While any land is in the possession of a competent authority by virtue of this regulation . . . the land may . . . be used by, or under the authority of, the competent authority for such purpose, and in such manner, as that authority thinks expedient in the interests of the public safety . . .”

It is contended on behalf of the defendants that the powers conferred by that regulation are very wide, as, indeed, they are, and that they are sufficiently wide to warrant or to justify the requisitioning authority, if they deem it expedient, transferring any requisitioned property to another authority. It is, I think, clear that that is the procedure which was adopted during this period by the various authorities which were competent to requisition property. If property which had been requisitioned by one authority was not required by that authority, but was required by another, the process appears to have been adopted of transferring the requisition from one authority to another. That, no doubt, was a matter of great convenience to the authorities, but, as I see

it, it does not come within the powers given to an authority by reg. 51 (1) or reg. 51 (2) of the regulations of 1939, and counsel on both sides agreed that, apart from reg. 51, there was nothing in the regulations of 1939 which gave an authority power in those circumstances to transfer a requisition to another authority. It might well be that an authority, having requisitioned property and not requiring it for the time being, might properly license the use of it by some other authority,* but I see nothing in the regulations to justify the contention that one authority may transfer the requisition to another authority and thereby divest themselves of all responsibility with regard to the requisition.

Applying that to this case, the position appears to be this. The defendants requisitioned the plaintiff's property and, in the course of requisitioning, they agreed to become voluntary bailees of the chattels which they allowed the plaintiff to leave on the premises. I am satisfied that in those circumstances they could not without the consent of the plaintiff, which, admittedly, was never given, divest themselves of the responsibility for that bailment merely by transferring, or purporting to transfer, the requisition from themselves to the Ministry of Works or to any other competent authority. Another way of looking at the matter—the result is the same—is that the arrangement to become bailees of the plaintiff's goods was merely collateral to the actual requisition, and, even if the competent authority, the War Office, had the power to transfer the requisition to another authority, it does not follow that they could at the same time, without the consent of the owner of the goods, transfer their responsibility for the bailment of the goods. Therefore, I am satisfied that the contention that, if there is any liability, it is the liability of some authority other than the defendants is as much without substance as it is without merit.

[HIS LORDSHIP assessed the damages at the amount claimed by the plaintiff.]

Judgment for the plaintiff.

Solicitors: *Weston, Fisher & Weston*, Kidderminster (for the plaintiff); *Beale & Co.*, Birmingham, agents for the *Treasury Solicitor* (for the defendants).

[Reported by MISS GWYNEDD LEWIS, *Barrister-at-Law.*]

* See *Progress Building, Ltd. v. Westminster City Corporation* ([1947] 1 All E.R. 684) where MACNAGHTEN, J., held that a competent authority which requisitions property under the Defence Regulations holds it on behalf of the Crown and is entitled to transfer possession of it to another competent authority.

F INLAND REVENUE COMMISSIONERS v. CITY OF LONDON CORPORATION (AS THE CONSERVATORS OF EPPING FOREST).

[HOUSE OF LORDS (Lord Normand, Lord Oaksey, Lord Morton of Henryton, Lord Reid and Lord Cohen), February 16, 17, 18, 19, 23, April 20, 1953.]

G *Income Tax—Income—“Annual payment”—Statutory liability to contribute to upkeep of forest—Amount of contribution ascertained by reference to excess of conservators' expenditure over other income—Right of contributor to deduct tax and of conservators to recover it—Income Tax Act, 1918 (c. 40), sched. D, Case III, r. 1 (a).*

H The Epping Forest Act, 1878, s. 3, provided for the regulation of Epping Forest by the corporation of the city of London as the conservators of Epping Forest. By s. 39, the Act provided that the corporation should from time to time contribute “such moneys as shall be necessary” to the capital and income of the Epping Forest fund from which the expenses of the conservators were to be defrayed. In every year since 1878, the receipts of the fund, apart from the contribution of the corporation, were insufficient to defray expenses, and the corporation in each year transferred to the fund a sum equal to the deficiency. In 1948-49 the deficiency

was £16,006 3s. 4d. which the corporation met by a payment (after deduction of income tax) of £8,803 7s. 10d. The conservators claimed to recover £7,202 15s. 6d. from the Crown as the amount of tax deducted. It was agreed (i) that the conservators were a separate persona from the City of London Corporation; (ii) that the contribution by the corporation was paid wholly out of profits or gains on which the corporation had paid income tax; and (iii) that the conservators were a body established for charitable purposes only, and, therefore, exempt from income tax on annual payments forming part of their income.

HELD: on the true construction of s. 39 of the Act of 1878 the duty of the corporation was not to discharge the debts of the conservators, nor to pay a mere "balancing" sum in the nature of a trade receipt against which must be set expenses, but to make contributions to supplement the income of the conservators; these contributions were "pure income profit" and were, therefore, "annual payments" made by the corporation to the conservators within the meaning of r. 1 (a) of Case III of sched. D to the Income Tax Act, 1918; and the conservators were entitled to recover the tax deducted by the corporation.

Lincolnshire Sugar Co., Ltd. v. Smart ([1937] 1 All E.R. 413) and *Pontypridd & Rhondda Joint Water Board v. Ostime* ([1946] 1 All E.R. 668), distinguished.

AS TO ANNUITIES AND OTHER ANNUAL PAYMENTS CHARGEABLE UNDER THE INCOME TAX ACT, 1918, SCHED. D, CASE III, see HALSBURY, Hailsham Edn., Vol. 17, pp. 180-183, paras. 377-380; and FOR CASES, see DIGEST, Vol. 28, pp. 66-74, Nos. 340-397.

Cases referred to:

- (1) *Brodie v. Inland Revenue Comrs.*, (1933), 17 Tax Cas. 432; Digest Supp.
- (2) *Howe (Earl) v. Inland Revenue Comrs.*, [1919] 2 K.B. 336; 88 L.J.K.B. 821; 121 L.T. 161; 7 Tax Cas. 289; 28 Digest 111, 683.
- (3) *Re Hanbury*, (1939), 20 A.T.C. 333.
- (4) *Brighton College v. Marriott*, [1926] A.C. 192; 134 L.T. 417; 28 Digest 24, 127.
- (5) *Forth Conservancy Board v. Inland Revenue Comrs.*, [1931] A.C. 540; 100 L.J.P.C. 193; 145 L.T. 121; 95 J.P. 160; *sub nom. Inland Revenue Comrs. v. Forth Conservancy Board*, 16 Tax Cas. 103; Digest Supp.
- (6) *Mersey Docks & Harbour Board v. Lucas*, (1883), 8 App. Cas. 891; 53 L.J.Q.B. 4; 49 L.T. 781; 48 J.P. 212; 2 Tax Cas. 25; 28 Digest 21, 104.
- (7) *Moss' Empires, Ltd. v. Inland Revenue Comrs.*, [1937] 3 All E.R. 381; [1937] A.C. 785; 106 L.J.P.C. 138; 157 L.T. 396; 21 Tax Cas. 264; 1937 S.C. (H.L.) 35; Digest Supp.
- (8) *Perkins' Executor v. Inland Revenue Comrs.*, (1928), 13 Tax Cas. 851; Digest Supp.
- (9) *Glenboig Union Fireclay Co., Ltd. v. Inland Revenue Comrs.*, 1922 S.C. (H.L.) 112.
- (10) *Humber Conservancy Board v. Bater*, [1914] 3 K.B. 449; 83 L.J.K.B. 1745; 111 L.T. 856; 6 Tax Cas. 555; 28 Digest 9, 37.
- (11) *Lincolnshire Sugar Co., Ltd. v. Smart*, [1937] 1 All E.R. 413; [1937] A.C. 697; 106 L.J.K.B. 185; 156 L.T. 215; *sub nom. Smart v. Lincolnshire Sugar Co., Ltd.*, 20 Tax Cas. 643; Digest Supp.
- (12) *Pontypridd & Rhondda Joint Water Board v. Ostime*, [1946] 1 All E.R. 668; [1946] A.C. 477; 115 L.J.K.B. 343; 174 L.T. 413; 110 J.P. 281; 28 Tax Cas. 261; 2nd Digest Supp.

- (13) *Inland Revenue Comrs. v. Miller*, [1930] A.C. 222; 99 L.J.P.C. 87; 142 L.T. 497; *sub nom. Miller (Lady) v. Inland Revenue Comrs.*, 15 Tax Cas. 25; Digest Supp.

APPEAL by the Crown from an order of the Court of Appeal dated May 29, 1952, reversing an order of DONOVAN, J., dated Dec. 21, 1951, and affirming the determination of the Special Commissioners of Income Tax. The Special Commissioners held that payments made by the corporation of the city of London to themselves as conservators of Epping Forest, under the Epping Forest Act, 1878, s. 39, constituted "annual payments" within the Income Tax Act, 1918, sched. D, Case III, r. 1 (a), and that, in the circumstances, the conservators were entitled to receive repayment of tax deducted from the payments by the corporation.

- B *The Attorney-General (Sir Lionel Heald, Q.C.), Cyril King, Q.C., and Sir Reginald Hills* for the Crown.

Millard Tucker, Q.C., Mustoe, Q.C., and R. R. D. Phillips for the Conservators of Epping Forest.

The House took time for consideration.

- C Apr. 20. The following opinions were read.

LORD NORMAND: My Lords, the appeal arises out of a claim by the respondents for exemption from income tax for 1948-49 under the Income Tax Act, 1918, s. 37 (b), and for recovery from the Inland Revenue of £7,202 15s. 6d., which had been deducted (professedly under r. 19 (1) of the All Schedules Rules), by the mayor and commonalty and citizens of the city of London in paying to the respondents a contribution under the Epping Forest Act, 1878, s. 39 (1), for the year ended Mar. 31, 1949, of £16,006 3s. 4d. The Court of Appeal decided in favour of the respondents, reversing a judgment of DONOVAN, J., and re-affirming the determination of the Special Commissioners. Against the decision of the Court of Appeal, this appeal is taken by the appellants, the Inland Revenue Commissioners.

- E The substantial question is whether the contribution paid to the respondents is an "annual payment" within the meaning of Case III of sched. D. Under r. 1 (a) of the Rules Applicable to Case III, income tax extends to

"any interest of money . . . or any annuity, or other annual payment, whether such payment is payable . . . either as a charge on any property of the person paying the same by virtue of any deed or will or otherwise, or as a reservation thereout, or as a personal debt or obligation by virtue of any contract, or whether the same is received and payable half-yearly or at any shorter or more distant periods."

- G If the payment of the contribution falls within the words "annual payment", it follows on the facts of the case that the respondents are entitled under r. 19 (1) of the All Schedules Rules, on making the payment, to deduct and retain a sum representing the amount of the tax thereon at the rate in force during the period when the payment was accruing due, and, further, that the Conservators of Epping Forest, the respondents, can recover from the Inland Revenue the amount of the tax deducted. These consequences inevitably follow from these findings which are now common ground: (i) that the conservators, the recipients of the sum, are a separate legal persona from the City of London Corporation which pays them, though the members of the two bodies are the same; (ii) that the contribution was paid wholly out of profits or gains on which the corporation had paid income tax; and (iii) that the conservators are a body established for charitable purposes only, and, therefore, exempt from income tax on "annual payments" forming part of their income.

In June, 1871, the Court of the Common Council of the Corporation of the City of London met the First Commissioner of Works and offered to abandon

certain ancient rights of metage on grain and wares brought into the Port of London and to devote the revenue arising from a fixed duty, which it was proposed should be levied in lieu of metage, to the preservation of Epping Forest for the benefit of the public at large. This offer was voluntary, and it was accepted. In pursuance of this arrangement, an Act was passed in 1872 abolishing compulsory metage, and creating a fixed due called the "City of London Grain Duty". This Act also created a fund to be applied to the preservation of open spaces near London. In the meantime, an inquiry was proceeding in order to ascertain what illegal enclosures had been made in the previous twenty years. There were legal proceedings for the purpose of staying further illegal enclosures and for the purpose of obtaining a declaration that all owners and occupiers of lands and tenements within the regard of the forest were entitled to rights of common pasture and pannage over the whole waste land of the forest. These legal proceedings, in which the City Corporation took a part, were successful. Thereafter, the corporation acquired by voluntary purchase the waste lands of certain manors in the forest. The next step was the introduction by the government of the day, by arrangement with the corporation, of a Bill which became the Epping Forest Act, 1878. It should also be mentioned that the corporation's interest in the preservation of open spaces for the benefit of the public was not confined to Epping Forest. That was, however, much the largest of the open spaces which the corporation was anxious to preserve.

The Act of 1878 is entitled

"An Act for the Disafforestation of Epping Forest and the preservation and management of the uninclosed parts thereof as an Open Space for the recreation and enjoyment of the public; and for other purposes."

It recites with much detail the steps which had led to its enactment. From these recitals I quote the following:

"Whereas the Corporation of London have made great exertions to preserve the Forest as an open space for the recreation and enjoyment of the public, and for that purpose they have purchased and hold a large proportion of the waste lands, and have expended large sums of money . . . And whereas the Corporation of London are desirous of being constituted Conservators of the Forest, and are willing and able to defray such expenses as are to be borne by the Conservators."

Section 3 of the Act provides that Epping Forest shall be regulated and managed under and in accordance with the Act by the Corporation of the City of London, acting by the mayor, aldermen and commons of the City in Common Council assembled, as the Conservators of Epping Forest. Section 7 requires the conservators at all times to keep the forest unenclosed and unbuilt on, as an open space for the recreation and enjoyment of the public, and, inter alia, to preserve as far as possible the natural aspect of the forest, ancient remains within it, and its natural amenities. There are provisions (s. 30) providing for the appointment of verderers, and (s. 31) of a committee, of which the verderers are ex officio members, with authority to exercise the powers of conservators. The powers and duties of the conservators are set out (s. 33), and are designed to give the conservators authority and power to manage the forest in order, inter alia, to safeguard and improve the forest as a place of public resort and enjoyment, and they include powers to set apart such parts as they think fit for the use of the inhabitants to play at cricket and other sports, and to lay out cricket grounds and grounds for other sports, and to enter into agreements with, and to confer special privileges on, particular clubs or schools, and powers to set apart and maintain bathing places. The obligation of the Corporation of London to contribute is dealt with in s. 39. The material provisions of the section are:

"(1) The Corporation of London shall from time to time contribute to the capital and income of a fund, to be called the Epping Forest fund, such moneys as shall be necessary out of the City of London grain duty or from other sources. (2) The fund shall consist of—As regards capital: . . . As regards income: . . . (iv) The annual income arising from the investments of any money, part of the capital of the fund: (v) The half-yearly or other periodical payments in respect of rentcharges: (vi) All fines, penalties, proceeds of timber-cuttings and loppings, and other moneys received by the Conservators, other than capital as aforesaid: (vii) The fees and income received for marking the cattle of the commoners, and in respect of cattle and animals impounded: (viii) All moneys contributed by the Corporation of London, or by any person, to the income of the fund."

It should be explained that the City of London grain duty referred to in s. 39 (1) came to an end in 1902, and that the contributions to the Epping Forest fund have since then been provided out of the city's cash, the income of which consists of the profits from the corporation's estates and markets and certain investments, all of which, in the hands of the corporation, are brought into computation for income tax purposes. In every year since the Act of 1878 became law, the other receipts of the Epping Forest fund have been insufficient to defray the expenses of the conservators and the corporation has in each year transferred to the fund a sum equal to the deficiency. The burden had been increasing and this fact, no doubt, moved the corporation for the first time to deduct income tax in the year in question when it made the payment. The chamberlain of the City of London is the banker of the corporation and he is also treasurer of the Epping Forest fund. Bills are presented through the Epping Forest committee and are examined by the accountant auditors, and a cheque or warrant is drawn on the chamberlain in payment. As regards the wages of the forest staff, an account is kept by the superintendent of the forest, which the Epping Forest committee keeps in funds by means of warrants drawn from time to time on the chamberlain. The accounts of income and expenditure are gone through monthly, and at the end of the year the amount of the corporation's contribution from the city's cash necessary to make up the deficiency between the income and expenditure of the year is finally determined. Payment is made, in account, by the chamberlain as banker and he makes the necessary transfer in his books from the city's cash account to the Epping Forest account. In 1948-49, the expenses were £22,660 19s. 2d., the receipts (other than the respondents' contribution), £6,654 15s. 10d. The deficiency was £16,006 3s. 4d., which was met by a net payment (i.e., a payment after deduction of income tax), in account, of £8,803 7s. 10d. This payment was made on the footing that the respondents were entitled to recover the tax deducted, amounting to £7,202 15s. 6d. from the appellants.

The Special Commissioners give their reasons and conclusion in the following paragraphs:

"In our opinion, once it is conceded that the corporation's contributions to the Epping Forest fund are properly regarded as payments (in account) to a separate body of persons (namely, the conservators), the proper view of s. 39 and s. 41 of the Epping Forest Act, 1878, is, not that the corporation discharges debts of the conservators, nor that it pays a mere 'balancing' sum in the nature of a trade receipt against which must be set expenses, but that it makes contributions to the income of the conservators, and that, out of their independent income and these contributions, the conservators discharge their own debts. In other words, we think a reasonable interpretation of these sections is that the corporation is required to supplement the income of the conservators, so as to ensure that such income, so supplemented, shall be sufficient to enable the conservators to meet all

expenditure on revenue account incurred in the performance of their statutory duties. A sum payable (albeit out of capital) under a will to supplement the income of an individual is itself 'income' (*Brodie v. Inland Revenue Comrs.* (1)) and in this respect we see no difference in principle between this and a sum payable (out of revenue) under a statute to supplement the income of a body of persons. The question then arises whether this 'income' has the characteristics of an 'annual payment'. The fact that the annual amount is not fixed but variable is immaterial. The sums in question are legally exigible, they have the quality of recurrence, and, in our opinion are a 'pure income profit', as distinct from sums in the nature of trade receipts against which have to be set the expenses of earning them. We therefore hold that the contributions are 'annual payments' made by the corporation to the conservators."

DONOVAN, J., agreed with the Special Commissioners in the proposition that the respondents do not discharge the conservators' debts, but he found that the Special Commissioners' reasoning was fallacious because it assumed that, if a sum is paid by one person to supplement the income of another, the supplement is necessarily "profit income" in the hands of the recipient. He thought that the test was whether, on the facts as a whole, the contribution paid by the respondents was an item of revenue against which expenses must be set to determine whether the conservators had made a profit. He said:

"The conservators get a sum only because they have performed duties which involve them in an outlay of equivalent amount. If the charitable exemption were abolished, I think the conservators would be astonished if the Inland Revenue descended upon them and said 'Never mind about your expenses, the £16,000 is all profit: pay tax on it'."

SIR RAYMOND EVERSLED, M.R., who delivered the judgment of the Court of Appeal, rejected the test of DONOVAN, J. In his view

"... the vital element is that the enterprise which the conservators manage and conduct is a charitable enterprise to be regarded in the same way as any other charitable enterprise conducted with charitable funds by charitable trustees. The conservators are not carrying on a trade; and in spite of references in the argument, naturally enough, to 'subsidies' and 'balancing figures', the enterprise which the conservators conduct is, in our judgment, nothing like a trade. The question, therefore—What if a profit were made?—seems to us not really capable of being sensibly asked. For, by the statute, every penny piece of income must be applied for the purposes (being charitable purposes) of the forest and no other purposes, and the corporation's obligation is by the statute to pay what is required to provide for the year's expenses and no more. There is, thus, no real question or possibility of the conservators so conducting the affairs of the forest as to result in the production of 'profits or gains' within the meaning of the Income Tax Acts."

Again, the learned Master of the Rolls says:

"... it is of the essence of the matter that the conservators are engaged upon a charitable purpose."

And yet again:

"... it seems to us that the learned judge treated the operations of the conservators as being of a quasi-trading character or of a character capable of producing 'profits or gains' ... For the reasons which we have given it is upon this matter that we have formed a different view. It does not seem to us irrelevant (as the judge thought) whether the conservators could be thought of as carrying on a trade or not. It is, in our judgment, of the essence of the matter that they do not do any such thing."

In my view, these passages make it clear beyond any doubt that the Court of Appeal decided the question, annual payment or not, on the ground that the conservators, being a body constituted for charitable purposes only and bound to apply their whole income to those purposes, were incapable in law of earning profits within the meaning of the Income Tax Acts, with the corollary that their accounts were not such as that

- A "the idea of an annual profit and loss account in respect of the year's operations was applicable."

My Lords, both in the judgment of DONOVAN, J., and in the judgment of the Court of Appeal, reference was made to the well-known judgment of SCRUTTON, L.J., in *Earl Howe v. Inland Revenue Comrs.* (2), and to the judgment of LORD GREENE, M.R., in *Re Hanbury* (3). In the first of these

B authorities, SCRUTTON, L.J., pointed out that if someone agrees to pay his butcher an annual sum for meat, the whole sum is not profit of the butcher. To find how much of the annual sum is profit, the butcher must deduct the cost of the meat. In his hands the sum paid is a gross receipt, not an annual payment under Case III. In *Re Hanbury* (3) LORD GREENE, M.R., distinguished two classes of annual payments—one which the Income Tax Acts regard as

C "pure profit income" of the recipient, which is not diminished by any deduction, and which the payer is entitled to treat as a payment which goes out of his income altogether, and the other, a number of annual payments the very quality and nature of which makes it impossible to treat them as pure profit income of the recipient, the proper way of treating them being to treat them as an element to be taken into account in discovering what the profits of the recipient are.

- D The judgment of the Court of Appeal, after a timely reminder that the court must construe the Act itself and not a judicial paraphrase of it, expresses the opinion that DONOVAN, J., was misled by the words in the formula of LORD GREENE, M.R., "pure *profit* income", into placing an undue emphasis on the word "profit" in its business sense. I do not think that DONOVAN, J., fell into any verbal trap or that his reasoning is vitiated by giving a false emphasis
- E to the word "profit". I respectfully think that he addressed himself to a real and not a verbal distinction, whether the sum received by the respondents was an item of revenue or receipt in their hands against which their expenses have to be set, or whether it was income in their hands. It is not possible, and I think I would have the assent of every one to this, to state the issue in a short and tidy formula, which shall have regard equally to the character of
- F the payment from the payer's position and from the payee's position. But LORD GREENE's formula, which would, perhaps, lose nothing by the omission of the words "pure profit" states the position, at any rate from the point of view of the payee, in terms which are not misleading, and I see no reason for thinking that the problem was not understood by DONOVAN, J.

- The ratio of the decision of the Court of Appeal was, we were told, not
- G among the reasons put forward by the respondents in that court, nor does it appear among the reasons in their Case. It was not supported by counsel for the respondents, and I must, with understandable regret, admit that a ratio, which would afford a short and clear-cut solution of our problem, is scarcely in line with the ratio of previous decisions of this House. It is, indeed, much too late to say that a charitable body, every penny of whose income must be
- H applied to its exclusively charitable purposes, is incapable of earning profits or gains. I do not know how to reconcile this with *Brighton College v. Marriott* (4), where the surplus earned by a charitable body in carrying on its trade of education was held to be subject to tax though the surplus was dedicated to the charitable purposes of the college. It is true that, in my opinion, the respondents were not carrying on a trade as defined in the Income Tax Act, 1918, s. 237, i.e., a trade, manufacture, adventure or concern in the nature of trade. But the activities they were carrying on are fairly within the category

"analogous to trade", and if they had resulted in a surplus, the surplus would be profits and gains under sched. D, Case VI, though it could only be applied for purposes which exclude "personal profit", to use the words employed by VISCOUNT DUNEDIN in *Forth Conservancy Board v. Inland Revenue Comrs.* (5). That case was not concerned with a charity, and the conservancy was not carrying on a trade or a concern in the nature of a trade and was not liable to tax under Case I of sched. D. But it was carrying on an enterprise "analogous to trade", and the dues it was entitled to levy exceeded its outgoings. The surplus was held to be subject to tax under Case VI. LORD DUNEDIN would have held, but for authority, that it was not liable to tax because ([1931] A.C. 548):

A

"Not a penny of the dues . . . can be employed for any other purposes except only for the necessary expenses of the trust. No one makes a personal profit out of any of the moneys received."

B

But LORD DUNEDIN conceded that he was bound by the authority of *Mersey Docks & Harbour Board v. Lucas* (6), in which (*ibid.*, 549)

"it was most definitely laid down in this House that the purpose to which the money collected was applied could not be considered in settling whether it was a gain or profit, or not."

C

Now, the conservators in the present case might have had a surplus in some one year apart from any contribution by the corporation of the City of London. That may have been improbable, but it was not impossible. They would not then, of course, have been entitled to any contribution from the corporation. The surplus would have been available in the next year or later for the charitable purpose of preserving the forest as a public resort, but it would none the less have been a profit within the meaning of the Income Tax Act, sched. D, Case VI. The question whether it would have been exempted from the liability to tax is a different question; that depends on the scope of the exempting provisions of the Income Tax Acts, which themselves necessarily pre-suppose a profit that without them would be taxable. The result is that if the decision of the Court of Appeal is to stand, it must be supported by reasons other than those given in the judgment. The other reasons must show that, though the respondents may be regarded as carrying on an activity which might render a resulting surplus taxable under Case VI, they also received the sum in question as income within Case III, a sum, therefore, that does not come into the reckoning of its Case VI profits, but remains taxable separately under Case III without any deduction. That is a situation that the Income Tax Act contemplates and for which it has made provision.

D

E

F

The convenient course will be to turn to the other grounds which were put forward on the respondents' behalf. The case in outline is as follows. The payment in question is an annual payment hardly distinguishable from an annuity. The matter has to be looked at both from the payees' point of view and from the respondents' point of view. Regarded as a payment, it is a sum paid under a legal obligation, and it makes no difference that the obligation is statutory and not under covenant. It has the characteristic of recurrency. It is true that unlike an ordinary annuity it fluctuates from year to year, but that is immaterial: *Moss' Empires, Ltd. v. Inland Revenue Comrs.* (7). It is paid wholly out of taxed money, and it is a transfer of part of the income from the payee with its tax burden: *Perkins' Executor v. Inland Revenue Comrs.* (8). It is calculated by reference to a rule prescribed in the Epping Forest Act, 1878, s. 39 (2), but

G

H

"there is no relation between the measure that is used for the purpose of calculating a particular result and the quality of the figure that is arrived at by means of the test: *Glenboig Union Fireclay Co., Ltd. v. Inland Revenue Comrs.* (9)."

It cannot reasonably be regarded as payment for services rendered or for any consideration of any kind. Regarded as a receipt, the respondents take it as a sum at their own disposition to expend just in the same way as interest on their investments or rents received by them, and the fact that it was, or even had to be, expended in payment of debts incurred in the performance of their duties is irrelevant. Many of these propositions are not in dispute. The controversy, indeed, settled down on the question whether the sum is income in the hands of the respondents. On this, the Crown submitted that it was a balancing item in the respondents' profit and loss account, or an account of the nature of a profit and loss account. This account was kept in accordance with the provisions of the Epping Forest Act, 1878, s. 39 (2), which stamped the payment with the character of a trade receipt. Moreover, the payment only filled up a deficit and it could, therefore, unlike the sum paid to shareholders in *Moss' Empires, Ltd.* (7), never be a profit in the pocket of the recipient. Apart from that it was a payment in return for the performance of the duties laid on the recipients by the Epping Forest Act, 1878, and in effect a payment in discharge of debts thereby incurred and not income or pure profit in the hands of the respondents.

My Lords, it is evident that the decision of the appeal, subject to the effect of the authorities, largely hinges on the proper construction of the Epping Forest Act, 1878, and especially of s. 39. But in view of the Crown's contention that the payment was made in return for services or some advantage received by or on behalf of the corporation, it is necessary to recall the circumstances antecedent to the passing of the Act, and those recitals of the Act which I have quoted. I will deal with this aspect of the Crown's case first. It may in limine be said that there is no finding that the corporation received any consideration, or money's worth in any form, in return for the payment, but I go further and say that no such finding could have been made consistently with the evidence laid before the commissioners and accepted by them. In the first place, it seems necessary to repeat that the whole actions of the corporation which led up to the passing of the Act were disinterested, and sprang from a desire to preserve this forest, among other open spaces, for the benefit of the public. That was the motive which induced the corporation to undertake the obligation and to agree to have it embodied in the statute. But satisfaction of a motive must not be confused with consideration. To come to the Act itself, the duties laid on the respondents were duties which they owed to the public, not to the corporation. In view of some of the argument addressed to us, it may be well to add that the public, who are the beneficiaries of the Act, are the public at large, and that the sparse dwellers among the offices, warehouses and public buildings in the city of London are today but a microscopic part, and even in 1878 must have been only a small proportion, of those who enjoy the open spaces of Epping Forest. I dismiss as a fantasy the notion that the corporation was in some way, direct or indirect, the beneficiary of the respondents' performance of their duties, and that the sum has the quality of a payment for services or the like.

I turn next to examine the question whether s. 39 imparts to the sum the character of a trade receipt in a kind of profit and loss account. Now, in my opinion, the character of the payment cannot depend on the place which it takes in the account even though that account is statutory. The account does not bind the Inland Revenue when it comes to assess the taxable income of the respondents. Nor are the respondents bound by the account in their discussions with the Inland Revenue. The question between them is whether the sum ought to be dealt with as a trade receipt or an item of that nature in an account properly framed to arrive at the taxable profit of the respondents, assuming them to have been carrying on a trade (Case I) or some enterprise analogous to a trade (Case VI), or whether it ought to be dealt with as a Case

III profit or income. We cannot advance towards a decision merely by asking how the accounts of the respondents have been framed, or how they must be framed under their statute. But, secondly, this contention of the Crown is, in my opinion, based on a misconstruction of s. 39. The first sub-section creates the obligation to contribute to the capital and income of the Epping Forest fund "such moneys as shall be necessary". The question immediately occurs: How measure what is necessary?, and the answer is found appropriately in the immediately following sub-section. It provides the measure of what must be paid to the income of this fund. I do not attach any importance to the description "income" in s. 39 for the reasons already explained, that the use of such a word in the statute or in the account cannot affect the issue. Nor do I attach the least importance to the fact that the sum is a balancing figure. It is that, of course, but the purpose of coming to a balance is merely to measure what is "necessary". It is to be noted, moreover, that among the credit figures in the account are the income from investments and payments of rentcharges, which are not of the nature of trade receipts.

My Lords, a reading of the recitals and of the Act convinces me that the approach of the Crown's argument to the issue is faulty and involves a perverted view both of the duties of the respondents and of the means at their disposal to achieve the purposes for which the Act was passed. From the first, the respondents had large duties thrust on them, duties which might be discharged in a niggardly, penurious way, or in a generous and liberal way. They had a very small income apart from the corporation's contribution. Without that contribution they would have been able to do little to achieve the purpose of the Act. They certainly could not fulfil that purpose unless they had at their command an income on a scale which would enable them to follow a policy for the management of the forest involving a certain magnitude of expenditure. It was there that the corporation were willing to help, not by defraying the annual debts, or part of them, incurred by the conservators, but by giving the assurance, under sanction of statute, that the conservators would have an income of the order required for their task. Since the members of the corporation were also the conservators, there was a practical safeguard against the burden thus assumed becoming unmanageable. That is my reading of the Act, and it is worth noticing that s. 39 (viii) contemplates the possibility that persons other than the corporation would contribute to the income of the fund. What can this mean except that other persons might desire, like the corporation, to contribute recurrent gifts of money to the conservators, and what would such gifts be but benevolent contributions of income to income? It is here that I must respectfully part company from DONOVAN, J. He says that the conservators get the sum only because they have performed duties which involve them in outlay of equivalent amount. I think that the truth is that the conservators performed their duties in a manner which involved them in a considerable outlay only because they had the assurance of this income contribution from the corporation. In the next succeeding sentence DONOVAN, J., poses the question what would happen if the charitable exemption were abolished? Here, I think, the Court of Appeal has given the correct answer. A larger sum would then be "necessary" within the meaning of s. 39, and it would be arrived at by "grossing up" the £16,000 and then deducting the income tax. But this, again, is not relevant to the issue. It is merely a matter of measuring the sum "necessary".

The last point with which I must deal before coming to the authorities is the Crown's contention that, since the contribution only filled a gap between receipts and expenditure, it never could be the income of anyone. The Crown used *Moss' Empires, Ltd. v. Inland Revenue Comrs.* (7) by way of contrast, and said that there the sums paid were in fact income in the shareholders' pockets, but whose pockets does the corporation's contribution reach except the pockets

of the respondents' trade creditors as payment of the debts due to them? This argument was met by the respondents' counsel with a short but cogent answer. Though the respondents paid away the whole sum of £16,006 3s. 4d. to their creditors, they were better off to the extent of £16,006 3s. 4d. by receiving it. That they paid it to creditors is in no way inconsistent with its being the respondents' income. The argument is inconsistent with the principle that one cannot determine the nature of a payment by inquiring what becomes of it, or even what must become of it, after the payee has received it.

My Lords, I am satisfied with the way in which the Special Commissioners have dealt with the question, and with their reasons. I am also in agreement with much that is said in the judgment of the Court of Appeal, though I have differed from it on the actual ground of the decision. The sum, in my opinion, is in no different position from a sum (having the requisite quality of recurrence) paid without conditions or counter stipulations out of taxed income under a covenant by a private individual to any charitable body. The Crown would neither admit nor deny that such a payment would be an annual payment to the charity within the meaning of Case III, or that the party paying it would be entitled to retain the tax, or that the charity would be entitled to recover it. We were implored to be guarded in our opinions on covenants in favour of charities. I can only say that I am compelled to follow where the argument leads. If the payment under covenant were made by an individual to a body not a charity, it could still be an annual payment, but the question whether it was in return for some consideration would probably be much more prominent and acute. If it were an annual payment the payer would be entitled to deduct tax under r. 19, but the payee would not be entitled to recover the tax.

If my analysis of the Epping Forest Act, 1878, s. 39, and my interpretation of that Act as a whole is correct, it will be apparent that the conservancy case (*Humber Conservancy Board v. Bater* (10)), in which a lump sum paid to a conservancy board by a railway company which participated in the benefits of the board's operations was held to be of the nature of a trade receipt, has little to do with the matter. Nor, in my opinion, are the decisions in the so-called subsidy cases relevant. The facts were far removed from the facts in this case, if I am right in my presentation of them. In *Lincolnshire Sugar Co., Ltd. v. Smart* (11) the company's trade consisted in the manufacture and sale of sugar made from beet grown in this country. The industry was new and there had been a sharp fall in the price of sugar. The effect of this would, from the national point of view, have been unfortunate, for the company might not be able to pay the farmers their contract prices for the beet, and the whole policy of growing beet for sugar and manufacturing it in this country might collapse in insolvency. To meet the difficulty a statute was passed under which "advances" were made to the company in respect of the *sugar manufactured* by them from home-grown beet during a period of one year up to a maximum fixed at three hundred thousand hundredweight of manufactured sugar and at a rate not exceeding 1s. 3d. per hundredweight. It was provided that no advance was to be made unless the Minister was satisfied that the price paid to the grower was not less than the price specified in a schedule to the Act. There were certain conditional provisions for repayment which never came into operation. The question to be decided was whether the advances were loans and, therefore, not subject to income tax, or trade receipts. There was no contention that they were annual payments, and no discussion of that question. This House took the view that the grants were not loans but were artificial supplements of the trading receipts, or, in other words, of the price which the company received for its sugar, and that the supplement partook of the nature of the price supplemented. Counsel for the appellants, however, fastened on the words employed by LORD MACMILLAN ([1937] 1 All E.R. 418):

"It was with the very object of enabling it to meet its trading

obligations that the 'advances' were made; they were intended artificially to supplement the company's trading receipts so as to enable the company to maintain its trading solvency."

He said:

"Strike out the word 'trading' and every word applies literally to the payments in this case."

This is an extreme instance of construing, not the Act of Parliament, but judicial dicta. The argument is particularly subject to this objection because the words were used with reference to a wholly different issue from the issue whether there was an annual payment. But in substance the answer to the argument of counsel for the appellants is that in the present case there is nothing corresponding to the sugar, nothing corresponding to the price of the sugar, and nothing corresponding to a supplement of the price of the sugar. I need not take up much time with *Pontypridd & Rhondda Joint Water Board v. Ostone* (12). The facts are complicated, but the essence of the matter is that the water board was selling water. It could not raise the price payable by its customers, and there was a deficit in its accounts. The urban district councils, many of whose constituents were among those supplied, granted a subsidy to the board, levying on their ratepayers. The question at issue was not whether the subsidy was an annual payment or a trade receipt. The issue was whether the lump sum payments were receipts of trade or the equivalent of a rate levied by a local authority to meet a deficit on its own undertaking. This House solved the question in the same way as it had solved the *Lincolnshire Sugar Co.* case (11). It held that the payments were a supplement to the water board's trading receipts, i.e., to the payments for the supply of water, and LORD MACMILLAN's words above cited were used by LORD THANKERTON to define the purpose and character of the payments.

I find it unnecessary to deal with the cases on payments out of trust funds, one of which (*Inland Revenue Comrs. v. Miller* (13)) is referred to by the Special Commissioners. They were cited and relied on by counsel for the respondents and it is not suggested that the Crown can gain any comfort from them. They are decisions on trust law, and I think they add little to the discussion of the principles involved in this case. I would dismiss the appeal with costs.

LORD MORTON OF HENRYTON: My Lords, I concur, and my noble and learned friend, **LORD OAKSEY**, has asked me to say that he also concurs. We have both had an opportunity of reading the opinions of LORD NORMAND and LORD REID.

LORD REID: My Lords. The real question in this case is whether the payments which the City of London make to the Conservators of Epping Forest under the Epping Forest Act, 1878, are or are not annual payments within the scope of the Income Tax Act, 1918, sched. D, Case III, r. 1. The appellants contend that they are not, and the first argument adduced in support of this contention is that payments in return for services are not annual payments, and that these payments are made in return for services rendered by the conservators, because the Epping Forest Act and the whole circumstances show that the city undertook to make these payments in order to have these services performed and to obtain benefit for the citizens of London. I agree with your Lordships that this argument is unsound. The conservators are a charity and the beneficiaries are the public as a whole. The city were anxious to have Epping Forest preserved for public purposes, they were responsible for obtaining the Act which set up this charity, and they undertook heavy financial responsibilities in order to achieve this result, but I cannot see any relevant distinction between this case and a case where a private benefactor has taken a leading part in founding a charity and has undertaken to pay

to the charity each year such sum as may be necessary to meet any deficit from its operations. It is not admitted that sums payable under such an obligation would come within the scope of Case III, at least where the charity carries on trading operations or operations of such a kind that if a surplus were produced in any year it would be taxable under Case VI of sched. D. I shall assume in favour of the appellants that the conservators carry on such operations.

- A It is, I think, clear that the sums payable by the city have all the necessary characteristics of annual payments, taking "annual" in the sense in which that word is generally used in the Income Tax Act; but it is equally clear that by no means all payments which have those characteristics fall within the scope of Case III. There is no qualification or limitation of the words "annual payments" expressed in the Rules Applicable to Case III, but a limitation must be implied so as to exclude certain kinds of annual payments. The Act must be read as a whole, and construed so as to produce, so far as possible, a coherent scheme, and it is settled that Case III does not apply to payments which are in reality trading receipts in the hands of the recipients although such payments take the form of annual payments. One reason is that income tax is a tax on income and trading receipts are not income: a trader's income from his trade can only be determined after he has deducted his expenditure from his receipts and it cannot be supposed that sums which are not income are to be taxable under Case III. But, in my judgment, the payments in this case are not trading receipts in the hands of the conservators, even if they are carrying on a trade or something in the nature of a trade. Trading receipts are generally received in return for something done or provided by the recipient for the payer, but, as I have said, that does not appear to me to be the case here.
- B
- C
- D

- So, if the appellants are to succeed it must be because the payments in this case fall within some other class of annual payments which, as well as annual payments received as trading receipts in return for something done or provided or to be done or provided, must for some reason be held to be excepted from the scope of Case III. But before considering this difficult question, I think it well to consider certain annual payments, not related to any benefit to the payer, which, in my opinion, are clearly within the scope of Case III. That most relevant to the present case is an annual subscription under covenant to a charity by a donor who gets no advantage to himself in return for it. If the charity is not trading or carrying on anything in the nature of a trade, I cannot see how such a payment can be excluded from the scope of Case III.
- E
- F
- What reason can there be for excluding it? Charities are not excluded from the scope of the Income Tax Acts: certain provisions entitle them to certain particular exemptions from tax, but that is all, and it was not suggested that any of those provisions affect this matter. Then on what ground can it be said that such a subscription is not income in the hands of the charity? What else could it be? It cannot be a trading receipt, because I am dealing for the moment only with a charity which is not carrying on anything in the nature of trading operations. But such a charity spends money and may need its subscriptions to meet its current expenditure. A donor might base the amount of his annual subscription on the needs of the society or might undertake to pay such sum in each year as might be necessary to balance the accounts.
- G
- H
- Would the money which he paid not be income in the hands of the society although other subscriptions in ordinary form were income? I see no escape from the conclusion that such payments to non-trading charities come within the scope of Case III. Can it then be held that the nature of the payment is essentially different if the charity happens to carry on some trading operation?

Two cases were cited by the appellants as decisive in their favour: *Lincolnshire Sugar Co., Ltd. v. Smart* (11), and *Pontypridd & Rhondda Joint Water Board v. Ostime* (12). Neither case dealt with payments to a charity and in

neither case was the issue raised whether the payments there in question came within the scope of Case III. The importance of these cases lies in the fact that in both it was held that payments made without any direct return to the payer must be taken into account for income-tax purposes and treated as trading receipts.

The *Lincolnshire Sugar Co.*'s case (11) was concerned with payments by the Treasury to the company under the British Sugar (Subsidy) Act, 1925, and the British Sugar Industry (Assistance) Act, 1931. It was admitted that payments under the former Act were trade receipts, but it was contended that payments under the latter Act, which were called advances, were really loans and should not be taken into account at all for income tax purposes: the company had not needed to use these payments and had not carried them to its profit and loss account. I think that the grounds of the decision of the House are to be found in the following passages from the speech of LORD MACMILLAN with which the other noble and learned Lords agreed ([1937] 1 All E.R. 418):

"What, to my mind, is decisive, is that these payments were made to the company in order that the money might be used in its business . . . if the company had not happened to be able to pay for its raw material otherwise, it could properly have used the 'advances' for this purpose. It was with the very object of enabling it to meet its trading obligations that the 'advances' were made; they were intended artificially to supplement the company's trading receipts so as to enable the company to maintain its trading solvency."

The payments in question were made during 1931-32, and it was not until 1934 that it was certain that they would not have to be set off against later payments of subsidy. After dealing with that matter LORD MACMILLAN said (*ibid.*, 419):

"But I do not find it necessary to rest my judgment on wisdom after the event. I prefer to rest it on my view of the business nature of the sums in question which the company received in 1931-32. I think that they were supplementary trade receipts, bestowed upon the company by the government, and proper to be taken into computation in arriving at the balance of the company's profits and gains for the year in which they were received."

In the *Pontypridd* case (12) the rates received by the water board were not sufficient to meet its expenditure, and the board was entitled to issue precepts to its "constituent authorities", two urban district councils, for amounts necessary to meet estimated deficits. It is settled that if a surplus results in any year from a public authority having collected more rates from its ratepayers than is necessary to meet current expenses that surplus is not taxable as income, and it was argued for the board that the sums received from its constituent authorities were analogous to rates collected from ratepayers. This contention was rejected, and it was held that the sums in question must be brought into account as trading receipts. VISCOUNT SIMON said ([1946] 1 All E.R. 669):

" . . . payments in the nature of a subsidy from public funds made to an undertaker to assist in carrying on the undertaker's trade or business are trading receipts, i.e., are to be brought into account in arriving at the balance of profits or gains under sched. D, Case I",

and he cited the *Lincolnshire Sugar Co.* case (11) as an illustration of this. LORD THANKERTON, quoting words used by LORD ATKIN in an earlier case, said (*ibid.*, 674) that these sums were received "'as a sum which went to make up the profits or gains of their trade'" and he also relied on the *Lincolnshire* case (11).

While it is true that no one contended in these cases that the payments there in question were annual payments within the scope of Case III, and no reference was made to Case III, it might now be difficult to argue, in face of clear statements that those payments were trade receipts, that similar payments can now be treated as annual payments. But it is another matter to treat these cases as laying down a general rule that no payment can come within the scope of Case III if words used in this House in these cases can be applied to it. These cases dealt with payments in the nature of a subsidy. LORD MACMILLAN rested his opinion in the *Lincolnshire* case (11) on "the business nature of the sums in question" and VISCOUNT SIMON in the *Pontypridd* case (12) referred to payments "to assist in carrying on the undertaker's trade or business". In my opinion, the payments in the present case were not of a business nature—they were of a benevolent nature—and they were not primarily made to assist in carrying on any trade or business—they were made primarily to achieve a public benefit of a charitable nature. If the appellants are right, the result would be far-reaching and, in my opinion, anomalous. Many, if not all, subscriptions to a charity which achieves its charitable object by trading could properly be described as intended to supplement its trading receipts, or to assist it in carrying on its trade, but if that were the sole criterion, the result would be an unreal distinction between charities which do not trade and those which do: in the one case subscriptions would be part of their income and within Case III, and in the other case not. If one reason, and, perhaps, the main reason, for excluding from Case III payments which apparently fall within its scope is to produce a coherent scheme of taxation, I cannot see anything coherent or reasonable in so distinguishing between charities which do trade and charities which do not, but, on the other hand, to treat all business payments alike, whether or not the payer gets any direct return for them, seems to me to be eminently reasonable. I would reserve my opinion about a payment which is primarily benevolent but which brings some incidental benefit to the donor.

The appellants also submitted a rather different argument. This was, as I understand it, that a payment which is destined to go into the profit and loss account of the recipient cannot be within the scope of Case III. Case III only deals with payments which are profit income in the hands of the recipient and if a receipt has to go into a profit and loss account and be set against outgoings it cannot be all profit. The appellants point out that no part of the sums paid by the city in this case can ever be profit in the hands of the conservators, because the amount of any sum payable is measured by the amount of the conservators' deficit, and, therefore, the whole of it must go to pay expenses and no part of it can ever be profit. This argument appears to me to be based on some misunderstanding of what the Act means by income or profit. Such cases as *Forth Conservancy Board v. Inland Revenue Comrs.* (5) and *Mersey Docks & Harbour Board v. Lucas* (6) make it clear that a receipt or surplus is none the less income although the recipient is bound to use it in a particular way and cannot enjoy it as a profit in the ordinary sense. Reference was made to a judgment of LORD GREENE in *Re Hanbury* (3). There LORD GREENE contrasted (20 A.T.C. 335) annual payments "which the Acts regard and treat as being pure income profit of the recipient" with those

"the very quality and nature of which make it impossible to treat them as part of the pure profit income of the recipient, the proper way of treating them being to treat them as an element to be taken into account in discovering what the profits of the recipient are."

The phrase "pure income profit" is appropriate in the sense that the rules applicable to Case III permit no deductions, and I think that the context shows that LORD GREENE was referring to this. I cannot think that he meant that Case III only applies to payments which are pure profit in the sense that the

recipient is free to use them as he pleases. He does not say that because a payment has to go into a profit and loss account, therefore, it is not pure profit income. He puts it the other way round, and says in effect that if you find payments

“the very quality and nature of which make it impossible to treat them as part of the pure profit income of the recipient”

then you treat them as an element in the profit and loss account. So one must first inquire into the quality and nature of the payment, and not as to its destination. Not every receipt by a trader in the course of his business is a trading receipt in the income tax sense. For instance, “interest of money” is specially mentioned in Case III as falling within the scope of that Case. It may be a business receipt which would appear in the trader’s profit and loss account made up for ordinary business purposes, but, having been already taxed at source, it must be excluded from his profit and loss account for the purpose of Case I, or otherwise it would be taxed twice. So, in my opinion, neither the fact that the amount of the payments in this case is measured by the amount of the conservators’ deficit, nor the fact that the conservators cannot use these payments as they please, but must carry them to the profit and loss account to extinguish that deficit, can determine whether or not these payments come to them as income. For the reasons which I have given, I am of opinion that these payments are income in the hands of the conservators and fall within the scope of Case III. I, therefore, agree that this appeal should be dismissed.

LORD COHEN: My Lords, I also concur.

Appeal dismissed.

Solicitors: *Solicitor of Inland Revenue; Comptroller and City Solicitor.*

[Reported by G. A. KIDNER, ESQ., Barrister-at-Law.]

BRAY (INSPECTOR OF TAXES) v. COLENBRANDER.

HARVEY (INSPECTOR OF TAXES) v. BREYFOGLE.

[HOUSE OF LORDS (Lord Normand, Lord Oaksey, Lord Morton of Henryton, Lord Reid and Lord Cohen), February 24, 25, 26, April 20, 1953.]

Income Tax—Foreign employment—Remuneration paid outside United Kingdom—Work and residence in United Kingdom—Income Tax Act, 1918 (c. 40), sched. D, Case V, r. 2.

The taxpayer was under a contract of employment with an employer resident abroad. By the contract, which was made in the country of the employer’s residence, the taxpayer’s remuneration was to be paid in that country, but his duties under the contract were performed in England, and he was resident in the United Kingdom for the purpose of the employment.

HELD: the contract of employment having been made outside the United Kingdom and the place of payment under the contract being outside the United Kingdom, the employment was outside the United Kingdom; the fact that the taxpayer performed his duties under the contract in the United Kingdom was irrelevant to the question whether the “possession”, within the meaning of Case V of sched. D to the Income Tax Act, 1918, was outside the United Kingdom; and, therefore, the taxpayer was assessable in respect of the income arising from his employment under Case V of sched. D, and, under r. 2 of the Rules Applicable to Case V, he was assessable only on the actual sum annually received by him in the United Kingdom.

Ratio decidendi of *Foulsham v. Pickles* ([1925] A.C. 458), applied.

Bennett v. Marshall ([1938] 1 All E.R. 93), approved.

AS TO INCOME FROM POSSESSIONS OUT OF THE UNITED KINGDOM, see HALSBURY, Hailsham Edn., Vol. 17, pp. 195, 196, paras. 400, 401, p. 199, para. 410, and 1952 Supp.; and FOR CASES, see DIGEST, Vol. 28, pp. 79-81, Nos. 433-450.

Cases referred to:

- A (1) *Colquhoun v. Brooks*, (1889), 14 App. Cas. 493; 59 L.J.Q.B. 53; 61 L.T. 518; 54 J.P. 277; 2 Tax Cas. 490; 28 Digest 79, 433.
(2) *Foulsham v. Pickles*, [1925] A.C. 458; 94 L.J.K.B. 418; 133 L.T. 5; sub nom. *Pickles v. Foulsham*, 9 Tax Cas. 261; 28 Digest 25, 131.
(3) *Bennett v. Marshall*, [1938] 1 All E.R. 93; [1938] 1 K.B. 591; 107 L.J.K.B. 319; 158 L.T. 75; 22 Tax Cas. 73; Digest Supp.

B APPEALS by the Crown from orders of the Court of Appeal (SOMERVELL, DENNING and ROMER, L.JJ.), dated July 24, 1952, affirming orders of DANCKWERTS, J., dated May 2, 1952, whereby appeals by the Crown from determinations of the Special Commissioners of Income Tax on Cases Stated by the commissioners were dismissed and the determinations of the commissioners were affirmed.

C In *BRAY v. COLENBRANDER*, the taxpayer was a Dutch national employed as a journalist on a Dutch newspaper which was owned by a Dutch corporation. There was no written contract of service and the arrangements as to his remuneration, conditions of service, and the nature of his duties were made by the editor of the newspaper on behalf of the employers. In December, 1945, he came to the United Kingdom to take up an appointment as London correspondent to the newspaper, and he had remained in the United Kingdom since that time except for holidays and periodical visits to Holland to confer with the editor. The duties of his employment were almost exclusively performed in the United Kingdom. During the material period his wife and child remained in Holland. His remuneration was payable in Holland, and part of it was paid direct to his wife for the maintenance of his home in Holland, the balance being remitted to him in England. For the years 1945-46 to 1949-50 inclusive, he was assessed to income tax under sched. E to the Income Tax Act, 1918, in respect of all sums paid to him as remuneration. The Special Commissioners allowed his appeal against the assessments.

F In *HARVEY v. BREYFOGLE*, the taxpayer was an American citizen, domiciled in the United States of America. Since 1929 he had been in the employment of the National City Bank of New York. In 1945, by an oral agreement made in New York, he was posted to London, being designated manager of the London branch of that bank. One of his main functions was to keep the head office of the bank in New York apprised of economic and monetary policy and developments in Europe and other parts of the world. The main part of his duties were performed in London. Under the terms of the agreement, his remuneration was paid to the credit of his account with the bank in New York, deductions being made in respect of an American pension scheme. His family lived with him in England in a house which he had purchased in 1946. He visited the United States from time to time, but did not maintain a home there. For the year 1947-48 he was assessed to income tax under sched. E in respect of his remuneration. The Special Commissioners allowed his appeal against the assessment.

H In each case, the Crown contended, inter alia, that the taxpayer was a person residing in the United Kingdom to whom profits arose from an employment carried on in the United Kingdom, that the employment so carried on was an employment falling within Case II of sched. D, which had been transferred to sched. E by the Income Tax Act, 1922, s. 18 (1), and that, therefore, the taxpayer had been rightly assessed to tax under sched. E. On behalf of each of the taxpayers it was contended that the remuneration was income

arising from a possession out of the United Kingdom chargeable to income tax under Case V of sched. D.

The Attorney-General (Sir Lionel Heald, Q.C.) and Sir Reginald Hills for the Crown.

Heyworth Talbot, Q.C., and D. C. Miller for the taxpayer, Colenbrander. Borneman, Q.C., and S. M. Young for the taxpayer, Breyfogle.

The House took time for consideration.

Apr. 20. The following opinions were read.

LORD NORMAND: My Lords, in each of these appeals the taxpayer entered into a contract of employment with an employer resident abroad. The contract was in each case entered into in the country of the employer's residence and it provided for payment of the employee's remuneration in that country. Parenthetically, it should be said that there is no suggestion that the place of payment was nominal or pretended, or that the real or genuine place of payment was not the place specified in the contract. Nothing, therefore, of what follows in this opinion in any way touches a case where the designated place of payment is challenged as nominal or pretended and unreal. Substantially the whole duties of the employee under the contract in each case were performed in the United Kingdom and any duties performed elsewhere were, for the purposes of these appeals, negligible. The taxpayers were resident in the United Kingdom at all material times.

By the assessments under review the Crown assessed each of the taxpayers under sched. E in respect of all sums paid to them as the remuneration of their employment and the Crown has consistently maintained that the taxpayers were assessable as persons residing in the United Kingdom in respect of the whole annual profits and gains accruing from an employment carried on in the United Kingdom under Case II of sched. D which, by the provisions of s. 18 (1) of the Finance Act, 1922, became chargeable under sched. E. The taxpayers have with equal consistency maintained that they are assessable under Case V of sched. D and that the measure of assessability is the amount of the actual sums annually received by them in the United Kingdom (r. 2 of the Rules Applicable to Case V). They claim the benefit of the express exception in s. 18 (1) of the Finance Act, 1922, whereby profits and gains chargeable under Case V of sched. D remain chargeable under that schedule. It is now quite settled that the word "possession" in Case V covers employment: see *Colquhoun v. Brooks* (1), *Foulsham v. Pickles* (2), and *Bennett v. Marshall* (3), per SIR WILFRID GREENE, M.R. ([1938] 1 All E.R. 96). But to fall within Case V the "possession", the employment, must be outside the United Kingdom, which means entirely outside the United Kingdom. The taxpayers' case is that an employment is entirely outside the United Kingdom if the place of payment under the contract of employment is outside the United Kingdom, and that the place or places at which the duties of the employment are performed by the employee are irrelevant to the question whether the "possession" is outside the United Kingdom. They further say, and it is admitted, that *Bennett v. Marshall* (3) so decided. *Bennett v. Marshall* (3) was decided by the Court of Appeal, and the Special Commissioners, DANCKWERTS, J., and the Court of Appeal have all followed it as an authority binding on them in the present cases.

The present appeals, are, therefore, brought for the purpose of bringing under review the ruling of the Court of Appeal (SIR WILFRID GREENE, M.R., ROMER, L.J., and MACKINNON, L.J.), in *Bennett v. Marshall* (3) that the employee was assessable only under Case V because the place of payment of his remuneration was outside the United Kingdom, and that the fact that some of his duties were performed in the United Kingdom was irrelevant to the question whether the "possession" was wholly outside the United Kingdom. The Court of Appeal's decision was unanimous and it affirmed the

judgment of LAWRENCE, J., in the court below. In both courts it was held that the case was concluded by the decision and reasoning of this House in *Foulsham v. Pickles* (2). That was disputed by the Crown and it is the real point of controversy in this case. The facts in *Foulsham v. Pickles* (2) were the converse of those in the present cases and in *Bennett v. Marshall* (3), for in it the taxpayer was employed abroad by an English company under a contract of employment, which provided for payment of his remuneration in England. This House held that his employment was not wholly out of the United Kingdom. The question debated in *Bennett v. Marshall* (3) was whether the ratio decidendi of this House in *Foulsham v. Pickles* (2) was (a) that the place or places where the employee performed his duties were irrelevant to the question whether his employment was wholly outside the United Kingdom, and that the only relevant matter was the place of payment of his remuneration, or (b) that the place of payment was a relevant consideration, without excluding as irrelevant the place or places at which the duties were performed. That question was carefully considered by LAWRENCE, J., and by the members of the Court of Appeal in *Bennett v. Marshall* (3). The Master of the Rolls devoted a large part of his judgment to a close examination of the speeches of each of the noble Lords who took part in *Foulsham v. Pickles* (2). All these learned judges came to the conclusion which I take from the words of ROMER, L.J. His words are all the more worthy of attention since he confessed that, apart from authority, he would have come to a different view. After stating ([1938] 1 All E.R. 103) that *Colquhoun v. Brooks* (1) had decided that

“ . . . whenever one finds a source of taxable income, of which source it can properly be said that it is wholly situated abroad, that source of income fails to be taxed under Case V of sched. D . . . ”

he concluded thus (*ibid.*, 105):

“ The House of Lords . . . in *Foulsham v. Pickles* (2) have definitely decided that in the case of an employment the locality of the source of income is not the place where the activities of the employee are exercised, but either the place where the contract for payment is deemed to have a locality or the place where the payments for the employment are made, which may mean the same thing.”

I have studied the judgments of LAWRENCE, J., and of the Court of Appeal in *Bennett v. Marshall* (3) so far as they bear on the question of the ratio decidendi of *Foulsham v. Pickles* (2), and I am unable to find any ground for rejecting them or, indeed, any ground for criticism. It is my humble opinion that SIR WILFRID GREENE, M.R., who dealt most fully with the point, expounded the opinions of the House of Lords with extraordinary precision and insight. It would be a mere waste of time to go over again the ground that he has so completely and satisfactorily covered in that part of his judgment. There is no doubt left in my mind that this case is governed by the ratio of *Foulsham v. Pickles* (2). The appeals must, therefore, I think, be dismissed with costs. But before leaving the cases I wish to refer to a matter which at one time caused me some uneasiness, and which I mentioned at an early stage of the hearing as a matter which might require consideration.

If, instead of being fully satisfied that *Bennett v. Marshall* (3) had correctly interpreted the reasoning in *Foulsham v. Pickles* (2), we had come to think, on a nice balance of considerations on one side and the other, that the Crown's argument in the appeals should, on the whole, be preferred, what would our duty have been ? Ought we to have given judgment in favour of the Crown ? Or ought we to have had regard to the hardships and injustices which might result ? The point is this. In 1937 *Bennett v. Marshall* (3) was decided. Leave was obtained to appeal to this House, but nothing followed on that. In the

successive Finance Acts between 1938 and 1950, when the assessments in the present cases were, I think, made, the Inland Revenue could have laid before Parliament a clause to make it clear for the future that the place where the employee performed his duties was a relevant circumstance in considering the locality of the employment. Nothing was done. But now this appeal is taken, and if it had succeeded it would have rendered a number of taxpayers liable to additional assessments going back six years. In the interval between 1938 and 1950 many people must, I should think, have entered into contracts of employment with a tract of future time in the faith that the place of payment of their salary was conclusive in settling whether they would have to pay British income tax on the actual amount of their remuneration remitted to the United Kingdom, or on the whole amount of their remuneration. That would have been for them of great importance when they were negotiating the contract. This matter was mentioned at the hearing but it was not debated. I would have asked that it should be debated if the conditions in which it might have been important had not evaporated by the conclusion of the argument. I am still in doubt about what our duty would have been if these conditions had still been present. I have formed no opinion about it, save on this one point, that in modern times it would be unrealistic to attach more importance to a disposition of property made on the faith of a judicial decision than to a contract with a tract of future time entered into on the faith of a judicial decision. I wish it to be clearly understood that in raising this question as I did, I had no thought of blaming or casting any reflection on anyone.

LORD MORTON OF HENRYTON: My Lords, my noble and learned friend, **LORD OAKSEY**, has asked me to say that he agrees with the opinion which has just been delivered. I agree that this appeal must be dismissed, for the reasons given by my noble and learned friend on the Woolsack, and I only desire to add two observations. I would echo the tribute which has been paid to the judgment of **SIR WILFRID GREENE, M.R.**, in *Bennett v. Marshall* (3), but I think that one slip appears in that judgment, which was extempore. The learned Master of the Rolls there said ([1938] 1 All E.R. 103):

"If I am right in my view as to the effect of *Foulsham v. Pickles* (2), it has the result in this case that the test as to the source of income is to be looked for in the place where the income really comes to the employee, and that place is Canada. It is out of the United Kingdom—that is where the source is."

It was immaterial, for the purposes of that case, whether the source of income was the United States of America or Canada, but I should have thought it was the United States, where the respondent's employers resided and whence his pay was remitted to Canada. I make this observation because I am apprehensive that some subtle argument may be based hereafter on this portion of the judgment.

I have formed no view on the matter discussed by **LORD NORMAND** at the end of his speech, as it proved unnecessary to hear any argument thereon.

LORD REID: My Lords, I concur.

LORD COHEN: My Lords, I also agree that this appeal should be dismissed for the reasons given by my noble and learned friend on the Woolsack, and would only add that, like my noble and learned friend, **LORD MORTON OF HENRYTON**, I have formed no opinion on the matter discussed by **LORD NORMAND** at the end of his speech, as it proved unnecessary to hear any argument thereon.

Appeals dismissed.

Solicitors: *Solicitor of Inland Revenue* (for the Crown); *Simmons & Simmons* (for the taxpayer, Colenbrander); *Linklaters & Paines* (for the taxpayer, Breyfogle).

[Reported by G. A. KIDNER, Esq., Barrister-at-Law.]

LONDON COUNTY COUNCIL v. MARKS & SPENCER, LTD. AND OTHERS.

[HOUSE OF LORDS (Lord Normand, Lord Oaksey, Lord Morton of Henryton, Lord Reid and Lord Cohen), March 10, 11, April 20, 1953.]

Town and Country Planning—"Works for the erection of a building"—*Demolition of existing buildings and clearance of site*—*Erection of new building not begun*—*Town and Country Planning Act, 1947 (c. 51), s. 78 (1).*

Town and Country Planning—*Interim development*—*Conditional permission*—*Limitation of time for commencement and completion of work*—*No reason given for imposing condition*—*Validity of condition*—*Town and Country Planning Act, 1932 (c. 48), s. 10 (3).*

In August, 1937, the respondents entered into a building agreement with the freeholder of a site under which, on the completion of agreed buildings on the site, they would become entitled to a lease of the premises for ninety years at an agreed rate. On Aug. 9, 1938, they obtained from the local authority planning permission under the Town and Country Planning Act, 1932, and the Town and Country Planning (General Interim Development) Order, 1933, for the erection of the new buildings. This permission was granted subject to, *inter alia*, the condition that the work should be commenced within six months and completed within eighteen months of Aug. 1, 1938, "failing which the consent shall become null and void". Plans for the new buildings were approved, and on June 9, 1939, the respondents entered into a written contract with a firm of contractors for the demolition of the existing buildings, which was completed by the end of July, 1939. Due to the international situation no contract for the new buildings was entered into, and during the war the building project remained in abeyance, but the respondents never abandoned it, and execution of the scheme was resumed in November, 1948, when the respondents gave notice to the local authority of their intention to proceed. The authority refused to sanction the development of the site, and the Central Land Board refused the respondents' claim to exemption from development charge.

HELD: (i) the words "works for the erection . . . of a building" in s. 78 (1) of the Town and Country Planning Act, 1947, included operations which were not in themselves building operations; in carrying out the demolition, since that was part of the totality of the physical work on the site necessary to carry out the building project, the respondents had begun "works for the erection of a building" within the sub-section; and, therefore, planning permission was to be deemed to have been granted in respect of the completion of the work and no development charge could be determined by the Central Land Board to be payable in respect thereof.

(ii) on the true construction of s. 10 (3) of the Town and Country Planning Act, 1932, the local authority were bound to give a reason for their decision to grant permission subject to a condition, and, as they had failed to do so, the application for planning permission was to be deemed to have been granted unconditionally, and, therefore, the failure of the respondents to comply with the condition attached to the planning permission of Aug. 9, 1938, did not prevent their proceeding with the work.

Decision of COURT OF APPEAL, sub nom. *Re 42-48 Paddington Street and 62-72 Chiltern Street, St. Marylebone* ([1952] 1 All E.R. 1150), affirmed.

FOR THE TOWN AND COUNTRY PLANNING ACT, 1947, s. 78, see HALSBURY'S STATUTES, Second Edn., Vol. 25, p. 590.

APPEAL by the London County Council from an order of the Court of Appeal, dated Apr. 1, 1952, reported [1952] 1 All E.R. 1150, reversing an order of HARMAN, J., dated Dec. 4, 1951, reported [1951] 2 All E.R. 1025.

Lawrence, Q.C., and *H. E. Francis* for the appellants.

Capewell, Q.C., *J. R. Willis* and *V. M. C. Pennington* for the respondents, Marks & Spencer, Ltd.

Denys B. Buckley for the respondents, Central Land Board.

The House took time for consideration.

Apr. 20. The following opinion was read.

LORD NORMAND: My Lords, the Court of Appeal reversed the judgment of **HARMAN, J.**, and declared that by virtue of s. 78 of the Town and Country Planning Act, 1947, the respondents, Marks & Spencer, Ltd., must be deemed to have been granted permission by the London County Council under Part III of the said Act for the completion of work for the erection of an office building on the site of Nos. 42-48 Paddington Street and 62-72 Chiltern Street, St. Marylebone, in the county of London in accordance with certain plans submitted to the London County Council and that no development charge can lawfully be determined by the respondents, the Central Land Board, to be payable in respect of the completion of the said works for the erection of the said office building.

The facts are set out by **HARMAN, J.**, in his judgment, to which I refer. It will suffice, therefore, to recapitulate them in the barest outline. Marks & Spencer, Ltd. entered into a building arrangement with the freeholder of the site binding themselves to erect a building in accordance with plans and specifications approved by the freeholder. They also obtained on Aug. 9, 1938, from the London County Council a planning permission or order under the Town and Country Planning Act, 1932, and the Town and Country Planning (General Interim Development) Order, 1933 (S.R. & O., 1933, No. 236), for the erection of the new office building illustrated in plans submitted with the application for permission. The permission was expressly subject to certain conditions of which only the first is material. It runs:

"... subject to (1) The work being commenced within six months and completed within eighteen months from Aug. 1, 1938, failing which the consent shall become null and void ..."

There were on the site certain buildings the demolition of which was essential to the completion of the proposed office building. In 1939 Marks & Spencer, Ltd., entered into a contract with a firm of demolition contractors to do the necessary work of taking down the existing buildings and clearing and preparing the site. These works were completed by the end of July, 1939. No contract was made for the erection of the building and no constructive work was begun. The reason for that was the anxious international situation then existing, and subsequently the war prevented until 1948 any attempt to proceed with the building. But Marks & Spencer, Ltd. never at any time abandoned their intention to complete the building for which they had obtained the planning permission.

The first question in this case depends on the proper construction of s. 78 (1) of the Act of 1947. This section, in effect, grants an exemption from other provisions of the Act which require that a planning permission shall be obtained in respect of any development of land carried out after the appointed day (July 1, 1948) and impose development charges in respect of the carrying out of operations for which a planning permission under the Act is required. The material words of s. 78 (1) are:

"Subject to the provisions of this section, where any works for the erection or alteration of a building have been begun but not completed before the appointed day, then if immediately before that day those works could have been completed ... in accordance with permission granted by or under an interim development order ... planning permission shall, by virtue of this section, be deemed to be granted under Part III of this Act in respect of the completion of those works."

Marks & Spencer, Ltd. contend that the phrase "works for the erection ...

of a building " means, in relation to the present case, the totality of the physical works on the site necessary to carry out their building project, as authorised in 1938, beginning with the work of demolition and ending with the completion of the building. The London County Council contend that these words refer only to building operations of a constructional nature and not to operations consisting in demolitions or in the clearance of the site. On this issue HARMAN, J., and, in the Court of Appeal, the Master of the Rolls (SIR RAYMOND EVERSHED) were in favour of the London County Council, but JENKINS, L.J., and MORRIS, L.J., found in favour of Marks & Spencer, Ltd.

My Lords, the question lies in a small compass and I find myself wholly in agreement with the reasoning and the conclusion of JENKINS, L.J., and MORRIS, L.J. I shall not repeat what they have said, and I could not find words more apt to express my own views than are to be found in their opinions. It is, nevertheless, proper that I should give reasons for differing from the opinions of HARMAN, J., and of the Master of the Rolls, and that I should consider some aspects of the arguments addressed to us by counsel for the appellants, which were not fully dealt with in the judgments of JENKINS, L.J., and MORRIS, L.J. HARMAN, J., in his judgment held that it was a question of fact whether, at the critical date, works for the erection of a building had been begun but were not finished on the site, and so far I agree with him. But he appears to have thought that the crucial point in the case was that no contract for the erection of the building ever came into existence. I can only say, with deference, that, in my opinion, this is to take too narrow a view because it concentrates on but one fact, and ignores other facts which seem to me material, such as the grant of permission to erect buildings, which necessarily involved demolitions, the identification of the buildings by plans and the fact that the demolition was carried out as a work necessary for the erection of the building. The Master of the Rolls, in my humble opinion, has also taken too narrow a view of the words " works for the erection of a building " in holding that they do not, in such cases as the present, *prima facie* include works of demolition. As regards the other reason which influenced the Master of the Rolls, I have not found it necessary to consider in what circumstances permission may have been required for demolition works as such under the Act of 1932, for, as I have said, I agree with the opinions of JENKINS, L.J., and MORRIS, L.J., who assumed that demolition works did not require a planning permission. Counsel for the appellants argued that, on the construction of s. 78 (1) of the Act of 1947 adopted by the majority of the Court of Appeal, strange results would follow, and he referred especially to the effect of such a construction on the powers and duties of the planning authority under s. 21, s. 22, s. 26 and s. 30 of the Act. I am not satisfied that the results apprehended by counsel for the appellants would follow, and, in any case, the words of s. 78 (1) are themselves clear and they ought not to be wrested from their plain meaning because it is thought that anomalies may result.

On this first point, therefore, I am of opinion that Marks & Spencer, Ltd. succeed. But there is another point which is equally vital to their success in defending the order pronounced by the Court of Appeal. They have manifestly failed to comply with the condition attached to the planning permission of Aug. 9, 1938, and the London County Council, therefore, maintain that in terms of the condition their consent is null and void. Marks & Spencer, Ltd., however, maintain that the failure to fulfil the condition cannot have that effect because no reason for the condition was given in the order of Aug. 9, 1938, and they refer to s. 10 (3) of the Act of 1932. It reads:

" Where an application for permission to develop land is made to the specified authority in manner provided by the order, the authority may, subject to the terms of the order, grant the application unconditionally or subject to such conditions as they think proper to impose, or may refuse the application, and they shall be deemed to have granted the applica-

tion unconditionally unless within two months from the receipt thereof, or within such longer period as the applicant may agree in writing to allow, they give notice to him that they have decided to the contrary, stating their reasons for so doing . . ."

The London County Council argue that "decided to the contrary" means "decided not to grant the application", and this is the construction put on the words by **HARMAN, J.** **Marks & Spencer, Ltd.** argue that the phrase means "decided not to grant the application unconditionally". The Court of Appeal has unanimously adopted this construction, and I most respectfully agree with their conclusion and with their reasons. I think that as a matter of language no other view is tenable. The failure to give a reason for the condition brings about a statutory deeming that the application for the planning permission was granted unconditionally. **Marks & Spencer, Ltd.** succeed on this point also. I would, therefore, dismiss the appeal with costs.

LORD REID: My Lords, I am asked by my noble and learned friends, **LORD OAKSEY** and **LORD MORTON OF HENRYTON**, who are unable to be present this morning, to say that they concur in the motion proposed. My Lords, I also concur.

LORD COHEN: My Lords, I also concur.

Appeal dismissed.

Solicitors: *J. G. Barr* (for the London County Council); *J. C. Parry* (for **Marks & Spencer, Ltd.**); *Treasury Solicitor* (for the Central Land Board).

[Reported by **G. A. KIDNER, ESQ., Barrister-at-Law.**]

SYKES v. MILLINGTON.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Lynskey and Parker, JJ.), April 17, 1953.]

Street Traffic—Person by whom vehicle "used"—Vehicle hired by owner to another person—Driver paid by owner—Vehicle used to carry goods for hire or reward for greater distance than permitted by owner's licence—Road and Rail Traffic Act, 1933 (c. 53), s. 1 (3).

The respondent, a haulage contractor, was the holder of two B licences, which enabled him to carry certain goods for hire or reward within certain limits. A company was the holder of a C licence which enabled it to hire a vehicle and use it for the carriage of goods, without limiting the distance within which the hired vehicle might be used by the company. On various occasions the company hired from the respondent a vehicle with a driver and used it to carry goods which were not covered by the respondent's B licences over a greater distance than was permitted under those licences. On each occasion the driver's wages and insurance contributions were paid by the respondent, but the driver received his orders as to where he was to go and what he was to do from the company. The respondent was charged with unlawfully using vehicles for the carriage of goods for hire or reward on behalf of the company otherwise than in accordance with the conditions imposed by his B licences, contrary to s. 2 (3) of the Road and Rail Traffic Act, 1933.

HELD: in the circumstances the drivers were the servants of the respondent, and under s. 1 (3) of the Road and Rail Traffic Act, 1933, he was to be deemed to be the person by whom the vehicles were being used, and, therefore, under s. 9 (1) of the Act, was guilty of failing to comply with the conditions of the B licences held by him.

FOR THE ROAD AND RAIL TRAFFIC ACT, 1933, s. 1 (3) and (4) and s. 2 (3), see **HALSBURY'S STATUTES**, Second Edn., Vol. 24, pp. 675, 676 and 678.

Case referred to:

- (1) *Mersey Docks & Harbour Board v. Coggins & Griffith (Liverpool), Ltd.*, [1946] 2 All E.R. 345; [1947] A.C. 1; 115 L.J.K.B. 465; 175 L.T. 270; 2nd Digest Supp.

CASE STATED by Hampshire justices.

A At a court of summary jurisdiction sitting at Havant on Oct. 24, 1952, the appellant, Kenneth Tredgold Sykes, a traffic examiner to the licensing authority, South Eastern Traffic Area, preferred eight informations against the respondent, Henry Edmund Millington, charging that on May 14, 20, 21, June 24, and July 9, 22, 23 and 24, 1952, he unlawfully used three vehicles for the carriage of goods for hire or reward on behalf of Messrs. Maurice Hill Construction Co., Ltd., otherwise than in accordance with the conditions imposed in his B carrier's licence, contrary to s. 2 (3) of the Road and Rail Traffic Act, 1933. The appellant also preferred three informations against the respondent, charging that on May 14 and 21 and July 24, 1952, he unlawfully used two of the vehicles for the carriage of goods for hire or reward without the authority of a permit, contrary to s. 52 (1) of the Transport Act, 1947.

C It was proved or admitted that the respondent, who carried on business as a haulage contractor at Bedhampton, was the holder of two B licences. The first of these licences related to vehicles FBK 118 and FRV 74, and limited the use of those vehicles thereunder to the carriage of milk, corn, cattle foods, furniture and effects within seventy-five miles, and of other goods within thirty miles, of Havant railway station. The second licence related to vehicle GPX 353 and limited its use thereunder to the carriage of milk, corn and cattle foods, within D twenty-five miles of Havant railway station. On each of the dates referred to in the informations one or other of the vehicles was being used to convey building materials and plant belonging to the company to places more than thirty miles from Havant railway station. On each occasion the driver of the vehicle in question was either one Alderson or a son of the respondent. Alderson was in the respondent's employment and he paid his wages and included them in his E return for employer's liability insurance. The respondent did not pay his son any regular wages, but provided him with board and lodging and, in addition, money. The respondent also paid the contributions due from an employer under the National Insurance Acts for both Alderson and his son. The company held a C licence authorising it to use any one vehicle hired by it for the carriage of goods in the course of its trade or business. The distance within which a F hired vehicle might lawfully be used by the company was not limited, and the appellant admitted that the C licence would allow a hired vehicle to make the journeys to the places and for the purposes for which it was being used on each of the dates referred to in the informations. There was no contract in writing between the respondent and the company in respect of the vehicles. Arrange- G ments were made orally by telephone under which a vehicle and a driver were sent from the respondent's depot to the company's office, the driver there being told where he had to go and what he had to do. The respondent would not necessarily know what the company's instructions were until after the vehicle returned after the work had been completed, and he had no control over the vehicle after it had reported at the company's office. The company paid the H respondent for the use of the vehicles, the amount being calculated on either a time or a mileage basis. The company at no time paid any wages to the drivers, but the respondent kept a separate record of the wages attributable to the periods during which the vehicles were working for the company, and took them into account in making charges against the company. The records required under s. 16 of the Road and Rail Traffic Act, 1933, were kept in duplicate, one copy being at the company's office and one at the respondent's office.

It was contended on behalf of the appellant that (i) as the vehicles were hired with the drivers by the company and the drivers' wages and insurance stamps

were paid by the respondent, the drivers were at all times his servants; (ii) by virtue of the Road and Rail Traffic Act, 1933, s. 1 (3), the vehicles were, at the material times, to be deemed to be used by him; and (iii) as the journeys were not in accordance with the conditions of the respondent's B licences he was guilty of the offences charged. It was contended on behalf of the respondent that, as at the material times the drivers were under the orders of the company, they were the company's servants, or, at any rate, their agents, within the meaning of the Road and Rail Traffic Act, 1933; that the lorries were being used by the company in accordance with their C licence; and, that, therefore, no offence had been committed.

The justices dismissed the informations and the appellant appealed.

J. P. Ashworth for the appellant.

Threlfall for the respondent.

LORD GODDARD, C.J. : This is a Case stated by justices for the county of Hampshire, before whom the respondent was charged on eight informations with unlawfully using vehicles for the carriage of goods for hire or reward on behalf of Messrs. Maurice Hill Construction Co., Ltd., otherwise than in accordance with the conditions imposed on his B carrier's licence, contrary to s. 2 (3) of the Road and Rail Traffic Act, 1933.

[His LORDSHIP stated the facts and continued:] Section 1 of the Road and Rail Traffic Act, 1933, provides:

"(3) When a goods vehicle is being used on a road for the carriage of goods, the driver of the vehicle, if it belongs to him or is in his possession under an agreement for hire, hire purchase or loan, and in any other case the person whose agent or servant the driver is, shall, for the purposes of this Part of this Act, be deemed to be the person by whom the vehicle is being used. (4) Where at any time goods are carried in a goods vehicle, being a vehicle which has been let on hire by the person who at the time of the carriage of the goods is within the meaning of this Part of this Act the user of the vehicle, the goods shall be deemed to be carried by that person for hire or reward".

Applying the tests which have been laid down, the principal one being by the House of Lords in *Mersey Docks & Harbour Board v. Coggins & Griffith (Liverpool), Ltd.* (1), this case is too clear for argument so far as the question of whose servants these drivers were. They were at all times the servants of the respondent. The respondent paid the wages and the insurance contributions for them, and what he was doing was making money by hiring out his lorries, together with a driver, to a person who held a C licence, and the person who held that licence held a licence which enabled him to hire.

I can well understand why the justices tried to see if they could find a way of dismissing these summonses because the whole thing seems to me to be somewhat in the nature of a trap. One hopes that something may be done, either by inserting terms in licences or giving notice to licence holders of the curious result which seems to follow if a person holds a C licence which enables him to hire a lorry. If he hires a motor vehicle with a driver and makes use of the vehicle he commits no offence, but the person who hires out his vehicle to the hirer who has a C licence may commit an offence. The material words of s. 1 are contained in sub-s. (3). The only question, therefore, is whether the persons who drove these vehicles were the agents or servants of the respondent? As I have said, it is perfectly clear, by any test you like to apply, that they were the servants of the respondent. The justices said they would not decide whose servants they were, but that they did decide that they were the agents of Maurice Hill Construction Co., Ltd. A man cannot be the servant of A and the agent of B in performing the same piece of work. He is either the servant of A or the servant of B, though he may become the agent of B. No one doubts that. Counsel

for the appellant, in the course of the argument, gave an illustration in which one person was doing something for another person, not as servant but as agent. I cannot see how it is possible to say, if my servant is doing something as my servant—for instance, driving my car as my servant—that the mere fact that I have lent the car to a friend and told my driver to drive him makes him the friend's agent. He remains my servant all the time. There might be circumstances in which the person driving the car would not be my servant, because the relationship of master and servant might be changed, but there was no evidence here on which the justices could find that the drivers were the servants of any person except the respondent. Therefore, they could not find that they were the agents of Messrs. Maurice Hill Construction Co., Ltd., and the case must go back to the justices with an intimation that the offences were proved.

LYNSKEY, J. : I agree. The respondent was granted a class B licence by the road licensing authority, and it is provided in s. 2 (3) of the Road and Rail Traffic Act, 1933:

“ A limited carrier's licence (in this Part of this Act referred to as ‘ a B licence ’) shall entitle the holder thereof to use the authorised vehicles, as he thinks fit from time to time, either for the carriage of goods for or in connection with any trade or business carried on by him, or, subject to any conditions which the licensing authority, in the exercise of his discretion to attach conditions to a B licence, may attach to the licence, for the carriage of goods for hire or reward ”.

The effect of that sub-section, in the absence of any conditions, enables the holder of a B licence to carry his own goods or goods of anybody else for hire or reward without limit as to goods or distance. The effect of the B licence granted to the respondent was that he was only allowed to use his vehicles for limited purposes and was only allowed to carry goods for hire or reward within limits and under restrictions.

The result of the application of s. 1 (4) of the Road and Rail Traffic Act, 1933, to the facts of this case on the finding that the respondent let his vehicles for reward to Maurice Hill Construction Co., Ltd., and was carrying their goods, is that he was to be deemed to be carrying the goods for hire or reward. The goods he was carrying were not permitted to be carried under his licence for the distance for which he carried them, so that he was clearly in breach of his licence if he was using his vehicles for that purpose. It is said that he was not using his vehicles for that purpose, and that, although the facts come exactly within what is contemplated by s. 1 (4), nevertheless, the justices ought to have held, and did hold, that these vehicles were being used not by the respondent but by Maurice Hill Construction Co., Ltd. The justices did not decide whose servants were driving the vehicles at the time, but they said that the vehicles were being driven by the agents for Maurice Hill Construction Co., Ltd. So far as I can see, they found that there was no evidence that the drivers of these vehicles, either Alderson or the respondent's son, were ever the agents for Maurice Hill Construction Co., Ltd. in the driving of those vehicles, and that is the matter that has to be considered.

[His LORDSHIP read s. 1 (3) of the Road and Rail Traffic Act, 1933, and continued:] It is clear that the drivers of these vehicles—there was no direct finding on the matter, but the inference is clear—were the servants of the respondent, and, as they were his servants, one is bound to hold that the vehicles were deemed to be used by him, whether they were or not. There is no room for the finding that either of the drivers could be treated as being the servants of the respondent for one purpose and the agents of Maurice Hill Construction Co., Ltd. for another purpose, because only one person is to be deemed to be using a vehicle. Apart from that, it seems to me that the driver, if he is the agent of anybody at all, is an agent for his employer. He is an agent for his employer in

driving the vehicle, not for the carriage of the goods, but for the purpose of earning the hire which the employer gets for the use of his services and for the use of the vehicle.

It is said that there was a C licence issued in favour of Maurice Hill Construction Co., Ltd., but that was a licence granted to that company and not to the respondent, and it does not purport to alter the conditions of the respondent's licence. It seems to me that the respondent was in breach of his licence and had, therefore, committed an offence. The fact that a C licence existed might have caused, and, perhaps, it was liable to cause, confusion in the minds of those who had to operate these vehicles, and I agree with my Lord that it would be desirable to make the conditions of the C licence clear, and also to make it clear that the holder of a licence, if he is going to use other people's vehicles for the purpose of taking advantage of the privileges granted to him, must be careful to hire a vehicle which, by the terms of its licence is not limited or receives express permission to do extended journeys, or which is a public service vehicle available for general hire. Unless he takes those steps, not he, but the person whose vehicle he hires is going to get into trouble because he is, in fact, in breach of the conditions of the licence. For those reasons, I would allow the appeal.

PARKER, J.: I agree with both judgments.

Case remitted.

Solicitors: *Treasury Solicitor* (for the appellant); *Arthur S. Joseph & Cates*, agents for *MacDonald, Jacobs & Oates*, Portsmouth (for the respondent).

[*Reported by G. A. KIDNER, Esq., Barrister-at-Law.*]

THOMAS v. MARSHALL (INSPECTOR OF TAXES).

[HOUSE OF LORDS (Lord Normand, Lord Oaksey, Lord Morton of Henryton, Lord Reid and Lord Cohen), March 2, 3, 4, April 20, 1953.]

Income Tax—Settlement—Transfer of assets—Absolute gift—Deposits to child's account in Post Office Savings Bank and purchases of Defence Bonds for child—Finance Act, 1936 (c. 34), s. 21 (9) (b).

A father opened Post Office Savings Bank accounts in the names of his two infant unmarried children, and from time to time paid sums to the credit of those accounts. Various sums were drawn from the accounts from time to time and were expended for the children's benefit. He also bought holdings of Defence Bonds in the names of the children. The deposits and the Defence Bonds were absolute and unconditional gifts made by the father to his children.

HELD: the gifts were "settlements" within the meaning of s. 21 (9) (b) of the Finance Act, 1936, so that the income arising therefrom fell to be treated as the father's income for tax purposes under s. 21 (1).

Hood-Barrs v. Inland Revenue Comrs. ([1946] 2 All E.R. 768) approved and applied.

Decision of COURT OF APPEAL ([1952] 2 All E.R. 32), affirmed.

FOR THE FINANCE ACT, 1936, s. 21, see HALSBURY'S STATUTES, Second Edn., Vol. 12, p. 361.

Cases referred to:

- (1) *St. Aubyn (L. M.) v. A.-G.* (No. 2), [1951] 2 All E. R. 473; [1952] A.C. 15; 2nd Digest Supp.
- (2) *Hood-Barrs v. Inland Revenue Comrs.*, [1946] 2 All E.R. 768; 176 L.T. 283; 27 Tax Cas. 385; 2nd Digest Supp.
- (3) *Yates v. Starkey*, [1951] 1 All E.R. 732; [1951] Ch. 465; 2nd Digest Supp.
- (4) *Inland Revenue Comrs. v. Morton*, 1941 S.C. 467; 24 Tax Cas. 259; 2nd Digest Supp.

- (5) *Chamberlain v. Inland Revenue Comrs.*, [1943] 2 All E.R. 200; 25 Tax Cas. 317; 2nd Digest Supp.
- (6) *Vestey's Executors v. Inland Revenue Comrs. Vestey's Executors v. Colquhoun*, [1949] 1 All E.R. 1108; 31 Tax Cas. 1; 2nd Digest Supp.
- (7) *Re Player. Ex p. Harvey*, (1885), 15 Q.B.D. 682; 54 L.J.Q.B. 554; 5 Digest 840, 7091.
- A (8) *Re Vansittart. Ex p. Brown*, [1893] 1 Q.B. 181; 62 L.J.Q.B. 277; 67 L.T. 592; 57 J.P. 132; 5 Digest 838, 7086.
- (9) *Re Tankard. Ex p. Official Receiver*, [1899] 2 Q.B. 57; 68 L.J.Q.B. 670; 80 L.T. 500; 5 Digest 838, 7085.
- (10) *Re Plummer*, [1900] 2 Q.B. 790; 83 L.T. 387; 5 Digest 837, 7079.

B APPEAL by the taxpayer from a decision of the Court of Appeal, dated May 13, 1952, reported [1952] 2 All E.R. 32, affirming a decision of DONOVAN, J., dated Dec. 20, 1951, reported [1952] 1 All E.R. 173, that the deposits in the Post Office Savings Bank and the purchase of Defence Bonds were "settlements" within the meaning of s. 21 (9) (b) of the Finance Act, 1936.

Sir Andrew Clark, Q.C., and *C. Lawson* for the taxpayer.

C *The Solicitor-General (Sir Reginald Manningham-Buller, Q.C.)*, *Pennycuik, Q.C.*, *J. H. Stamp* and *Sir Reginald Hills* for the Crown.

The House took time for consideration.

Apr. 20. The following opinions were read.

D LORD NORMAND: My Lords, I have had the advantage of reading the opinion about to be delivered by my noble and learned friend, LORD MORTON OF HENRYTON, and I agree with him that this appeal must be dismissed for the reasons given by him. He has quoted and commented on certain observations made by me in *St. Aubyn (L. M.) v. A.-G.* (No. 2) (1). I must confess that I there used language of a breadth which lends itself to misunderstanding and that I ought to have expressly qualified my words in the manner which my noble and learned friend indicates.

E LORD MORTON OF HENRYTON: My Lords, my noble and learned friend, LORD OAKSEY, has asked me to say that he concurs in the opinion which I am about to deliver.

F My Lords, the question which arises on this appeal is whether interest on two Post Office Savings Bank accounts, one in the name of the appellant's son, Michael, and the other in the name of the appellant's daughter, Heather, and interest on two holdings of £1,000 3 per cent. Defence Bonds, in the names of Michael and Heather respectively, ought to be treated, for all the purposes of the Income Tax Acts, as the income of the appellant.

G The relevant facts are fully set out in the Case Stated and may be summarised as follows:—On Dec. 20, 1933, a Post Office Savings Bank account was opened by or on behalf of the appellant in the name of Michael (born Sept. 8, 1933) with a deposit of £50, and on May 28, 1936, another Post Office Savings Bank account was opened by or on behalf of the appellant in the name of Heather (born Feb. 1, 1936) with a deposit of £50. Thereafter, the appellant paid further sums into the same bank for each of his children. Various sums were drawn from the accounts from time to time and were expended for the children's benefit. On H Dec. 31, 1948, Michael's account was in credit £844 9s. and Heather's account was in credit £844 8s. 3d. In the year 1945 the appellant bought £1,000 3 per cent. Defence Bonds for each of the two children. All the sums paid into the children's bank accounts, and the said Defence Bonds, were absolute and unconditional gifts made by the appellant to his children. The inspector of taxes treated the interest on the two savings bank accounts, exclusive of interest on interest, and the interest on the two holdings of Defence Bonds as being income of the settlor for the purposes of the Income Tax Acts. This he did in

reliance on the terms of s. 21 of the Finance Act, 1936. That section provides as follows:

"(1) Where, by virtue or in consequence of any settlement to which this section applies and during the life of the settlor, any income is paid to or for the benefit of a child of the settlor in any year of assessment, the income shall, if at the commencement of that year the child was an infant and unmarried, be treated for all the purposes of the Income Tax Acts as the income of the settlor for that year and not as the income of any other person . . . (9) In this section— . . . (b) the expression 'settlement' includes any disposition, trust, covenant, agreement, arrangement or transfer of assets; (c) the expression 'settlor', in relation to a settlement, includes any person by whom the settlement was made or entered into directly or indirectly . . ."

Counsel for the appellant sought to rely on certain other sub-sections in the course of his argument, but I think it is unnecessary to set them out, as I understand that all your Lordships are of opinion that they throw no light on the question which arises for decision.

For the sake of simplicity, I shall consider only the gifts to Michael, as the gifts to Heather stand on precisely the same footing. Counsel for the appellant does not seek to draw any distinction between the interest on the bank account in Michael's name and the interest on the Defence Bonds bought in Michael's name, and it is common ground that, if the gifts of money and Defence Bonds were "settlements" within the meaning of s. 21 of the Finance Act, 1936, the appellant was the settlor. It is also common ground that income was paid to Michael by virtue or in consequence of these gifts. Thus, the only point for determination is: Were the absolute gifts in question "settlements" within the meaning of s. 21 of the Finance Act, 1936? This question has been answered in the affirmative successively by the commissioners, by DONOVAN, J., and by the Court of Appeal.

My Lords, I, too, would answer this question in the affirmative. It is true that an absolute gift of money or of an investment would not ordinarily be described as a "settlement", but it is expressly enacted that in s. 21 the expression "settlement" includes, *inter alia*, "any . . . transfer of assets". For my part, I see no escape from the conclusion that the appellant made a transfer of assets, in the ordinary meaning of that phrase, when he used his own money to make a payment into Michael's bank account and to purchase Defence Bonds in Michael's name. Counsel for the appellant invited your Lordships to put a limited and special meaning on this phrase. I shall shortly examine his arguments, but it should be said at once that the matter is by no means free from authority.

In *Hood-Barrs v. Inland Revenue Comrs.* (2) the Court of Appeal had to decide whether a gift of shares by a father to each of his two infant and unmarried daughters was a "settlement" within s. 21 of the Act of 1936. The court unanimously held that it was, because it was a "transfer of assets", and declined to give that phrase a limited meaning. That decision is not, of course, binding on your Lordships' House, but, in my view, it was correct and is indistinguishable from the present case. It is, I think, unnecessary to consider the decision in *Yates v. Starkey* (3) as the facts differed widely from the facts of the present case, but JENKINS, L.J., observed that for the meaning of the words "settlement" and "settlor" in s. 21 ([1951] 1 All E.R. 737):

" . . . I must go to the definitions provided by sub-s. (9), construe those definitions, and apply them according to their true construction, however remote from the ordinary conceptions of 'settlement' or 'settlor' the content of the definitions may in any given instance appear to be."

This observation, with which I agree, is particularly relevant to the argument presented by counsel for the appellant in the present case.

Counsel for the appellant, while conceding that each of the gifts now in question might be described as a transfer of assets, if this phrase were to be given its ordinary meaning, contended that, as the word "settlement" was the only word used in the charging sub-s. (1), it was "the dominant word", and that a transaction did not come within s. 21 unless it was "something in the nature of a settlement". It follows, he said, that a transaction which might ordinarily be described as a transfer of assets did not come within s. 21 unless (a) it was accompanied by some restraint on alienation, such as would subject the transferee to some action at law or in equity if he attempted to alienate the subject of the gift, or (b) the income and the capital of the subject of the gift were given to different persons, or (c) the legal title and the equitable interest in the subject of the gift were conferred on different persons. In any one of these three cases, he said, and it may be in other cases, a transfer of assets would be something in the nature of a settlement, but an absolute and unconditional gift is the antithesis of a settlement and cannot be a "transfer of assets" within the meaning of s. 21. My Lords, in the words used by LORD GREENE, M.R., in *Hood-Barrs v. Inland Revenue Comrs.* (2), this is a "subversive suggestion" as to the meaning and operation of such an interpretation clause as sub-s. (9) (b) and I cannot accept it. The object of the sub-section is, surely, to make it plain that in s. 21 the word "settlement" is to be enlarged to include other transactions which would not be regarded as "settlements" within the meaning which that word ordinarily bears. Its effect is that wherever the word "settlement" occurs in s. 21 one must read it as "settlement, disposition, trust, covenant, agreement, arrangement, or transfer of assets", and if, "by virtue or in consequence of" any of these transactions or deeds, income is paid to or for the benefit of a child of the settlor, s. 21 comes into operation. I can find no context here which should lead your Lordships to give, for instance, the words "transfer of assets" any meaning other than that which they ordinarily bear, or to infuse into them some flavour of the meaning ordinarily given to the word "settlement". Further, counsel for the appellant's contention, if it were accepted, would create grave uncertainty as to the precise content of each of the words used in sub-s. (9) (b). What, for instance is a covenant "in the nature of a settlement"? And what is the difference between a "settlement", in the ordinary meaning of that word, and a trust "in the nature of a settlement". Counsel for the appellant submits that uncertainty also results if an absolute gift is held to fall within s. 21, for it may be a matter of great difficulty to determine, in certain cases, whether income is paid to or for the benefit of a child of the settlor "by virtue or in consequence of" such a gift. For example, said counsel, if a father gives his child a motor car or jewellery, and the child sells the gift and invests the proceeds, is the income from the investment paid to the child "by virtue or in consequence of" the gift, or is it paid to him or her in consequence of the sale of an asset which belonged absolutely to the child? My Lords, I can find no force in this argument. It is true that difficulties may arise of the kind suggested by counsel. In each case it will be for the commissioners to make a finding whether the income in question was or was not paid to or for the benefit of the child "by virtue or in consequence of" the settlement. These are not difficulties in construing the section, but difficulties in applying it to the facts of particular cases. Their existence affords no reason for imparting uncertainty into the meaning of the words used in sub-s. (9) (b).

I must, however, refer to certain authorities relied on by counsel for the appellant as supporting his argument. He first referred to *Inland Revenue Comrs. v. Morton* (4), *Chamberlain v. Inland Revenue Comrs.* (5) and *Vestey's Executors v. Inland Revenue Comrs.* *Vestey's Executors v. Colquhoun* (6). These were all decisions as to the effect of s. 38 (2) of the Finance Act, 1938. That section provided that, if and so long as the terms of any settlement answered

a particular description, any income arising under the settlement "from the property comprised in the settlement" should be treated as the income of the settlor, and the definition sub-section—s. 41 (4) (b)—is in substance the same as s. 21 (9) (b) of the Act of 1936, except that the words "or transfer of assets" are omitted. Counsel for the appellant does not rely on the decisions in these cases, but he does rely on certain observations which appear in the judgments. My Lords, I can derive no assistance from any of these observations. They were very fully analysed by SIR RAYMOND EVERSHED, M.R., in his judgment in the present case. I agree with that analysis and I need not repeat it. It is to be noted that the observations in question were not directed to the section now under consideration; further, in each of these cases it was unanimously held that there was a "settlement", within the meaning of s. 38 and s. 41 (4) (b) of the Act of 1938, and the attention of the Court of Session in *Morton's case* (4), and of this House in the cases of *Chamberlain* (5) and *Vestey* (6), was directed to determining what was "the property comprised in the settlement".

Counsel for the appellant next sought support from *St. Aubyn (L. M.) v. A.-G.* (No. 2) (1) and, particularly, from observations of LORD SIMONDS and LORD NORMAND as to the meaning of the words:

"Where a person dying after the commencement of this Act has made to a company to which this section applies a transfer of any property"

in s. 46 (1) of the Finance Act, 1940. The majority of this House decided that, in paying cash for one hundred thousand preference shares, for which he subscribed, the second Baron St. Levan did not "make a transfer of any property" to St. Aubyn Estates, Ltd., within the meaning of s. 46. LORD SIMONDS said ([1951] 2 All E.R. 485):

"The first point arises on the subscription by Lord St. Levan for one hundred thousand preference shares. For these he paid cash according to the ordinary use of language. Did he then 'transfer property' to the company within the meaning of s. 46? My Lords, I have no hesitation in saying that the payment of cash to a company on a subscription for shares is not a transfer of property to the company. No one, lawyer, business man, or man in the street, was ever heard to use such language to describe such an act and I decline to stretch the plain meaning of words in an Act of Parliament in order to comply with what is said to be its purpose . . . The question is not at what transaction the section is according to some alleged general purpose aimed, but what transaction its language according to its natural meaning fairly and squarely hits. Applying this, the one and only proper test, I say that when Lord St. Levan paid for his shares he did not transfer property to the company."

LORD NORMAND said (*ibid.*, 492):

"The first point is whether Lord St. Levan, when he paid £100,000 for the preference shares in the company made a transfer of property within the meaning of s. 46. My opinion is that 'transfer of property' are not the usual words which would be naturally selected to describe a payment of money, though it cannot be denied that money is property or that payment is a transfer. I think that if it had been intended to strike at money payments the simple words necessary to make that intention clear would have been added."

The observations of LORD SIMONDS were clearly directed only to the section then under consideration, and to the meaning of the words "transfer of any property" in the context wherein they then appeared. In my view, they do not assist the appellant in the present case. On the contrary, I think that the transaction in the present case is one which the phrase "transfer of assets" in the section now under consideration "fairly and squarely hits." It is, no

doubt, possible to read LORD NORMAND'S observations as referring generally to the meaning of the phrase "transfer of property", but I feel sure that my noble and learned friend intended to deal only with the meaning and effect of the words "transfer of property" in s. 46 of the Finance Act, 1940, and to concur with the view of LORD SIMONDS that Lord St. Levan, in paying cash for preference shares, did not transfer property to the company within the meaning of the section.

A Finally, counsel for the appellant referred to a series of decisions on the meaning of the word "settlement" in s. 47 of the Bankruptcy Act, 1883. That section provided as follows:

B " (1) Any settlement of property not being a settlement made before and in consideration of marriage, or made in favour of a purchaser or incumbrancer in good faith and for valuable consideration, or a settlement made on or for the wife or children of the settlor of property which has accrued to the settlor after marriage in right of his wife, shall, if the settlor becomes bankrupt within two years after the date of the settlement, be void against the trustee in the bankruptcy, and shall, if the settlor becomes bankrupt at any subsequent time within ten years after the date of the settlement, be void against the trustee in the bankruptcy, unless the parties claiming under the settlement can prove that the settlor was at the time of making the settlement able to pay all his debts without the aid of the property comprised in the settlement, and that the interest of the settlor in such property had passed to the trustee of such settlement on the execution thereof . . . (3) 'Settlement' shall for the purposes of
C this section include any conveyance or transfer of property."

D Section 168 (1) provided:

E "In this Act, unless the context otherwise requires—. . . 'Property' includes money, goods, things in action, land, and every description of property, whether real or personal and whether situate in England or elsewhere; also, obligations, easements, and every description of estate, interest and profit, present or future, vested or contingent, arising out of or incident to property as above defined."

F In *Re Player. Ex p. Harvey* (7) it was held by a Divisional Court (MATHEW, CAVE and WILLS, JJ.) that a gift of £650 made by the bankrupt to his son, in order to pay for the stock in trade necessary to enable the son to commence a business, was not a "settlement" within s. 47. CAVE, J., after setting out the history of the earlier statutes dealing with this matter, said (15 Q.B.D. 686):

G "It is contended that by virtue of the interpretation clause in the Act of 1883, when applied to s. 47, every gift by a father to children, if followed within two years by the father's bankruptcy, is within that section, and that a son can be compelled to refund all moneys given to him within that period for his maintenance or advancement in life. It seems to me a very strong thing to say that a definition of 'property' not to be found in the section itself which deals with this matter, but found in the interpretation clause applying to the whole Act, should have an effect going so much further than the legislature has gone before. I do not think it was intended that s. 47 should have that effect. One must look at the whole of the language
H of the section in applying that definition, and consider what is meant by 'settlement'. Although 'settlement', by sub-s. (3) 'shall for the purposes of this section include any conveyance or transfer of property', yet I think the view of MATHEW, J., is well founded, and that a settlement in the ordinary sense of the word is intended. The transaction must be in the nature of a settlement, though it may be effected by a conveyance or transfer. The end and purpose of the thing must be a settlement, that is, a disposition of property to be held for the enjoyment of some other person.

Thus a purchase by the father of shares, which are registered in the son's name, and upon which the son receives the dividends, is within the statute. But where the gift is of money to be expended at once, the transaction is not, in my opinion, within s. 47 of the Act of 1883. It would not have been within the Act of 1849, and I do not feel bound by reason of the interpretation clause in the Act of 1883, the effect of which is, I think, restricted by the terms of s. 47 itself, to put a construction upon the words of that section which has never been put upon similar words before the Act of 1883 was passed, and which would bring about such serious and far-reaching consequences."

In *Re Vansittart. Ex p. Brown* (8), VAUGHAN WILLIAMS, J., adopted the reasoning just quoted, and held that a gift of jewellery by the bankrupt to his wife within two years of his bankruptcy was a "settlement" within s. 47 and, therefore, void against the trustee in the bankruptcy, because ([1893] 1 Q.B. 184): "... the 'donor' contemplated the retention by his wife of the present which he gave her." In *Re Tankard. Ex p. Official Receiver* (9), WRIGHT, J., followed the two cases just cited, and in *Re Plummer* (10), the Court of Appeal approved of all three cases. In the last-mentioned case LORD ALVERSTONE, M.R., observed ([1900] 2 Q.B. 804):

"There are two lines of cases bearing upon the subject, which I will indicate as follows. If there is a gift by a father to a son of money or proceeds of property which can be traced, and the money or proceeds is or are intended to be retained or preserved as the property of the donee, that money or those proceeds will be property in 'settlement'. On the other hand, if there is a gift of money or proceeds, but it is not intended that the money or the proceeds shall be retained by the donee in the form of money, but shall be expended at once, that will not be a 'settlement'."

My Lords, I give full weight to the fact that in s. 47 of the Bankruptcy Act, 1883, the legislature first used the word "settlement" and then defined it, in the same section, as including any transfer of property, and I would not seek to draw any distinction between the phrase "transfer of property" and the phrase "transfer of assets" which occurs in s. 21 (9) (b) of the Finance Act, 1936. To this extent, the two sections resemble one another, and counsel for the appellant relies strongly on the observation of CAVE, J., in *Re Player. Ex p. Harvey* (7) (15 Q.B.D. 687), that to come within s. 47:

"The transaction must be in the nature of a settlement, though it may be effected by a conveyance or transfer."

I am content to assume in favour of the appellant that the four cases on s. 47 just cited were all rightly decided, and that the observation just quoted puts a correct construction on s. 47. In my opinion, however, these cases do not help the appellant. In none of them was it doubted that an absolute gift could be a "settlement" within s. 47, and in two of them such a gift was held to be a settlement. The court, however, felt able to put some restriction on the ordinary meaning of the words "transfer of property" by reason of the fact that the whole object of the section, as appeared from its terms, was to make certain transactions void as against the trustee in bankruptcy, and it was thought that a transfer of money, which was to be at once expended and could not be traced, was not within the intendment of the section. I can find no words in s. 21 of the Finance Act, 1936, which should lead your Lordships to put a limited meaning on the words "transfer of assets," and if and so far as one can gather the intendment of s. 21 from its wording, I think it was intended to throw the net as widely as possible, and to sweep in all kinds of transactions which would not ordinarily be regarded as settlements, provided only that "by virtue or in consequence" thereof any income is paid to or for the benefit of a child of the settlor. In my judgment, the argument for the appellant receives

no countenance from the wording of s. 21 or from any of the authorities relied on by counsel. I would dismiss the appeal with costs.

LORD REID: My Lords, I concur.

LORD COHEN: My Lords, I also concur.

Appeal dismissed.

Solicitors: *Tyrell Lewis & Co.* (for the taxpayer); *Solicitor of Inland Revenue* (for the Crown).

[*Reported by G. A. KIDNER, ESQ., Barrister-at-Law.*]

PERERA v. VANDIYAR.

B [COURT OF APPEAL (Sir Raymond Evershed, M.R., Birkett and Romer, L.JJ.), April 15, 1953.]

Landlord and Tenant—Covenant—Breach—Damages—Measure—"Eviction"—Gas and electricity supply cut off by landlord with intention of forcing statutory tenant to quit premises.

C On Oct. 8, 1952, the landlord of a flat, which was subject to the Rent Restrictions Acts, cut off the supply of gas and electricity to the flat with the object of inducing the statutory tenant to leave. As a result, the tenant was forced to move out of the flat and to live elsewhere until the services were restored on Oct. 15. In an action by the tenant against the landlord for damages for breach of the implied covenant for quiet enjoyment and for eviction,

D HELD: as the landlord's action did not constitute an interference with any part of the demised premises, it could not be regarded as a trespass; although an eviction which involved a trespass would be a tort, the mere intention to evict was not a tort and did not become a tort even if the landlord hoped to give effect to the eviction by interfering with the tenant's contractual rights; and, therefore, the tenant was entitled to damages merely for the breach of covenant and in respect of special damage which was proved, and he was not entitled to an additional sum as punitive damages on the basis that the landlord had committed a tort.

E *Lavender v. Betts* ([1942] 2 All E.R. 72), distinguished.

AS TO PUNITIVE DAMAGES, see HALSBURY, Hailsham Edn., Vol. 10, p. 87, para. 108; and FOR CASES, see DIGEST, Vol. 17, pp. 121-123, Nos. 291-323.

F Cases referred to:

- (1) *Cruise v. Terrell*, [1922] 1 K.B. 664; 91 L.J.K.B. 499; 126 L.T. 750; 31 Digest, Replacement, 698, 7891.
- (2) *Johnston v. Fischer*, [1921] N.Z.L.R. 529.
- (3) *Tankard v. Twomey*, [1922] N.Z.L.R. 79.
- G** (4) *Lavender v. Betts*, [1942] 2 All E.R. 72; 167 L.T. 70; 31 Digest, Replacement, 693, 7845.
- (5) *Whitham v. Kershaw*, (1886), 16 Q.B.D. 613; 54 L.T. 124; 31 Digest, Replacement, 399, 5285.

APPEAL by the landlord from an order of His Honour JUDGE LEON, made at Wandsworth County Court, and dated Jan. 23, 1953.

H The plaintiff was statutory tenant of a flat at No. 133, Trinity Road, Tooting, at a weekly rent of £1 12s. 6d. inclusive of gas and electricity. On Oct. 8, 1952, the landlord cut off the supply of gas and electricity, and the tenant was forced to leave the premises. On Oct. 15 the services were restored. In an action against the landlord the tenant claimed damages for breach of the implied covenant of quiet enjoyment and an injunction restraining the landlord from committing further breaches of that covenant. At the hearing leave was granted to the tenant to add a claim for damages for wrongful eviction. The

county court judge granted the injunction and awarded to the tenant damages amounting to £53 10s., £25 thereof being assessed as punitive damages in respect of the eviction. The landlord appealed on the question of damages.

The landlord in person.

Rountree for the tenant.

SIR RAYMOND EVERSHED, M.R.: The landlord, the defendant in the action, has sought to reduce the damages awarded for certain acts. The damages amounted to £53 10s. The acts complained of, so far as they were proved, were that, on Oct. 8, 1952, the landlord cut off the supply of gas and electricity to the tenant's flat, the supply remaining disconnected for a week. The landlord counterclaimed for possession on the basis of various acts of breach of contract and nuisance, but he failed to prove those matters. The counterclaim was dismissed and there is no appeal with regard to that part of the judgment. Of the £53 10s. awarded as damages, the sum of £3 10s. was special damages, the special damage having been proved. The judge then proceeded in the following terms:

"In assessing general damages I gave the [tenant] no damages in respect of any injury or inconvenience his wife and child may have suffered or in respect of any mental distress he may have felt about his wife and child, or in respect of the cold which he caught. I was not satisfied that he caught a cold as a result of the cutting off of the services. I gave him damages for the inconvenience actually suffered by him while in the house and for the inconvenience he suffered by having to move out of the house, live somewhere else, and move back again. If the claim had been only for breach of contract or if punitive damages had not been awarded, I should have awarded the [tenant] £25 general damages for this inconvenience."

Therefore, the judge's award of general damages for breach of contract was £25, and, as counsel for the tenant has virtually conceded, that was quite a generous award in respect of this conduct. The judge, however, then went on to say:

"The [tenant], however, by an amendment of his claim (which I deal with at the end of this note) claimed damages for eviction. I was quite satisfied that he was forced out of the house by the [landlord's] deliberate and malicious act, just as much as though he had been turned out by force. The [landlord] intended to evict him and succeeded. The [tenant] was, accordingly, in my view, entitled to punitive damages over and above the amount I should have awarded to him on the basis of inconvenience only."

Then he assessed as punitive damages (to be added to the £28 10s.), another £25. The further elucidation of this matter of punitive damages is found at the end of the judgment:

"The amendment of the [tenant's] particulars of claim arose in this way. At the close of the evidence of the [landlord], I asked the [tenant's] counsel why he had not pleaded the case in eviction and whether in view of the [landlord's] evidence he desired to apply for leave to amend such a claim. The [tenant's] counsel applied for leave to amend to include this additional claim."

Then, after a reference to what counsel for the landlord said, the learned judge referred to the amendment which was made and which took this form:

"The acts referred to [viz., the cutting off of the gas and electricity] were done with the intent to evict the [tenant] from the premises and they did cause such eviction."

Counsel for the tenant intimated in this court that he was thereby intending to allege, at the judge's invitation, a cause of action in tort for eviction.

The authority for such a cause of action which had, I think, impressed the judge, is derived from a passage in MEGARRY ON THE RENT ACTS, 6th ed., p. 187:

"A landlord will be liable in damages (which in a proper case will be punitive) if without an order of the court he evicts a tenant protected by the [Rent Restrictions] Acts either forcibly or peaceably, or removes the doors and windows so as to make the premises uninhabitable."

The authority for the liability in the case of a forcible removal is *Cruise v. Terrell* (1), and two decisions of the Supreme Court of New Zealand—*Johnston v. Fischer* (2) and *Tankard v. Tuomey* (3)—which we have not seen, are cited as the authorities for the liability where the tenant is evicted peaceably. The authority for the liability when doors and windows are removed is *Lavender v. Betts* (4), a decision of ATKINSON, J. In that case the landlord, with the intention (which succeeded) of removing the tenant from a flat which was subject to the Rent Restrictions Acts, removed the doors and windows of the flat. ATKINSON, J., said ([1942] 2 All E.R. 73):

"That is his method of riding rough-shod over these Acts of Parliament; and here to-day he is claiming he has the right to do that. I have not the slightest hesitation in saying he has no such right . . . It is admitted that these Acts were passed for the protection of tenants whose notice to quit has expired, and that they cannot be turned out of possession except by an order of the court; but [counsel for the defendant] says the landlord is entitled to do anything less than that so long as he does not try to turn them out of possession. He can take the doors off, the windows off, the roof off—he can do anything that he thinks fit short of taking possession. The plaintiff says this was a trespass upon their tenancy and wrongful interference with their quiet enjoyment of the premises, and, in my view, they have proved their case. Normally, plaintiffs are only entitled to such damages as they prove; but there are torts in respect of which the law permits a jury or a court to give what are called punitive damages, where the court is not limited to giving merely damages in respect of what we call special damage. In *Cruise v. Terrell* (1) LORD STERNDALE, M.R., said ([1922] 1 K.B. 670), that punitive damages can be given if a high-handed outrage has been perpetrated. In that particular case he held there were no aggravating circumstances; but he recognised and affirmed the right of the court to give aggravated damages, and quoted with approval what BOWEN, L.J., said in *Whitham v. Kershaw* (5) (16 Q.B.D. 618): ' . . . nothing we have said must be understood as in any way derogating from the principle that, when a wrongful act is done by a trespasser, or by a tenant to the property of his reversioner, under circumstances which call for vindictive damages, the jury may give vindictive damages.' "

Concluding his judgment, ATKINSON, J., said (*ibid.*, 74):

"This is a case for aggravated damages, and, in my judgment, I think a jury might give very high damages; but, for all that, one has to be as reasonable as one can and I assess the damages for this trespass at £45 . . ."

In my judgment, the tenant in the case now before us has not proved any separate tort. I am not satisfied that there is a tort of eviction. In so far as eviction is achieved, it seems to me, *prima facie*, to be a breach of contract. Nor am I satisfied that there was any trespass here in relation to the gas and electricity. Finally, though I do not doubt that the judge's estimate of the landlord's behaviour was right, I am not satisfied that it could fairly be called "a high-handed outrage" of the kind to which LORD STERNDALE, M.R., referred in *Cruise v. Terrell* (1). For one or more of those reasons, therefore,

I am not satisfied that there was here after the amendment had been made, and still less before, any basis on which a so-called punitive award of £25 could be made, and I think that that amount of damages cannot stand. The result, therefore, in my judgment, is that the tenant is not entitled to more than £3 10s. as special damages and £25 for breach of contract.

BIRKETT, L.J.: I am of the same opinion. In the course of the argument I ventured to say that there seemed to be a duplication of damages. The result which has been just announced by my Lord, namely, a reduction of £25, would seem to give some colour to the accuracy of that view. As I see the situation, the learned judge, after hearing the evidence on the case as pleaded, came to the conclusion that the acts of the landlord could be met by the award of £25 damages. He said:

“ If the claim had been only for breach of contract, or if punitive damages had not been awarded, I should have awarded the [tenant] £25 damages for this inconvenience.”

There, in the ordinary way, the case would have rested. [His Lordship referred to the circumstances in which the amendment of the tenant's particulars of claim was made, and to the decision of the county court judge, after hearing evidence on the matter, to award the extra sum of £25 as punitive damages, and he continued:] I am not sure that the learned county court judge ought to have allowed the amendment at that stage, as it was an entirely different cause of action which permitted the heavier damages to be given. In any event, for the reasons given by SIR RAYMOND EVERSHERD, M.R., I am not satisfied that there was, in fact, the cause of action which the learned judge allowed to be argued and decided. Therefore, I think that the sum of £25 which was added as punitive damages ought to be remitted.

ROMER, L.J.: I also agree. The county court judge, after assessing £25 as being the amount which, in his view, would be the right amount to award by way of damages for breach of contract, held that a further £25 should be added on the basis that the action of the landlord in cutting off the gas and electricity was a deliberate and malicious tort. That the landlord's action was deliberate is plain and that it was malicious is, I think, reasonably plain, but I cannot see that it amounted to a tort. It did not constitute an interference with any part of the demised premises, and, therefore, could not be regarded as a trespass. It was merely a breach of contract, the object of which was to persuade or induce the tenant to go. That is not a tort. The intention of the landlord in the present case was precisely the same as the intention of the landlord in *Lavender v. Betts* (4), but in that case the landlord resorted to trespass for the purpose of getting his own way and so was guilty of a tort. It was not because he formed an intention to evict that damages were awarded in *Lavender v. Betts* (4). They were awarded because he trespassed on his tenant's property. Eviction might, in certain circumstances, be a tort, and certainly would be if it involved a trespass, but the mere intention to evict, cannot, as I see it, be a tort, nor does it become a tort merely because the person who forms the intention hopes to give effect to it by interfering with the tenant's contractual rights. That is what the landlord did in the present case, and in respect of that the first sum of £25 was awarded against him. But he did not bring himself into the area of tort which would justify the awarding of a further sum under the head of punitive damages. Accordingly—though, perhaps, with some reluctance—I agree that the judgment of the learned judge went too far in awarding the second sum of £25, and the result which my Lord has already indicated must follow.

Appeal allowed.

Solicitor: *W. T. Donovan* (for the tenant).

[Reported by *F. GUTTMAN, Esq., Barrister-at-Law.*]

BARNARD AND OTHERS v. NATIONAL DOCK LABOUR BOARD AND ANOTHER.

[COURT OF APPEAL (Singleton, Denning and Romer, L.J.J.), March 24, 25, 26, 27, 30, 31, 1953.]

Employment—Regulation—Registration of workers—Suspension of workers by statutory tribunal—Action for declaration of invalidity of suspension—Dock labour—Delegation of power to suspend—Dock Workers (Regulation of Employment) Order, 1947 (S.R. & O., 1947, No. 1189), cl. 16 (2) (b).

The plaintiffs were registered dock workers employed by a firm of master lightermen. The National Dock Labour Board was set up under the Dock Workers (Regulation of Employment) Order, 1947, to administer the scheme provided by the order, with power to delegate to local dock boards constituted by the order certain disciplinary functions, including their power to suspend a worker for failing to comply with a provision of the order. The plaintiffs refused to obey a lawful order issued to them by their employers who reported them to the National Board under cl. 15 (3) of the order. The local board purported to delegate their powers to suspend the plaintiffs to the secretary to that board, the port manager, who, purporting to act under cl. 16 (2) (b) of the order, suspended the plaintiffs from work, and their appeal under cl. 18 (1) (b) to the appeal tribunal against the suspension was disallowed. In an action by the plaintiffs against the National Board for a declaration that their suspension was wrongful,

HELD: the power of suspension conferred by cl. 16 (2) (b) on the local board was a judicial or quasi-judicial function and the local board had no power to delegate it or subsequently to ratify a decision by a person to whom the power of suspension had been improperly delegated, and, therefore, the suspension of the plaintiffs by the port manager was a nullity; the court had power in their discretion to make a declaration relating to the validity of the decision of a statutory tribunal; and in the circumstances would grant the plaintiffs a declaration that their suspension was wrongful and a nullity.

Decision of McNAIR, J. ([1952] 2 All E.R. 424), affirmed.

Andrews v. Mitchell ([1905] A.C. 78) and *Cooper v. Wilson* ([1937] 2 All E.R. 726), applied.

Cases referred to:

- (1) *Huth v. Clarke*, (1890), 25 Q.B.D. 391; 59 L.J.M.C. 120; 63 L.T. 348; 55 J.P. 86; 33 Digest 17, 68.
- (2) *Local Government Board v. Arlidge*, [1915] A.C. 120; 84 L.J.K.B. 72; 111 L.T. 905; 79 J.P. 97; 38 Digest 97, 708.
- (3) *Cooper v. Wilson*, [1937] 2 All E.R. 726; [1937] 2 K.B. 309; 106 L.J.K.B. 728; 157 L.T. 290; 101 J.P. 349; Digest Supp.
- (4) *Andrews v. Mitchell*, [1905] A.C. 78; 74 L.J.K.B. 333; 91 L.T. 537; 25 Digest 325, 266.
- (5) *Abbott v. Sullivan*, [1952] 1 All E.R. 226; [1952] 1 K.B. 189.
- (6) *Lee v. Showmen's Guild of Great Britain*, [1952] 1 All E.R. 1175; [1952] 2 Q.B. 329.
- (7) *Leeson v. General Council of Medical Education & Registration*, (1889), 43 Ch.D. 366; 59 L.J.Ch. 233; 61 L.T. 849; 34 Digest 544, 30.
- (8) *Allinson v. General Council of Medical Education & Registration*, [1894] 1 Q.B. 750; 63 L.J.Q.B. 534; 70 L.T. 471; 58 J.P. 542; 34 Digest 544, 24.
- (9) *Toronto Ry. Co. v. Toronto Corpn.*, [1904] A.C. 809; 73 L.J.P.C. 120; 91 L.T. 541; 21 Digest 231, 624.

APPEAL by the plaintiffs from an order of McNAIR, J., dated Oct. 3, 1952. The plaintiffs and each of them were journeymen lightermen and members

of the Watermen, Lightermen, Tugmen and Bargemen's Union and at all material times were registered dock workers under the Dock Workers (Regulation of Employment) Order, 1947, made by the Minister of Labour pursuant to the Dock Workers (Regulation of Employment) Act, 1946, s. 2, and were at all material times in the employment of the first or of the second defendants or of both of them. The first defendants, the National Dock Labour Board, were established under cl. 3 (1) of the order of 1947, and the second defendants were registered employers under the scheme and members of the Association of Master Lightermen and Barge Owners (Port of London), and were habitually concerned with the providing of barges or other craft and of services for the unloading of sugar in bulk or otherwise in the Port of London.

The order laid down a scheme for the employment of registered dock workers and for their registered employers which it was the duty of the National Board to administer. Local dock labour boards were set up under cl. 5 of the scheme, and by cl. 3 (3) it was made the duty of the National Board to delegate to these local boards a number of its functions. By cl. 15 (3) a dock worker who failed to comply with any lawful orders given to him by his employer might be reported to the local board. By cl. 16 (2):

"Where a registered dock worker available for work fails to comply with any of the provisions of the scheme, then without prejudice to and in addition to the powers conferred by cl. 15 hereof, the local board may take any of the following steps as regards that dock worker—it may (a) determine that for such period as it thinks proper he shall not be entitled to any payment under cl. 14 hereof; (b) suspend him without pay for a period not exceeding seven days; (c) give him seven days' notice of termination of employment; (d) dismiss him summarily."

Clause 18 (1) provided, *inter alia*, that, if a registered dock worker had been suspended from the scheme,

"... he may within three clear days of being informed that he ... has been so suspended ... lodge an appeal in writing with the appeal tribunal ..."

No express power to delegate the powers contained in cl. 16 (2) was given to the local board by any provision of the scheme.

On Apr. 14, 1950, the plaintiffs received an order from the second defendants in the following terms:

"Attend s.s. Baron Renfrew, Williams' Jetty, Dagenham; load craft 2 p.m. to 10 p.m. . . . Any man refusing to carry out orders . . . will be reported to the National Dock Labour Board."

The plaintiffs refused to obey the order and the second defendants reported their refusal to the National Board. On Apr. 19 the men received a notice that, owing to their refusal to carry out their orders, they had failed to comply with provisions of the scheme and they were instructed to send their explanations within the next three days. Their explanations were sent within that time, but they were not received by the board until after the suspensions had taken place. Each of the plaintiffs received a notice dated Apr. 24, that he was suspended from work without pay for a period of seven days. It was admitted by the National Board that the suspensions were the act, not of the local board, but of Mr. Hogger, the secretary to the local board who was the port manager, and that by resolutions dated Oct. 2, 1947, and Nov. 29, 1948, the board had authorised Mr. Hogger as their agent to determine (subject to report to the board from time to time) whether or not suspension notices should be sent. The appeal of the men against their suspension was dismissed by the appeal tribunal.

The plaintiffs brought this action alleging that the orders given to them were unlawful in that they were not in accordance with their terms of employment,

and that the defendants had suspended them wrongfully and in breach of the terms of the scheme. They further alleged that

“ the pretended suspension was illegal, ultra vires and invalid as it was made by the London port manager and not by the local board as required by the said scheme, cl. 15 and 16 ”,

and they claimed a declaration that their suspension was wrongful. The National Dock Labour Board raised a preliminary point in their defence, contending that an action for a declaration did not lie, since the court had no jurisdiction to question the decisions of statutory tribunals except by proceedings for certiorari. McNAIR, J., gave judgment for the plaintiffs on that point (see [1952] 2 All E.R. 424) and the action proceeded. He found that the orders given to the plaintiffs were not unlawful, that the local board had delegated their duties under cl. 16 (2) to the port manager, that they had power so to do, and, therefore, that the suspension of the plaintiffs was not wrongful. The plaintiffs appealed. During the hearing of the appeal they accepted the finding of McNAIR, J., that the orders given were lawful, and so the appeal against the second defendants was dismissed with costs.

Platts-Mills for the plaintiffs.

Paull, Q.C., and *Harold Brown* for the National Dock Labour Board.

Carter, Q.C., and *Geoffrey Lane* for Silvertown Services, Ltd.

SINGLETON, L.J., stated the facts and continued: The first question for consideration is whether the local board had power to delegate their duties under cl. 15 and cl. 16 of the Dock Workers (Regulation of Employment) Order, 1947. The order does not give any such power expressly. Clause 15 deals with the question of payment, and cl. 16 is entitled “ Disciplinary procedure ”. It is, to my mind, essential to notice that by the order of 1947 the local board is entrusted with the disciplinary powers set out in cl. 16 (2). Those powers are of a judicial, or certainly of a quasi-judicial, nature. The constitution of the local board is laid down in cl. 5 (2). It is to consist of equal numbers of persons representing the dock workers and employers, and by cl. 5 (6) provision is made for payment to them of such salaries, fees and allowances as the National Board may determine. It is no answer to say there would have been too much work for the local board to do, nor do I think any such case is made out on the evidence. In view of the provisions of the order as a whole, I fail to see that the local board had any power to delegate their disciplinary duties under cl. 16, and I do not think that the authorities referred to in the judgment of McNAIR, J., i.e., *Huth v. Clarke* (1) and *Local Government Board v. Arlidge* (2), support the submission made on behalf of the defendants that the local board had power to delegate the duties given by cl. 16 (2). It follows that the port manager had no right to suspend the men, or to issue suspension notices, there being no order of the local board. During the hearing of the appeal I asked where was the order of the local board, and I was referred to the document of Apr. 24, 1950, headed: “ Notice of suspension ”. It is not an order of the local board; it is a notice issued by the port manager. I cannot regard it as other than a nullity. The plaintiffs appealed against that suspension, and their appeals were disallowed. It is not necessary to dwell on the irregularities, such as the failure to wait until the time for the submission of the plaintiffs’ explanations had run.

It is said on behalf of the National Board that, as the plaintiffs appealed and failed, they cannot now be heard to say that their suspension was wrongful. If, as I think, the notice of suspension was in each case a nullity, the fact that there was an unsuccessful appeal from it cannot turn that which was a nullity into an effective suspension, nor can the provision at the end of cl. 19, “ but otherwise the notice shall be treated as effective ” have any such effect. Clause 19 pre-supposes a good notice of suspension given on a decision of the

local board under cl. 16, and the notice which was given does not fall within that category. I do not think that the appeals of the plaintiffs can be said to amount to ratification or to waiver. That was the view of McNAIR, J., who said:

"On these findings it is also not necessary for me to express any final opinion on the question of waiver raised by the National Dock Labour Board. But had it been necessary I should as at present advised have inclined to the view that waiver was not established inasmuch as it was not proved that the plaintiffs had the requisite knowledge in fact as to the port manager's position or authority."

I now come to the last question. It was raised as a preliminary point at the trial, namely, that the action does not lie. It is submitted on behalf of the National Dock Labour Board that in the order of 1947 there is a complete code on matters of discipline, and that the only way in which decisions of the board can be questioned is by writ of certiorari. There is great force in this submission, and there is a body of authority to support it. It cannot be right to say that whenever a tribunal such as the local board or the appeal tribunal makes a mistake the court can grant such a declaration as is sought in the present case. That would lead to endless confusion. The courts have, however, power to grant a declaration or an injunction in certain cases to prevent an injustice.

In *Cooper v. Wilson* (3) this court granted relief to a police officer who had been dismissed by the watch committee of the Liverpool City Council. In that case a question of jurisdiction arose. The plaintiff said that he had resigned from the police force, and that he was "dismissed" afterwards. He brought an action against the chief constable and the watch committee claiming a declaration that he had duly resigned, and was, therefore, entitled to be paid the rateable deduction which had been made from his pay. It was held, MACNAGHTEN, J., dissenting: (i) that in a borough the right to dismiss a police constable was vested solely in the watch committee, but that in that case that committee had no power to dismiss the plaintiff, who had already terminated his service by due notice of resignation, and there was no power *ex post facto* to treat him as dismissed from a date prior to the hearing by them of an application to confirm the purported dismissal by the chief constable; (ii) that it could not be said that by appearing before the watch committee the plaintiff must be taken to have abandoned his notice of resignation; (iii) that the plaintiff was not limited to the right of appeal to the Secretary of State given by the Police (Appeals) Act, 1927; and, therefore, (iv) that he was entitled to the declarations claimed. The opinion was expressed that the proceedings before the watch committee were contrary to natural justice owing to the presence of the chief constable during the committee's deliberations on the plaintiff's appeal, and it was held that where a statutory body is alleged to have acted without jurisdiction its decision could properly be questioned in an action for a declaration that the decision was null and void. Counsel for the defendants submitted that when the judgment of GREER, L.J., in that case is examined it becomes clear that the case was one in which a body had acted without jurisdiction, and in such circumstances the court may have power to grant a declaration, as it did in that case. GREER, L.J., said ([1937] 2 All E.R. 731):

"It seems to me clear that the watch committee have no power to dismiss a constable who has already terminated his service by due notice, nor can they *ex post facto* decide that they would treat him as dismissed as from a date prior to the hearing of an application to confirm the decision of the chief constable . . . It would be idle for a plaintiff who is alleging that he has never been dismissed to appeal to the Secretary of State, nor do I think that the fact that that is a remedy which he could take

prohibits his access to the court for a declaration that his dismissal was invalid, nor do I think that the power which he undoubtedly possessed of obtaining a writ of certiorari to quash the order for his dismissal prevents his application to the court for a declaration as to the invalidity of the order of dismissal . . . The case of *Andrews v. Mitchell* (4) seems to me to support the view that a claim for a declaration that a statutory body acted without jurisdiction can be dealt with by an action for a declaration that the decision in question was null and void."

The headnote to *Andrews v. Mitchell* (4) is:

"Section 68 of the Friendly Societies Act, 1896, which enacts that every dispute between a member of a friendly society and the society shall be decided in manner directed by the rules of the society, and that the decision so given shall be binding and conclusive on all parties without appeal, does not apply to a decision given by the arbitration committee without jurisdiction, the rules having been disregarded upon a question of substance. A member of a friendly society was duly summoned before the arbitration committee for a breach of the rules, and was in his absence expelled from the society by a resolution of the committee upon a different charge, namely, of fraud and disgraceful conduct, of which no written notice had been given to him as required by the rules."

It was held that the decision was null and void. The member who was expelled from the society sued the trustees in the Carmarthen County Court claiming damages for wrongful expulsion and for an injunction. The county court judge held that he had jurisdiction to hear the motion and he adjourned the hearing. A summons was taken out by the committee for a writ of prohibition to the county court, and that was dismissed by DARLING, J., whose decision was affirmed by the King's Bench Division (the court consisting of LORD ALVERSTONE, C.J., WILLS and CHANNELL, JJ.), and by the Court of Appeal. There was an appeal to the House of Lords which was dismissed. It was argued on behalf of the trustees of the society that, in any case, the county court had no jurisdiction to hear the member's complaint until the decision of the arbitration committee had been set aside. That is virtually the same point as that taken by counsel for the defendants here. THE EARL OF HALSBURY, L.C., said ([1905] A.C. 81) in the course of his speech:

"When one looks to see what the course of procedure must necessarily be in order to justify an expulsion, Mr. Lawrence points out that there is a rule which certainly does justify expulsion, but it justifies expulsion upon the express proviso that the charge has been made as provided by the rules. In this case the charge never was made as provided by the rules; and if you have no power given under the rules to expel a member except upon a charge made and tried according to the rules, you have no power to expel in a case like this."

LORD DAVEY said (*ibid.*, 82):

"My Lords, I concur in the observations of my noble and learned friend as to the importance of upholding these domestic tribunals of friendly societies, and not lightly interfering with their decisions. But this is not in my opinion a question of irregularity or informality—it is a question of substance . . . it was an informality which went to the root of the jurisdiction, and the omission to follow the directions of the rules for preferring charges has had the unfortunate effect of making the resolution which was come to for the expulsion of the respondent, in my opinion, altogether null and void."

The House of Lords thus held that in those circumstances an action in the courts could be brought to put right the wrong which otherwise would be done.

In both those authorities it may well be said that the question was akin to a question of jurisdiction. The speech of LORD DAVEY shows that his view was really expressed on the rules of the society. The point argued by counsel for the trustees of the friendly society that the action would not lie failed.

In the present case, if the question is not one of jurisdiction, it is certainly closely akin to it. The local board had no jurisdiction to delegate; the port manager had no jurisdiction to adjudicate; each purported so to do; and, as in *Cooper v. Wilson* (3), a writ of certiorari was of no use. It could be of no use to the plaintiffs in this case because they did not know of the illegality which gives rise to the preliminary point until long after the time for taking out the writ had expired, and the question which has been argued before us was not before the appeal tribunal at all. In the circumstances, I am of opinion that the court has power to grant to the plaintiffs a declaration that their suspension was wrongful.

I am more concerned whether that relief should be granted. It is a matter for the discretion of the court, and that discretion should be exercised sparingly. Had it been the only question in issue, I should have doubted whether this court ought to grant the relief asked for, but throughout this case the defendants have strenuously argued that the local board had the right to delegate their disciplinary powers and had properly done so, and, further, that by their appeals the plaintiffs had put themselves into such a position that they were not entitled to any relief. It was only on the fifth day of the appeal that counsel for the defendants told the court that he was instructed to say that, if this court held that the local board could not delegate their powers, the board would abide by that. The case has been fully argued on both sides. I am in favour of allowing the appeal against the judgment in favour of the National Board to the extent of granting to the plaintiffs a declaration that the purported suspensions were unlawful.

DENNING, L.J.: It was urged on us that the local board had power to delegate their functions to the port manager on the ground that the power of suspension was an administrative function and not a judicial one. It was suggested that the action of the local board in suspending a man was similar in character to the action of an employer in dismissing him. I do not accept that view. Under the provisions of the order of 1947, so far from the board being in the position of an employer, the board are put in a judicial position between the men and the employers; they are to receive reports from the employers and investigate them; they have to inquire whether the man has been guilty of misconduct, such as failing to comply with a lawful order, or failing to comply with the provisions of the scheme; and, if they find against him, they can suspend him without pay or can even dismiss him summarily. In those circumstances they are just as much exercising a judicial function as the tribunals which were considered by this court in *Abbott v. Sullivan* (5), and in *Lee v. Showmen's Guild of Great Britain* (6), the only difference being that those were domestic tribunals, and this is a statutory one. The board, by their procedure, recognise that before they suspend a man they must give him notice of the charge and an opportunity of making an explanation. That is entirely consonant with the view that they exercise a judicial function and not an administrative one, and we should, I think, so hold.

While an administrative function can often be delegated, a judicial function rarely can be. No judicial tribunal can delegate its functions unless it is enabled to do so expressly or by necessary implication. In *Local Government Board v. Arlidge* (2) the power to delegate was given by necessary implication, but there is nothing in this scheme authorising the board to delegate this function and it cannot be implied. It was suggested that it would be impracticable for the board to sit as a board to decide all these cases, but I see nothing impracticable in that. They have only to fix their quorum at two members

and arrange for two members, one from each side, employers and workers, to be responsible for one week at a time.

Next, it was suggested that, even if the board could not delegate their functions, at any rate they could ratify the actions of the port manager, but, if the board have no power to delegate their functions to the port manager, they can have no power to ratify what he has already done. The effect of ratification is to make it equal to a prior command, but as a prior command, in the shape of delegation, would be useless, so also is a ratification.

Finally, counsel for the defendants said that these courts have no right to interfere with the decisions of statutory tribunals except by the historical method of certiorari. He drew an alarming picture of what might happen if once the court intervened by way of declaration and injunction. It meant, he said, that anyone who was dissatisfied with the decision of a tribunal could start an action in the courts for a declaration that it was bad, and thus, by a side-wind, you could get an appeal to the courts in cases where Parliament intended there should be none. I think there is much force in that contention—so much so that I am sure in the vast majority of cases the courts will not seek to interfere with the decisions of statutory tribunals—but I do not doubt that there is power to do so, not only by certiorari, but also by way of declaration. I know of no limit to the power of the court to grant a declaration except such limit as it may in its discretion impose on itself, and the court should not, I think, tie its hands in this matter of statutory tribunals. It is axiomatic that when a statutory tribunal sits to administer justice, it must act in accordance with the law. Parliament clearly so intended. If the tribunal does not observe the law, what is to be done? The remedy by certiorari is hedged round by limitations and may not be available. Why, then, should not the court intervene by declaration and injunction? If it cannot so intervene, it would mean that the tribunal could disregard the law.

The authorities show clearly that the courts can intervene. An instance of the remedy by injunction is *Andrews v. Mitchell* (4) where s. 68 of the Friendly Societies Act, 1896, enacted that the decision of a particular tribunal should be binding and conclusive on all parties without appeal and should not be removable into any court of law or restrained by injunction, but, nevertheless, the House of Lords held that the court could, in an action for an injunction, set aside a decision which was not given in accordance with the rules. An instance of the remedy by declaration is *Cooper v. Wilson* (3), where a watch committee, set up under statute, had dismissed a police sergeant when they had no power in law to do so, and had also acted in a way contrary to natural justice. GREER and SCOTT, L.JJ., held that on both grounds the sergeant was entitled to a declaration that the order of the watch committee was invalid. Furthermore, in *Leeson v. General Council of Medical Education & Registration* (7) and *Allinson v. General Council of Medical Education and Registration* (8), this court assumed without question that it had power to intervene by declaration and injunction in the case of statutory tribunals just as it had in the case of domestic tribunals, and I do not think we should admit any doubt on it.

This is not, however, the occasion to lay down the bounds of the jurisdiction. We have to consider here two decisions: first, the decision to suspend the plaintiffs; secondly, the decision of the appeal tribunal. So far as the decision to suspend is concerned, as I see it, we are not asked to interfere with the decision of a statutory tribunal, but we are asked to interfere with the position of a usurper. Mr. Hogger, the port manager, is in the position of a usurper. He acted in good faith on the authority of the board, but, nevertheless, he has assumed a mantle which was not his, but that of another. This is not a case of a tribunal which has a lawful jurisdiction and exercises it; it is a case of a man acting as a tribunal when he has no right to do so. These courts have always had jurisdiction to deal with such a case. The common law courts had a regular course

of proceeding by which they commanded such a person to show by what warrant—quo warranto—he acted. Discovery could be had against him, and, if he had no valid warrant, they ousted him by judgment of ouster. In modern times proceedings by quo warranto have been abolished and replaced by a declaration and injunction: see s. 9 of the Administration of Justice (Miscellaneous Provisions) Act, 1938. Side by side with the common law jurisdiction of quo warranto the courts of equity have always had power to declare the orders of a usurper to be invalid and to set them aside. So, at the present day we can do likewise. We can declare that the suspension ordered by Mr. Hogger, the port manager, was unlawful and void; we can declare it to be the nullity which in law it was. So far as the decision of the appeal tribunal is concerned, it seems to me that, once Mr. Hogger's order is found to be a nullity, it follows that the order of the appeal tribunal is also a nullity. The appeal tribunal has no original jurisdiction of its own; it cannot itself make a suspension order; it can only affirm or disaffirm a suspension order which has already been made. If no suspension order has been made because it is a nullity, the tribunal can do nothing: see *Toronto Ry. Co. v. Toronto Corpn.* (9) ([1904] A.C. 815). Counsel for the defendants argued that the appeal tribunal itself, if the point had been taken before it, could have decided whether the board had power to delegate or not and that if the appeal tribunal had decided that there was power to delegate to Mr. Hogger their decision could not have been reviewed in these courts. I do not agree with that. An inferior tribunal cannot by a wrong decision in point of law give itself a jurisdiction which it would not otherwise possess.

In the course of the argument counsel was compelled to admit that, if the plaintiffs had no remedy by way of declaration, they had no remedy at all. He agreed that the plaintiffs could not have obtained redress by certiorari for the simple reason that they did not know the facts. In certiorari there is no discovery, whereas in an action for a declaration there is. The plaintiffs only discovered the true position shortly before the trial, about two and a half years after the suspension. That shows that, but for these proceedings, the truth would never have been known. Mr. Hogger could have gone on indefinitely assuming a jurisdiction which did not belong to him, and the men would be subjected to penal orders which were null and void, and would have had no redress. I should be sorry to think that these courts were powerless to put right such a situation. The plaintiffs felt that they had not been treated justly, and they sought redress in the Queen's courts, which, it is said by the board, have no power to interfere. Let us take that argument into account by all means, but let us also remember that, if the plaintiffs cannot get redress here, they cannot get it anywhere else. I think they are entitled to redress, and I agree with my Lord that we should declare that the suspension was unlawful.

ROMER, L.J.: I also agree. On the question of delegation, to which the local board have attached so much importance, it seems to me that there are one or two elements present in the Dock Workers (Regulation of Employment) Order, 1947, which are worthy of notice. In the first place, the local dock board are themselves delegates because they exercise, mainly, if not wholly, functions delegated to them by the National Board which, under cl. 3, is to be responsible for the administration of the scheme. By cl. 3 (3) it is provided:

" . . . it shall be the duty of the National Board to delegate to the local boards, as many as possible of the functions of the National Board, being functions which in the opinion of the National Board can appropriately be so delegated and to consult fully with the relevant local board on all such matters as it considers appropriate, so, however, that the final determination under para. 1 (c) of this clause shall not be so delegated ",

and then under cl. 6 (1), which specifies the functions of the local boards, there is set out a considerable number of activities and “(g) such other functions as may from time to time be delegated to it by the National Board.” Therefore one finds that those local boards are primarily themselves delegates, and there is the well-established principle of law that, *prima facie*, a person to whom powers or duties are delegated cannot themselves delegate their performance to someone else. That is the general rule, but in cl. 5 (7) (a) of the scheme there is one express exception to it:

“The local board shall from time to time appoint appeal tribunals for the purpose of appeals under the scheme, and shall, if necessary, appoint a registration committee to whom it may delegate such duties as it may think fit in relation to the registers both of dock workers and of employers of dock workers.”

There is an express exception to the general rule to which I have referred, and by application of the principle *expressio unius est exclusio alterius*, it appears to me to confirm the view that except in regard to that one particular matter no further delegation was in contemplation under the scheme.

One then approaches the particular functions which have arisen on this appeal, the disciplinary functions of the local board, and their powers and duties in that regard as conferred and set out in cl. 15 and 16 of the scheme, cannot, as I see it, be regarded as administrative. The decision whether or not to impose penalties (amounting in serious cases to dismissal) for alleged offences, if those offences be proved, is a judicial or at least a quasi-judicial decision, and cannot from any reasonable point of view be regarded as merely administrative, and, as my brethren have pointed out, a judicial function is one which from its very nature is incapable of being delegated. No one has heard of an arbitrator who has been agreed on between the parties to a dispute being allowed to appoint someone to act in his place, because it is of the very essence of his office that he himself is the person who has to deal with the dispute referred to him. So, here the workmen under this scheme are entitled to have the attention of the local board brought to any complaint which is made against them before that complaint is implemented in the form of penal sanction, and it is no answer for the board to say that they cannot do this themselves, that there are too many complaints, and so they are delegating it to the port manager, Mr. Hogger, because, however efficiently he may perform that office, he is not the tribunal named in the scheme to whose consideration the men are entitled. Accordingly, under the scheme they cannot be compelled to accept any decision other than that of the local board itself.

The only substantial argument to the contrary was based on the evidence of Mr. Hogger, who said that he had a number of reports which had to be dealt with amounting to over twenty thousand in the course of one year. The practice is for those reports to be considered by the local committees notwithstanding the provisions in cl. 15 (4) that the local board shall consider them. Counsel for the defendant said it would be quite impossible for the local board itself to consider all these written reports, and that, therefore, it is a matter of necessary inference under cl. 15 (4), that in that regard they should have power to delegate. I think that one answer to that is that there is nothing to prevent the board from increasing its numbers and there is nothing to prevent the board from acting through quorums laid down under the powers conferred by cl. 5 (9) of the scheme. It may be that the whole of the original reports even then could not be dealt with conveniently by the board itself, but the reports which result in disciplinary action could certainly be dealt with by it. I agree with my brethren that there is no power in the board to delegate its judicial functions, its disciplinary functions, either under cl. 15 or under cl. 16 to any outside person or persons.

As to counsel's preliminary point, *prima facie* it is the right of everyone in this country who is involved in a legal dispute to have that dispute determined by Her Majesty's courts. That right can be taken away sometimes by contract, subject to certain safeguards, and certainly by statute, but except to the extent to which it is taken away (and here we are only concerned with Parliamentary intervention), that *prima facie* right remains. Counsel argued that the legislature in this scheme had expressly referred to the appeal tribunal all disputes initiated by persons who were aggrieved under the scheme, and that, accordingly, the tribunal had exclusive jurisdiction to determine all questions of law arising out of an appeal, including questions of law on which might depend the existence or otherwise of its own jurisdiction. Applying that general consideration to the circumstances of this case, he said that the appeal tribunal had jurisdiction to decide whether the delegation of the judicial function to Mr. Hogger by the local board was valid, and that, if it gave an affirmative answer to that question, it had jurisdiction to deal with any appeal from Mr. Hogger; that it did so; and that, accordingly, its decision was not open to review except by way of *certiorari*. I am by no means satisfied that this scheme conferred on the tribunal an exclusive power to decide what is essentially a question of law, namely, the question of construction on this delegation point and to decide it in such a way as to found a jurisdiction for itself so as to exclude any person affected by its decision from coming to these courts for relief by way of declaration or injunction. It seems to me before one can conclude that such an exclusive power is conferred on a lay tribunal of this sort there must be language clearer than that to be found in the scheme. Further, it is quite plain that, whether or not the board had power so to do, it never arrived at a decision on that question. It was a matter of assumption and not of decision that the delegation was valid, and that, therefore, Mr. Hogger's decision was valid. Accordingly, it seems to me the principle on which counsel relied on that point does not avail him in the present case. As to the rest, it seems to me, for the reasons my brethren have given, that there is good and sufficient ground for our holding that in the circumstances of this case it is open to this court to make a declaration.

Order accordingly.

Solicitors: *Harold Miller & Co.* (for the plaintiffs); *G. Grinling Harris* (for the National Dock Labour Board); *Linklaters & Paines* (for Silvertown Services, Ltd.).

[*Reported by* MISS PHILIPPA PRICE, *Barrister-at-Law.*]

Re POSNER (deceased). POSNER v. MILLER.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Karminski, J.), April 14, 1953.]

Will—False description of beneficiary—Validity of gift—Need to prove fraud.

A On Aug. 2, 1945, the deceased went through a ceremony of marriage with R.P. On Jan. 24, 1950, the deceased made a will naming "my wife [R.P.]" as the residuary legatee. On Nov. 18, 1951, the deceased died. On Mar. 24, 1952, R.P. died. On May 3, 1952, the plaintiff was granted letters of administration of the estate of R.P. with the will annexed. The defendant, the deceased's next of kin, alleged that at Aug. 2, 1945, R.P. was the lawful wife of S.D. who was still alive. On the trial of an issue whether, assuming that R.P. was not the lawful wife of the deceased and that at the time of the execution of the will the deceased did not know that she was not his lawful wife, the words "to my wife [R.P.]" in the will operated as words of gift to R.P.,

B

HELD: in the absence of any assumption that the gift had been procured by R.P. by fraud the facts did not operate to bar the gift to her under the will.

C AS TO BENEFICIARY OBTAINING BENEFIT BY FRAUD, see HALSBURY, Hailsham Edn., Vol. 34, p. 45, para. 50; and FOR CASES, see DIGEST, Vol. 44, pp. 219, 220, Nos. 438-447.

Cases referred to:

- (1) *Kennell v. Abbott*, (1799), 4 Ves. 802; 31 E.R. 416; 44 Digest 219, 438.
- (2) *Giles v. Giles. Penfold v. Penfold*, (1836), 1 Keen 685; 48 E.R. 471; *sub nom. Penfold v. Giles*, 6 L.J.Ch. 4; 44 Digest 219, 439.
- (3) *Wilkinson v. Joughin*, (1866), L.R. 2 Eq. 319; 35 L.J.Ch. 684; 14 L.T. 394; 30 J.P. 452; 44 Digest 219, 440.
- D

ISSUE ordered to be tried in a probate action.

E On Aug. 2, 1945, the deceased went through a ceremony of marriage with one Rose Posner. On Jan. 24, 1950, the deceased executed a will in which he named "my wife Rose Posner" as residuary legatee. On Nov. 18, 1951, the deceased died. On Mar. 24, 1952, Rose Posner died. On May 3, 1952, the plaintiff was granted letters of administration of the estate of Rose Posner with the will annexed. The defendant, who was the sole surviving daughter and the next of kin of the deceased, alleged that Rose Posner was not the wife of the deceased, since on Aug. 2, 1945, her real husband was alive. On Feb. 13, 1953, BARNARD, J., in chambers ordered the following issue to be tried, namely, whether

F

"assuming that Rose Posner was not the lawful wife of the deceased and that at the time of the execution of the will the deceased did not know that she was not his lawful wife, the words 'to my wife Rose Posner' in the will operate as words of gift to the Rose Posner with whom the deceased went through a ceremony of marriage on Aug. 2, 1945."

G

C. T. Reeve for the plaintiff.

H. Samuels for the defendant.

H KARMINSKI, J.: This is an issue which has been ordered to be tried in a probate action in the estate of William Posner, deceased. The statement of claim alleges that the deceased died on Nov. 18, 1951, having made and duly executed his last will on Jan. 24, 1950. By that will he had appointed Barclays Bank, Ltd. as his executor and named Rose Posner as residuary legatee. Rose Posner died on Mar. 24, 1952, and on May 3, 1952, the plaintiff was granted letters of administration of the estate of Rose Posner with the will annexed. The defendant, who is the sole surviving daughter and the next of kin of the deceased, alleges that the will was not duly executed, and she

further alleges that the trusts of the will have failed and the plaintiff is not entitled to take under it and has no beneficial interest in the estate of the deceased since the "Rose Posner" named in the will as "my wife Rose Posner," was not in fact the wife of the deceased, her real husband, Solomon Diamond, being alive on Aug. 2, 1945, when she went through a ceremony of marriage with the deceased. It is further alleged by the defendant that at the time of the execution of the will the deceased did not know she was not his lawful wife. By way of reply the plaintiff joins issue and alleges that Rose Posner was lawfully married to the deceased on Aug. 2, 1945. In the alternative, the defendant alleges that if Rose Posner was not lawfully married to the deceased the plaintiff was not entitled to take under the said will.

On those issues a summons came before BARNARD, J., on Feb. 13, 1953, and an issue was ordered to be tried in the following terms: Whether

"assuming that Rose Posner was not the lawful wife of the deceased and that at the time of the execution of the will the deceased did not know that she was not his lawful wife, the words 'to my wife Rose Posner' in the will operate as words of gift to the Rose Posner with whom the deceased went through a ceremony of marriage on Aug. 2, 1945."

That is the issue with which I now have to deal. The issue assumes two things—(i) that Rose Posner was not the wife of the deceased, and (ii) that the deceased did not know she was not his lawful wife. Those matters, I understand, may be the subject of serious dispute hereafter, but for the purposes of this issue I am treating them as having been established and proved, and what I have to decide, in the words of the issue, is whether or not in those circumstances the will operates as a gift to Rose Posner.

The principle of law involved is a short one, but is not, apparently, exactly covered by any authority. The first case cited was *Kennell v. Abbott* (1), and it will suffice if I extract from that report one passage from the judgment of SIR RICHARD PEPPER ARDEN, M.R. (4 Ves. 808):

"Falsam causam legato non obesse verius est, quia ratio legandi legato non cohaeret: sed plerumque doli exceptio locum habebit, si probetur alias legaturus non fuisse."

Summarising that in English, he said that a false reason given for the legacy is not of itself sufficient to destroy it, but there must be an exception of any fraud practised from which it may be presumed that the person giving the legacy would not, if that fraud had been known to him, have given it. That, from a source of great authority, seems to be the principle of the civil law. After discussing the questions of fact involved, the Master of the Rolls continues (*ibid.*, 809):

"Under these circumstances I am warranted to make a precedent; and to determine, that, wherever a legacy is given to a person under a particular character, which he has falsely assumed, and which alone can be supposed the motive of the bounty, the law will not permit him to avail himself of it; and therefore he cannot demand his legacy."

That case has been frequently followed and discussed, and it was referred to by LORD LANGDALE, M.R., in *Giles v. Giles, Penfold v. Penfold* (2) some thirty-seven years after *Kennell v. Abbott* (1). Again, extracting what I believe to be the principles in that case, I will content myself with quoting a short passage from the judgment of LORD LANGDALE (1 Keen 692):

"It is clear that, in point of law, a mere misdescription of a legatee will not defeat the legacy; and it is equally clear that a legacy given to a person in a character which the legatee does not fill, and by the fraudulent assumption of which character the testator has been deceived, will not take effect.

That was the principle upon which the case of *Kennell v. Abbott* (1) was decided, and the soundness of that decision has never been questioned."

What the Master of the Rolls was, I think, demanding as being sufficient to defeat the gift, was two things—one a legacy given to a person of a character which the legatee does not fill, but that by itself is not enough. In order to defeat the legacy there must also be a fraudulent assumption of that character, and, furthermore, the testator must have been deceived by that fraud. In the present case there is no allegation on the pleadings by way of defence of fraud against Rose Posner, though I am told that an application may be made to amend the pleadings to add such a charge. I would say at once that as at present advised I do not think that evidence of fraudulent misrepresentation should be admitted in a probate action unless it had been fully pleaded.

The principle has been followed in other cases. In *Wilkinson v. Joughin* (3) the income of a property was given by a testator to a woman, Adelaide Ward, whom he described as his wife, but who at the time of the marriage ceremony had a husband living. It was said that that bequest to her was void by reason of her fraud. There was a good deal of investigation to decide whether or not this woman had misrepresented her status, and whether, if she had done so, the misrepresentation was wilful, and the gist of the argument advanced by counsel on behalf of Adelaide Ward, which is summed up in the last two sentences of his argument—is this (L.R. 2 Eq. 321): "The mistake was an honest one on both sides. No fraud having been committed; the bequests ought to prevail". In a short judgment, SIR JOHN STUART, V.-C., said (*ibid.*, 322):

"In my opinion the bequest in favour of Adelaide Ward is void. She has sworn in her answer that which has been distinctly disproved. The evidence shows that she imposed in a gross manner upon the testator. Therefore, there must be a declaration to the effect that the bequest to Adelaide Ward, the pretended wife of the testator, is wholly void, and then there must be the usual decree for administration."

The learned Vice-Chancellor pointed out (*ibid.*):

" . . . in the case referred to of *Kennell v. Abbott* (1), LORD ALVANLEY took care to distinguish between the cases of an innocent and a fraudulent legatee . . ."

I do not think it is necessary to investigate the law further. Counsel for the plaintiff in his argument submitted that a false description by itself does not invalidate a gift unless the gift is procured by the fraud of the person falsely described. As the case is at present constituted, there is no allegation of procuring by fraud, and, although counsel for the defendant has argued that fraud is not essential, I believe, on authority, that it is. That being so, I answer the issue before me in this way: That assuming, as the issue directs, that Rose Posner was not the lawful wife of the deceased, and, further, that the deceased at the time of the execution of his will did not know she was not his wife, these facts do not operate to bar the legacy to her under the will, and I, therefore, decide the issue in favour of the plaintiff.

Order accordingly.

Solicitors: *Warren & Warren*, agents for *Rudd, Moorfoot & Davenport*, Westcliff-on-Sea (for the plaintiff); *Maxwell & Lawson* (for the defendant).

[Reported by A. T. HOOLAHAN, Esq., Barrister-at-Law.]

BICKNELL v. BROSANAN.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Lynskey and Parker, JJ.), April 20, 24, 1953.]

National Service—*Person liable to be called up for service*—"Ordinarily resident in Great Britain"—*Residence in Great Britain for more than two years*—*Citizen of Republic of Ireland*—*Domicil in Ireland and intention to return thereto*—*National Service Act, 1948 (c. 64), s. 34 (4) (b) (c)*—*British Nationality Act, 1948 (c. 56), s. 3 (2)*—*Ireland Act, 1949 (c. 41), s. 3 (1) (a) (i), s. 3 (2) (a)*.

In 1949 the respondent, a citizen of the Republic of Ireland, came to England where he obtained employment as a builder's labourer. He was then eighteen years old. He had resided in England ever since, but intended to return to Ireland eventually and make his permanent home there. In September, 1952, a notice was served on him under the National Service Act, 1948, s. 8 (1), requiring him to submit himself to medical examination before a medical board, but he refused to comply with it on the ground that he was not liable to be called on to serve with the armed forces of the Crown, as (a) he was resident in Great Britain for a temporary purpose only, and (b) he was not a British subject.

HELD: (i) as the respondent was in Great Britain for an indefinite period, he was not residing there for a temporary purpose only, within the meaning of the National Service Act, 1948, s. 34 (4) (b), notwithstanding that he had retained his Irish domicil and intended to return to Ireland at some unspecified date.

(ii) by s. 3 (2) of the British Nationality Act, 1948, citizens of Eire were to be treated as British subjects for the purpose of any Act which was in force at the date of the commencement of the British Nationality Act; by s. 3 (1) (a) of the Ireland Act, 1949, the operation of the British Nationality Act, and, in particular, s. 3 thereof, was not affected by the fact that the Republic of Ireland was not part of Her Majesty's dominions, and by s. 3 (1) (b) of the Act of 1949 references to citizens of Eire in the Act of 1948 were to include, on their true construction, references to citizens of the Republic of Ireland; therefore, citizens of the Republic of Ireland were to be treated as British subjects for the purpose of the National Service Act, 1948, which was passed before the British Nationality Act and came into force on the same day as that Act; by s. 34 (4) (c) of the National Service Act, read together with s. 3 (1) and s. 3 (2) (a) of the Act of 1949, a citizen of the Republic of Ireland who had been resident in Great Britain for less than two years was not to be deemed ordinarily resident there, but, as the respondent had been resident in Great Britain since 1949, he was to be regarded as ordinarily resident there, within the meaning of s. 1 (1) and s. 34 (4) of the National Service Act, and, therefore, in failing to comply with the notice served on him under s. 8 (1) of the Act, he had committed an offence against s. 8 (4).

FOR THE NATIONAL SERVICE ACT, 1948, see HALSBURY'S STATUTES, Second Edn., Vol. 22, p. 40, et seq.; FOR THE BRITISH NATIONALITY ACT, 1948, s. 3 (2), see *ibid.*, Vol. 28, p. 141; and FOR THE IRELAND ACT, 1949, s. 3, see *ibid.*, p. 447.

CASE STATED by Bristol justices.

At a court of summary jurisdiction sitting at Bristol on Dec. 9, 1952, an information was preferred by the appellant, an officer of the Ministry of Labour and National Service, charging the respondent with an offence against the National Service Act, 1948, s. 8 (4), in that, being a person subject to registration under the Act, he failed to comply with the requirements of a written

notice in the prescribed form duly served on him requiring him to submit himself to a medical examination by a medical board on Oct. 10, 1952.

The respondent was born on Feb. 25, 1931, at Tralee, co. Kerry, in the territory of what was then the Irish Free State and is now the Republic of Ireland. He claimed to be and was a citizen of the Republic of Ireland. He lived in Ireland until May, 1949, when he came to England where he obtained employment as a builder's labourer. Apart from one month's holiday in Ireland, he had resided in England continuously since May, 1949. He intended eventually to return to Ireland and to make his permanent home there, but it was impossible to determine when he would do so, and at present his usual place of residence was Bristol. On Sept. 26, 1952, notice was served on him, under the National Service Act, 1948, s. 8 (1), requiring him to submit himself to medical examination by a medical board on Oct. 10, 1952. He refused to do so on the ground that he was an Irish citizen. The appellant contended (i) that the respondent was a person subject to registration within the meaning of the National Service Act, 1948, s. 6 (2) and s. 8 (1), and (ii) that, even if the respondent were not a British subject, the provisions of the National Service Act, 1948, applied to him as if he were a British subject by virtue of the British Nationality Act, 1948, s. 3 (2), and the Ireland Act, 1949, s. 3 (1). The respondent contended, *inter alia*, (i) that he was resident in Great Britain for a temporary purpose only, (ii) that he was not a British subject, and (iii) that the sole purpose of the British Nationality Act, 1948, s. 3 (2), and of the Ireland Act, 1949, s. 3 (1), was to prevent Irishmen from suffering the disabilities of aliens. The justices, being of the opinion that the respondent was not a British subject, dismissed the information.

The Solicitor-General (Sir Reginald Manningham-Buller, Q.C.) and S. B. R. Cooke for the appellant.

G. A. Forrest for the respondent.

Cur. adv. vult.

Apr. 24. **LORD GODDARD, C.J.**, read the judgment of the court, in which, after stating the facts, he said: The material sections which we have to consider are, first, s. 1 (1) and s. 34 (4) of the National Service Act, 1948. Section 1 (1) provides that every male British subject ordinarily resident in Great Britain between the ages of eighteen and twenty-six, subject to certain excepted classes which are immaterial for the purposes of this case, shall be liable to be called on to serve in the armed forces of the Crown, and the Act contains consequential provisions for the registration of people liable for service and for their medical examination: see s. 7 and s. 8. Section 34 (4) provides:

"For the purposes of this Part of this Act, a person who is resident in Great Britain shall be deemed to be ordinarily resident there unless—

(a) he is residing there only for the purposes of attending a course of education; or (b) the circumstances of his residence in Great Britain are otherwise such as to show that he is residing there for a temporary purpose only; or (c) being a person who is, under the provisions of any Act in force in any part of [Her] Majesty's dominions outside Great Britain, a national or citizen of that part within the meaning of that Act, or a person who was born or is domiciled in any such part of [Her] Majesty's dominions or in a British protectorate, a mandated territory, a trust territory or any other country or territory being a country or territory under [Her] Majesty's protection or suzerainty, he has been resident in Great Britain for less than two years."

We shall refer at the end of this judgment to the exception contained in s. 34 (4) (c). As the justices held that the respondent was not a British subject, they did not find it necessary to deal with the question whether his residence was only temporary and we shall dispose of this point at once. On the evidence

it is impossible to hold that he is a mere temporary resident. Clearly, a temporary resident for this purpose means a person who is paying a visit, whether for social or business purposes, and merely making a short stay. This is emphasised by the fact that a person resident for the purposes of attending a course of education, which might easily last three or four years, is specially exempted by s. 34 (4) (a) of the Act. The respondent is here for an indefinite period and the fact that he intends to return at some unspecified date, so that he retains his Irish domicile, does not make him a temporary resident so as to bring him within s. 34 (4) (b) of the Act.

We have, therefore, to consider whether for the purposes of the National Service Act, 1948, the respondent is to be regarded as a British subject or, at any rate, as liable to be called on for service, and the material sections that we have now to consider are contained in the British Nationality Act, 1948. That Act and the National Service Act were both passed on July 30, 1948, and both came into force on Jan. 1, 1949. It is material to observe that up to that time Irish citizens ordinarily resident in this country were liable to the provisions of the Acts then relating to national service. By s. 1 (1) of the British Nationality Act:

"Every person who under this Act is a citizen of the United Kingdom and colonies or who under any enactment for the time being in force in any country mentioned in sub-s. (3) of this section [which are the countries commonly referred to as the dominions] is a citizen of that country shall by virtue of that citizenship have the status of a British subject."

Eire is not mentioned in that section. By s. 2 (1) citizens of Eire who were immediately before the commencement of the Act British subjects were given an option to remain British subjects provided that they satisfied certain conditions. Then s. 3 (2) provides:

"Subject to the provisions of this section, any law in force in any part of the United Kingdom and colonies or in any protectorate or United Kingdom trust territory at the date of the commencement of this Act, whether by virtue of a rule of law or of an Act of Parliament or any other enactment or instrument whatsoever, and any law which by virtue of any Act of Parliament passed before that date comes into force in any such place as aforesaid on or after that date, shall, until provision to the contrary is made by the authority having power to alter that law, continue to have effect in relation to citizens of Eire who are not British subjects in like manner as it has effect in relation to British subjects."

The only construction that the court can put on this sub-section is that the whole of the English law, whether common law or statute, in force at the date of the commencement of the Act is applied to citizens of Eire in like manner as it is to British subjects, and that the statute law applied to them includes any law passed before the commencement of the Act but which comes into force on or after that date which, as we have already said, is Jan. 1, 1949. As by the terms of that sub-section the law, whether common law or statute, in force at that date is to continue to have effect with relation to citizens of Eire who were not British subjects in like manner as it has effect in relation to British subjects, it seems to us that that must mean that citizens of Eire are to be treated for the purpose of such Acts in exactly the same way as though they were British subjects. It may at first sight seem that s. 3 (2) of the British Nationality Act is a somewhat obscure method of applying the National Service Act to citizens of Eire ordinarily resident in this country, but, as the Solicitor-General pointed out, as the two Acts were passing through Parliament together it would have been difficult and contrary to Parliamentary practice to apply expressly the provisions of the British Nationality Act while it was still only a Bill to the National Service Act which was also only a Bill,

A and not law, at the time when the former Act was passing through Parliament. But whatever the reason, it appears to us that, applying to s. 3 (2) of the British Nationality Act the ordinary canons of construction, which require a court to give the plain grammatical meaning to the words used, it is impossible to hold that the provisions of an Act, which had been passed before the British Nationality Act and which came into force on the same day as that Act, are not effective so as to make a citizen of Eire who is ordinarily resident here, and is not within the excepted classes mentioned in sched. I to the National Service Act, subject to its provisions.

B It is unnecessary for the purposes of this judgment to deal with s. 3 (1) of the British Nationality Act, as it would not appear to have any application to the facts of this case, but we would add that, as the National Service Act, 1948, is a consolidating Act, if it was intended to exempt persons hitherto liable for service, as the citizens of Eire were at the time of its passing, one would expect to find that they were exempted by clear words. The Ireland Act, 1949, s. 1 (3), provides that that part of Ireland theretofore known as Eire is to be referred to thereafter as the Republic of Ireland. It is, however, specially provided by s. 3 (1) (a) of that Act that the operation of the provisions of the British Nationality Act, 1948, and, in particular, s. 2, s. 3 and s. 6 thereof, is not affected by the fact that the Republic of Ireland is not part of Her Majesty's dominions, and, by s. 3 (1) (b), reference in the said provisions to citizens of Eire include, on their true construction, references to citizens of the Republic of Ireland. It is enough to say that the effect of s. 3 (1) and s. 3 (2) (a) of that Act, coupled with s. 34 (4) (c) of the National Service Act, seems to be that, if a citizen of the Republic of Ireland has been resident in Great Britain for less than two years, he is not to be regarded as ordinarily resident here, but, as the respondent has been resident here since 1949, it follows that he is to be regarded as ordinarily resident here. The effect of the various statutory provisions to which we have referred is that a national or citizen of the Republic of Ireland who is ordinarily resident in Great Britain, and is of the appropriate age and not in one of the excepted classes, is subject to the National Service Act, and, accordingly, we allow this appeal with costs and send the case back to the justices with a direction to convict.

Appeal allowed.

Solicitors: *Solicitor, Ministry of Labour and National Service* (for the appellant); *Pengelly & Co.*, agents for *J. W. Ward & Son*, Bristol (for the respondent).

[*Reported by F. GUTTMAN, Esq., Barrister-at-Law.*]

FINNEGAN *v.* CEMENTATION CO., LTD.

[COURT OF APPEAL (Singleton, Jenkins and Morris, L.J.J.), April 14, 15, 1953.]

Fatal Accident—Writ—Indorsement of claim "as administratrix"—Letters of administration obtained in Ireland—Plaintiff stated to be "widow and administratrix" in statement of claim—Competency of action—Fatal Accidents Act, 1846 (c. 93), s. 2.

The widow of a workman, who died on Jan. 22, 1952, as a result of an accident which he suffered while in the employ of the defendant company, obtained in Ireland a grant of letters of administration of his estate, but she did not obtain a grant of administration in England. On June 10, 1952, she commenced an action in this country against the defendants on behalf of her husband's dependants for damages under the Fatal Accidents Acts in respect of his death. The indorsement of the writ stated that her claim was "as administratrix of the estate" of her husband, and in the statement of claim it was stated that "the plaintiff is the widow and administratrix" of the deceased man. On Feb. 12, 1953, the defendants issued a summons asking that the writ and all subsequent proceedings be set aside on the ground that the plaintiff had no title to administer in England.

HELD: the fact that the plaintiff had obtained letters of administration in Ireland did not constitute her an administratrix for the purposes of s. 2 of the Fatal Accidents Act, 1846, and, therefore, she was not entitled to sue as such; even if it were legitimate to read the writ and the statement together, the effect of those documents, so read, was that the plaintiff was purporting to sue in the representative capacity of administratrix of her husband's estate; and, therefore, the plaintiff had no title to sue as her husband's executrix and the writ must be set aside.

Hilton v. Sutton Steam Laundry ([1945] 2 All E.R. 425), followed.

Hill v. Luton Corpn. ([1951] 1 All E.R. 1028) and *Stebbings v. Holst & Co., Ltd.* (ante, p. 925), distinguished.

FOR THE FATAL ACCIDENTS ACT, 1846, s. 1, s. 2, s. 3, see HALSBURY'S STATUTES, Second Edn., Vol. 17, pp. 4-7; and FOR THE FATAL ACCIDENTS ACT, 1864, s. 1, see *ibid.*, p. 9.

Cases referred to:

- (1) *Hilton v. Sutton Steam Laundry*, [1945] 2 All E.R. 425; [1946] K.B. 65; 115 L.J.K.B. 33; 174 L.T. 31; 2nd Digest Supp.
- (2) *Ingall v. Moran*, [1944] 1 All E.R. 97; [1944] K.B. 160; 113 L.J.K.B. 298; 170 L.T. 57; 2nd Digest Supp.
- (3) *Stebbings v. Holst & Co., Ltd.*, [1953] 1 All E.R. 925.
- (4) *Burns v. Campbell*, [1951] 2 All E.R. 965; [1952] 1 K.B. 15; 2nd Digest Supp.
- (5) *Hill v. Luton Corpn.*, [1951] 1 All E.R. 1028; [1951] 2 K.B. 387; 115 J.P. 340; 2nd Digest Supp.

APPEAL by the plaintiff from an order of PARKER, J., in chambers dated Mar. 3, 1953.

Patrick Joseph Finnegan, the husband of the plaintiff, Mrs. Josephine Finnegan, was a workman employed by the defendants, Cementation Co., Ltd., who were engaged on the River Erne scheme, near Ballyshannon, co. Donegal, Ireland. On Jan. 16, 1952, he met with an accident during the course of his employment and on Jan. 22 he died from the effects thereof. The plaintiff took out letters of administration to her husband's estate in Dublin in the Republic of Ireland on May 6, 1952, but she was never granted letters of administration in the United Kingdom.

The writ in the present action was issued on June 10, 1952, the indorsement being in the following terms:

A "The plaintiff's claim is as administratrix of the estate of Patrick Joseph Finnegan, deceased, for damages under the Fatal Accidents Acts on behalf of the dependants of the said Patrick Joseph Finnegan against the defendants for the negligence of themselves their servants or agents as a result of which the deceased lost his life and his dependants suffered damage."

The statement of claim was delivered with the writ on June 13, 1952, and in para. 1 thereof it was alleged:

B "The plaintiff is the widow and administratrix of Patrick Joseph Finnegan (hereinafter called the deceased) and she brings this action for the benefit of the dependants of the deceased under the Fatal Accidents Acts, 1846 to 1908, and for the benefit of the deceased's estate."

On Feb. 12, 1953, the defendants issued a summons for an order

C "that the writ of summons commencing this action and all subsequent proceedings therein be set aside on the ground that the plaintiff has no title to administer in England or to sue in England as administratrix of Patrick Joseph Finnegan deceased"

and that the plaintiff be ordered to pay the defendants their costs in the action. The master made an order

D "that the writ of summons commencing this action and all subsequent proceedings therein be set aside on the ground that the plaintiff has no title to administer in England or to sue in England as administratrix of Patrick Joseph Finnegan deceased and that the plaintiff pay to the defendants their costs of this action and application . . ."

The plaintiff's appeal was dismissed by PARKER, J., in chambers on Mar. 3, 1953.

E *Beney, Q.C.*, and *A. Rankin* for the plaintiff.
Stephen Chapman for the defendants.

SINGLETON, L.J., stated the facts and continued: The Fatal Accidents Act, 1846, ss. 1, 2 and 3, provide:

F "1 . . . Whosoever the death of a person shall be caused by wrongful act, neglect, or default, and the act, neglect, or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the person who would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony. 2 . . . Every such action shall be
G for the benefit of the wife, husband, parent, and child of the person whose death shall have been so caused, and shall be brought by and in the name of the executor or administrator of the person deceased . . .
3. Provided always . . . that not more than one action shall lie for and
H in respect of the same subject-matter of complaint; and that every such action shall be commenced within twelve calendar months after the death of such deceased person."

An amendment was made to those provisions by s. 1 of the Fatal Accidents Act, 1864, which is in these terms:

"If and so often as it shall happen at any time or times hereafter, in any of the cases intended and provided for by the [Act of 1846], that there shall be no executor or administrator of the person deceased, or that there

being such executor or administrator no such action as in the said Act mentioned shall within six calendar months after the death of such deceased person as therein mentioned have been brought by and in the name of his or her executor or administrator, then and in every such case such action may be brought by and in the name or names of all or any of the persons (if more than one) for whose benefit such action would have been, if it had been brought by and in the name of such executor or administrator; and every action so to be brought shall be for the benefit of the same person or persons, and shall be subject to the same regulations and procedure, as nearly as may be, as if it were brought by and in the name of such executor or administrator."

A

The result of that amendment is that, if there be no executor or administrator of the deceased's estate, it is open to any person who would benefit under the provisions of the Act to bring an action.

B

The summons, issued by the defendants on Feb. 12, 1953, was accompanied by an affidavit sworn by Mr. Ewing, the managing clerk to the defendants' solicitors, which sets out:

"On the instructions of my principals I did on Jan. 29, 1953, attend at the Principal Probate Registry, Somerset House, Strand, London, W.C.2 and made search and found no record of a grant of probate or letters of administration of the estate of Patrick Joseph Finnegan, deceased, being obtained in the Principal Probate Registry from Jan. 1, 1952, to Jan. 28, 1953, inclusive."

C

It is common ground that no letters of administration have been granted to the plaintiff in this country. An affidavit was sworn by Mr. Kent, partner in the plaintiff's firm of solicitors, in which he deposes to the fact that the defendants' solicitors had asked at some time considerably earlier to see the letters of administration, and in that affidavit he says:

D

"On Monday, Aug. 11, 1952, I received a telephone call from Mr. Bernard Wellington of the defendants' solicitors inquiring whether he could call that day to inspect the letters of administration and material birth, marriage and death certificates. I, therefore, gave him an appointment to call at my firm's offices for that same day at 4 o'clock in the afternoon, and then the said Mr. Bernard Wellington in my presence inspected the letters of administration extracted out of the Principal Probate Court situated at Dublin, and also the birth, marriage and death certificates of which he had previously by letter requested inspection. Following the inspection I informed Mr. Wellington that on the facts giving rise to the deceased's accident it did not appear that there could be any real defence to the plaintiff's claims."

E

F

So that as far back as Aug. 11, 1952, the defendants' solicitors had inspected the letters of administration extracted out of the Principal Probate Court at Dublin. This summons was not issued until Feb. 12, 1953, by which time more than twelve months had elapsed from the date of the death of Mr. Finnegan. It follows that no fresh action under the Fatal Accidents Acts can be successfully commenced and maintained now for the time has run.

G

Counsel for the plaintiff submitted to this court that the order of PARKER, J., striking out the writ and all further proceedings is wrong, and he made two points on the plaintiff's behalf. The first is that when the proceedings are examined it can properly be said that the action is brought by the plaintiff both as widow and as administratrix, that she was entitled to sue in her personal capacity as widow, that in fact she does so, and that her action, in so far as it is based on the Fatal Accidents Acts, is good. It was said that she, as widow, claims damages for herself and for the other dependants. The second point made by counsel was put by him in the form of a question: Is

H

it right to say that a grant of letters of administration in Ireland is not sufficient to enable the grantee to take proceedings under the Fatal Accidents Acts in the capacity of grantee? Section 2 of the Act of 1846 says that the action

“shall be brought by and in the name of the executor or administrator of the person deceased”,

A and counsel's submission on his second point is that the plaintiff, having obtained letters of administration in Dublin, can be regarded as administrator for the purposes of s. 2 of the Act of 1846. I do not think that submission is right. The section, when it refers to an administrator, means the person empowered by law to administer the estate of the deceased. The person to whom letters of administration are granted in Ireland is not a person empowered by law to administer the estate of the deceased in England. That point, therefore, fails.

B The first point, that the action is brought by the plaintiff both as widow and as administratrix, presents greater difficulty. From the title of the action it appears that the plaintiff sues as

“widow and administratrix of Patrick Joseph Finnegan, deceased.”

C She is not administratrix within the meaning of s. 2 of the Act of 1846, and I refer also to the indorsement on the writ from which it appears clear that the plaintiff's claim is as administratrix of the estate of Patrick Joseph Finnegan deceased. There is no mention in the indorsement of the fact that she is his widow. The statement of claim was delivered with the writ, and it is argued that we should have regard only to the statement of claim or treat it, under the Rules of the Supreme Court, as extending or modifying the claim indorsed on the writ. Paragraph 1 of the statement of claim reads:

D “The plaintiff is the widow and the administratrix of Patrick Joseph Finnegan (hereinafter called the deceased) and she brings this action for the benefit of the dependants of the deceased under the Fatal Accidents Acts, 1846 to 1908, and for the benefit of the deceased's estate.”

E I cannot see that that comprises either an extension or a modification of the indorsement on the writ which states that the plaintiff claims as administratrix. It seems to me that the words “the widow and” are no more than a description of herself as one entitled to damages if her action should succeed. I do not think that when the statement of claim and the writ are read together it is possible to draw an inference that she is claiming both as widow and as administratrix. She believed that as administratrix she was entitled to bring the action under s. 2 of the Fatal Accidents Act, 1846, and that was the basis of her claim. It is submitted by counsel that the fact that the plaintiff in para. 1 of the statement of claim sets out that she is the widow shows that she is claiming as a widow, and, consequently, the words “and administratrix” are surplusage and might properly be considered as struck out, and, further, that we need not look at the writ in view of that paragraph. I find it difficult to take that view.

F Had I been untrammelled by authority I might well have reached that conclusion, for it matters not to the defendants in which capacity the plaintiff sues and no injustice would be done if this were regarded as an action by a widow and the question of administration were not considered. There are, however, a number of authorities which bear on this matter and which, in so far as they are decisions of this court, are binding on us. In *Hilton v. Sutton Steam Laundry* (1) the plaintiff, who was the sole dependant of her deceased husband, issued a writ as administratrix of the deceased's estate, claiming damages against the defendants for negligence and breach of statutory duty pursuant to the provisions of the Fatal Accidents Acts and the Law Reform (Miscellaneous Provisions) Act, 1934. There had been no grant of letters of administration when the writ was issued. She delivered a statement of claim on Mar. 15, 1943, and para. 1 of it was as follows:

“The plaintiff, who is the widow of Frank John Hilton deceased, brings

this action as administratrix of the deceased's estate for the benefit of such estate under the Law Reform (Miscellaneous Provisions) Act, 1934, and for the benefit of herself the sole dependant of the deceased who has suffered damage by reason of the death of the deceased under the Fatal Accidents Acts, 1846 to 1908."

It was held, applying *Ingall v. Moran* (2), that the writ was a nullity and was not validated by the subsequent grant of administration, and that, although the action could have been brought by the plaintiff as sole dependant in a personal capacity with the same result, the court could not allow an amendment of the writ and statement of claim, more than a year after the husband's death, so as to convert the action into one brought by the plaintiff in her personal capacity. To allow such an amendment would deprive the defendants of the benefit of the time limit fixed for bringing an action by the Fatal Accidents Act, 1846, s. 3, which prevented the plaintiff from commencing a new action in a personal capacity. It is well to note the similarity between para. 1 of the statement of claim in that case and para. 1 of the statement of claim in the case with which this court is now concerned, and that the argument put forward on behalf of the plaintiff was in the same terms as counsel's argument in this case. It was submitted by counsel on behalf of the plaintiff in that case that there was special ground for allowing the amendment seeing that an action under these Acts had the same result whether the plaintiff sued in an administrative or in a personal capacity, and it was only the limitation of the time for bringing actions under these Acts to one year from the death that prevented the plaintiff from beginning a new action in a personal capacity. In that case the application was for leave to amend the proceedings by striking out the claim under the Law Reform (Miscellaneous Provisions) Act, 1934, and varying the claims under the Fatal Accidents Acts so as to make it a claim by the plaintiff in a personal capacity, and the master refused leave. *BIRKETT, J.*, affirmed his decision, and this court upheld the view of *BIRKETT, J.* *LORD GREENE, M.R.*, said ([1945] 2 All E.R. 426):

"If the appellant had, in fact, held letters of administration at the date of this writ, no difficulty would have arisen . . . She delivered a statement of claim on Mar. 15, 1943, and it is argued on her behalf that, on the true construction of that statement of claim, she has shifted her ground, as regards the claim under the Fatal Accidents Acts . . . claiming under that Act in her personal capacity and not in a representative capacity."

He held on the pleading that that was not so. He referred to the decision of the Court of Appeal in *Ingall v. Moran* (2) and said (*ibid.*, 427):

"If the principles there laid down are applicable to this case it would mean that the original writ here was a nullity and could not be validated by anything that happened afterwards, either by the alleged new basis on which the statement of claim is said to have been framed, or by the grant of letters of administration, or by an order of the court under any of the Rules of the Supreme Court, on the ground that it was a mere irregularity",

and (*ibid.*, 428):

"If the amendment is allowed, the action will not fail on that ground, although, of course, it may fail on the merits. The result, therefore, would be this. If we allow the amendment we shall be prejudicing the position of the respondents, who are, as things stand, in the position to argue that the appellant's case is irreparably lost because the action she had brought is incompetent, and the amendment . . . would enable her to set upon its feet an action which was defective . . . if the action is incompetent the appellant can do nothing, because the time for launching a new competent action has elapsed. If we . . . [allow] this amendment, the

respondents will, in that respect, be prejudiced because they will obtain no benefit from the limitation period laid down by the statute."

Thus, it was accepted in that case that as the action stood the plaintiff could have no rights, unless an amendment of the kind sought on the application before the court was granted. The judgment of LORD GREENE, M.R. (with which DU PARCQ and MORTON, L.JJ., agreed) was that in those circumstances it would be wrong to allow the amendment. I fail to find any difference between this case as pleaded and *Hilton v. Sutton Steam Laundry* (1). It seems to me that that decision binds this court and that this appeal must be dismissed.

Our attention was drawn to a case decided recently by DONOVAN, J., at the Leeds Assizes, *Stebbings v. Holst & Co., Ltd.* (3), in which the plaintiff, who was one of the dependants of her deceased husband, brought an action for damages in respect of his death by accident. At the time when the writ was issued she had not taken out letters of administration, but she described herself in the title of the action as "widow and administratrix" of the deceased and in the indorsement of the writ claimed damages

"under the Fatal Accidents Acts and the Law Reform (Miscellaneous Provisions) Act, 1934, as widow and administratrix"

of the deceased. The defendants contended that the writ was a nullity, and the plaintiff conceded that the writ was a nullity so far as the claim under the Law Reform Act was concerned. As regards the claim under the Fatal Accidents Acts it was held that the words "widow" and "administratrix" in the description of the plaintiff in the title simply described the plaintiff's personal status and did not declare the capacity in which she brought the action, and that a fair and grammatical interpretation of the indorsement of the writ was that the claim under the Fatal Accidents Acts was brought by her as widow and the claim under the Law Reform Act was brought as administratrix, and, alternatively, that the words "as administratrix" could be treated as an error and disregarded. DONOVAN, J., found himself able to distinguish the case as pleaded from *Hilton v. Sutton Steam Laundry* (1). He said in reference to the defendants' argument (ante, p. 926):

"That contention, in effect, asks me to erase the words 'as widow' from the indorsement. The words 'as widow' are wholly appropriate. The plaintiff was the widow. She was entitled under the Act of 1864 to bring her claim as widow. She was not entitled under the Act of 1934 to bring her claim as widow. Nevertheless, I am asked to disregard these words because they are found in conjunction with the words 'and administratrix'. If any words ought to be disregarded, it is these latter words, for the plaintiff was not administratrix at the time. That being so, it seems to me to be sense and not nonsense that the two capacities are referred to in the indorsement, for whether or not the claim under the Act of 1934 turned out to be premature because of the absence of a grant of representation, the claim under the Fatal Accidents Acts would, nevertheless, still be effectively begun 'as widow'. It seems to me to be a fair and reasonable, and, indeed, grammatical, interpretation of the indorsement that the claim under the Fatal Accidents Acts is brought 'as widow' and the claim under the Act of 1934 'as administratrix of the estate'. Alternatively, the proper thing to do, in my view, would be to treat the words 'as administratrix' simply as an error and to disregard them."

That case differs from the case before this court in which the plaintiff's claim is made as administratrix of the estate, and, as I have said already, the position of administratrix is preserved in para. 1 of the statement of claim.

In *Hilton's* case (1) LORD GREENE, M.R., said ([1945] 2 All E.R. 429):

"I should not be averse to discovering any proper distinction which

would enable this unfortunate slip to be corrected. Apart from the fact that the solicitors for the respondents in fairness pointed out the difficulty, there appear to be no merits on their side. But the statutory limitation is not concerned with merits. Once the axe falls it falls, and a defendant who is fortunate enough to have acquired the benefit of the statutory limitation is entitled to insist upon his strict rights. He is similarly entitled to insist upon the strict application of the rule that the court will not deprive him of those rights by allowing amendments in pleadings and so forth. In this case it seems to me that to allow this amendment would be to deprive the respondents of the benefit of s. 3 of the Act of 1846, by setting the action on its feet again and, in effect validating ab initio the original representative writ. The distinction suggested between this case and *Ingall v. Moran* (2) is one which, in my opinion, does not produce the result suggested. It is perfectly true that the result is the same whether an action under the Acts is brought by the personal representative or by the dependants. It does not, however, alter the fact that the action, looked at technically, is an action in different capacities, and the capacity in which it is brought must, under R.S.C., Ord. 3, r. 4, be stated in the indorsement on the writ. If that was done in this case, the appellant bound herself to an action in a representative capacity which she did not possess, and, unfortunately, she must take the consequences. In the result, sorry though I am, and sorry as BIRKETT, J., was, to be compelled to come to this conclusion, the appeal in my opinion must be dismissed with costs."

I would add that these technicalities are a blot on the administration of the law, and everyone except the successful party dislikes them. They decrease in numbers as the years go on, and I wish that I could see a way round this one. I do not know why the Fatal Accidents Act, 1846, contained a provision that the action must be brought within a year of the death. There is no such limiting period in the case of an injury, however serious. This action was commenced well within the twelve months' period, but it was brought by one who sued as an administratrix of the estate of her husband. She was not administratrix within the terms of the Acts, for no letters of administration in this country had been granted to her. It was thought that, as she had been granted letters of administration in Ireland, she was a person who was entitled to sue as administratrix in this country. If she had sued merely as the widow of her husband, the point which is now raised could not have been taken. The defendants have not been prejudiced in any way. The action was commenced in due time, but it was in the wrong form. The plaintiff sued in the wrong capacity, time had run before the point was raised by the defendants, and she cannot now raise an action in a new capacity. I would like to say that she can do so, but this court is bound by authority, and I find myself, as PARKER, J., found himself, constrained to say that the case is covered by the decision of this court in *Hilton's* case (1). For those reasons, this appeal must be dismissed.

JENKINS, L.J.: I agree that this appeal fails, though I share the regret expressed by my Lord in coming to that conclusion. This seems to me to be a case in which a technical blunder has deprived the plaintiff of her remedy, although the blunder was not such as to affect the substance of the claim in any way or to prejudice the defendants in defending the action in any degree. Nevertheless, the defendants are entitled to have their objection to the competence of the action dealt with according to law, and if the law supports their objection effect must be given to it, however unmeritorious it may appear to be. It must be borne in mind that in enacting the Fatal Accidents Act, 1846, the legislature thought fit to impose a limitation period of twelve months.

That means that a defendant in such a case is entitled to go scot-free, however negligent he may have been, unless a claim by a competent plaintiff is made in properly constituted proceedings within the prescribed period of twelve months. An action which is not properly constituted will not prevent the period of limitation from running any more than a total failure to bring any proceedings at all.

A As to the law, so far as this court is concerned it seems to me to be settled by *Ingall v. Moran* (2), *Hilton v. Sutton Steam Laundry* (1) and *Burns v. Campbell* (4), that an action commenced by a plaintiff in a representative capacity which the plaintiff does not, in fact, possess, is a nullity, and, further, that it makes no difference that the claim made in such an action is a claim under the Fatal Accidents Acts which the plaintiff could have supported in a personal capacity as being one of the dependants to whom the benefit of the Acts extends. B It follows in the present case that, if the action was brought by this plaintiff in the representative capacity of administratrix of the estate of her deceased husband, and if she did not, in fact, possess that capacity, then her writ was a mere nullity and her claim must fail, because she omitted to pursue it in properly constituted proceedings within the prescribed period, and, the period having run, the court will not take any step to validate proceedings which were ab initio defective. C

The first question is whether by virtue of the grant of administration taken out by the plaintiff in the Republic of Ireland she can properly be held to bear the representative capacity of administratrix of the estate of her husband for the purposes of an action in the English courts. In my view, it is reasonably plain that the answer to that question must be "No". I think there is no D escape from the conclusion that, whatever the position may formerly have been, at all events since the separation of Ireland from the United Kingdom a grant of representation under the local law of Ireland cannot be a grant for the purposes of an action in these courts.

E The second question is whether on the true construction of the writ, read in conjunction with the statement of claim, this was in truth an action brought by the plaintiff in the supposed representative capacity of administratrix of her husband's estate. To my mind, there can be only one answer to that question. The indorsement on the writ says in terms that the plaintiff's claim is as administratrix of the estate of Patrick Joseph Finnegan deceased. I think it follows, without going any further, that we are bound by the authorities F to hold that this writ was void ab initio. If I am wrong in that view, and it is legitimate to qualify the effect of the writ by reference to the statement of claim, which was delivered at the same time as the writ was served, the result must still, to my mind, be adverse to the plaintiff. Taking the indorsement on the writ and the statement of claim together, it seems to me reasonably plain that what the plaintiff was purporting to do was to sue in the representative capacity of administratrix of her husband's estate and in no other G capacity. I have only to add that, in my view, *Stebbins v. Holst & Co., Ltd.* (3) is distinguishable from *Hilton v. Sutton Steam Laundry* (1), and from the present case, by the circumstance that the claim was there in terms made by the widow not merely as administratrix, but as widow and administratrix, and it was possible, therefore, to say that she was suing as widow so far as the claim under the Fatal Accidents Acts was concerned.

H One other case was referred to, namely, *Hill v. Luton Corpn.* (5), which is also, to my mind, clearly distinguishable, because the defect in the proceedings relied on by the defendants consisted of an alleged want of particularity in the indorsement on the writ, and the learned judge was able to hold in that case that that want of particularity was cured by the statement of claim. To a case of that sort different considerations apply. It is, of course, clear that, if there were any inconsistency between *Stebbins v. Holst & Co., Ltd.* (3)

and *Hill v. Luton Corpn.* (5), and the cases in this court to which I have referred, it would be the duty of this court to follow its own decisions, but for the reasons I have shortly stated, I do not regard *Stebbins v. Holst & Co., Ltd.* (3) and *Hill v. Luton Corpn.* (5), as inconsistent with those decisions. Accordingly, with regret, I agree with my Lord that there is no alternative here but to dismiss the appeal.

MORRIS, L.J.: I am in full agreement with the two judgments which have been delivered. It seems abundantly clear that the action brought by the plaintiff was brought by her in a representative capacity, that is to say, in the capacity of administratrix. The indorsement on the writ clearly so shows, for the opening words are:

“The plaintiff’s claim is as administratrix”.

That language differs from the language of the indorsement in *Stebbins v. Holst & Co., Ltd.* (3) where the words were:

“The plaintiff’s claim is for damages under the Fatal Accidents Acts and the Law Reform (Miscellaneous Provisions) Act, 1934, as widow and administratrix of the estate of Alfred Stebbings, deceased.”

The present words are similar to those to be found in *Hilton’s* case (1) where the writ was issued by the plaintiff as administratrix of the deceased’s estate. It is provided by R.S.C., Ord. 3, r. 4 (1), as follows:

“If the plaintiff sues, or the defendant or any of the defendants is sued, in a representative capacity, the indorsement shall show, in manner appearing by such of the Forms in Appendix A, Part III, s. 7, as shall be applicable to the case, or by any other statement to the like effect, in what capacity the plaintiff or defendant sues or is sued.”

Paragraph 1 of the statement of claim confirms the view that the action was brought by the plaintiff in the representative capacity of administratrix. It reads:

“The plaintiff is the widow and administratrix of Patrick Joseph Finnegan (hereinafter called the deceased) and she brings this action for the benefit of the dependants of the deceased under the Fatal Accidents Acts, 1846 to 1908, and for the benefit of the deceased’s estate.”

She could only sue as widow if there were no administratrix, for the action was brought within six months of the death of the husband, and she herself asserted that she was administratrix. It appears, therefore, that she was suing in a representative capacity. Furthermore, some of the claims made in the action could not be made by the widow, namely, the claims under the Act of 1934. It is, however, submitted by counsel for the plaintiff that some words in the statement of claim might merely be ignored and that there might be amendment by way of deleting certain words. Counsel has relied on R.S.C., Ord. 20, r. 4, which reads:

“Whenever a statement of claim is delivered the plaintiff may therein alter, modify, or extend his claim without any amendment of the indorsement of the writ”,

but what he is seeking to do is not merely to alter, modify, or extend the claim. He is seeking to alter the capacity in which the action was brought by the plaintiff, and as to that matter the decision of this court in *Hilton’s* case (1) appears to me to be conclusive. In that case there were applications for leave to amend by striking out the claim under the Law Reform (Miscellaneous Provisions) Act, 1934, and varying the claim under the Fatal Accidents Acts so as to make it a claim by the plaintiff in a personal capacity.

This court held that that could not be done. LORD GREENE, M.R., said ([1945] 2 All E.R. 429):

"It is perfectly true that the result is the same whether an action under the Acts is brought by the personal representative or by the dependants. It does, not, however, alter the fact that the action, looked at technically, is an action in different capacities, and the capacity in which it is brought must, under R.S.C., Ord. 3, r. 4, be stated in the indorsement on the writ. If that was done in this case, the appellant bound herself to an action in a representative capacity which she did not possess, and, unfortunately, she must take the consequences."

In *Burns v. Campbell* (4) the plaintiff issued a writ in the High Court in England by which she claimed as administratrix of the deceased for damages under the Fatal Accidents Acts. The writ was issued within twelve months from the death, but at the date of issue the plaintiff had only obtained a grant of administration in Northern Ireland. DENNING, L.J., said ([1951] 2 All E.R. 966):

"The result is that on Jan. 19, 1951, when the writ was issued, the plaintiff had not obtained a grant of administration to the English assets. So far as the English courts were concerned, she was not the administratrix. The action, therefore, was not properly constituted. It purported to be an action by her as administratrix, but she was not administratrix. The action was a nullity: see *Hilton v. Sutton Steam Laundry* (1)."

Much as I regret the conclusion which we have reached, I consider that this appeal must be dismissed.

Appeal dismissed.

Solicitors: *R. I. Lewis & Co.* (for the plaintiff); *Goldingham, Wellington & Co.* (for the defendants).

[Reported by MISS PHILIPPA PRICE, Barrister-at-Law.]

Re THOMSON SETTLEMENT TRUSTS. ROBERTSON v. MAKEPEACE AND OTHERS.

[CHANCERY DIVISION (Roxburgh, J.), April 17, 21, 1953.]

Settlement—Hotchpot—Life interest—Basis of valuation—Actual or actuarial value—Interest on actuarial value.

By a marriage settlement dated July 12, 1875, it was provided that after the death of the survivor of the spouses the trust fund should be held (in the events which happened) as the survivor should by deed or will or codicil appoint, and, in default of appointment, in trust for the child or children of the marriage if more than one in equal shares. It was further provided that no child who or whose issue should take any part of the trust property under any appointment should, in default of appointment to the contrary, have any share of the unappointed part of such trust property without bringing the share appointed to him or her or his or her issue into hotchpot. On Mar. 22, 1933, the husband, the survivor of the spouses, died, having by his will appointed life interests to his three daughters and his three grand-daughters, the appointment being otherwise invalid. On Mar. 29, 1941, a daughter, Edith, died.

HELD: for the purposes of the application of the hotchpot provision, Edith's life interest ought to be valued actuarially as at Mar. 22, 1933, and not according to the benefit which Edith actually received, and the value so ascertained ought to be brought into hotchpot without interest.

Re Westropp (1903) (37 Ir. L.T. Rep. 183) and dictum of EVERSHED, J., in *Re North Settled Estates* ([1946] Ch. 16), applied.

Re West ([1921] 1 Ch. 533), and *Re Bradberry* ([1942] 2 All E.R. 629), distinguished.

AS TO HOTCHPOT CLAUSE, see HALSBURY, Hailsham Edn., Vol. 29, pp. 602, 603, paras. 875-877; and FOR CASES, see DIGEST, Vol. 40, pp. 564-568, Nos. 1031-1055.

Cases referred to:

- (1) *Re Heathcote*, [1891] W.N. 10; 40 Digest 566, 1043.
- (2) *Re Westropp*, (1903), 37 Ir. L.T. Rep. 183.
- (3) *Re West*, [1921] 1 Ch. 533; 90 L.J.Ch. 342; 125 L.T. 117; 40 Digest 566, 1045.
- (4) *Re North Settled Estates*, [1946] Ch. 13; 115 L.J.Ch. 138; 174 L.T. 303; 2nd Digest Supp.
- (5) *Re Bradberry*, [1942] 2 All E.R. 629; [1943] Ch. 35; 112 L.J.Ch. 49; 167 L.T. 396; 2nd Digest Supp.

ADJOURNED SUMMONS to determine, inter alia, (i) how for the purposes of the hotchpot provisions of an indenture of settlement dated July 12, 1875, limited interests in the fund thereby settled appointed by the will of John Millar Thomson, deceased, ought to be valued; and (ii) whether the value of the life interests so ascertained ought to be brought into hotchpot at four per cent. per annum (or some other and what rate) as from the death of the said John Millar Thomson.

The said indenture of settlement was made in consideration of the marriage of the said John Millar Thomson ("the husband") and Louisa Aikin ("the wife") and it was therein declared that the trustees thereof should, after the death of the survivor of the husband and the wife, stand possessed of the capital and income of the property thereby settled ("the trust fund") on trust for all or such one or more exclusively of the other or others of the children and remoter issue of the said marriage at such age or time if more than one in such shares and in such manner as the husband and the wife should by deed jointly appoint. In default of and subject to any such appointment, the trust fund was directed to be held as the survivor of the husband and wife should in like manner or by will or codicil appoint, with the usual provision in favour of children in further default of appointment. The indenture further provided that no child who or whose issue should take any part of the trust property subject to the trusts of those presents under any appointment should, in default of appointment to the contrary, have or be entitled to any share of the unappointed part of such trust property without bringing the share or shares appointed to him or her or to his or her issue into hotchpot and accounting for the same accordingly. On Nov. 26, 1899, the wife died, and on Mar. 22, 1933, the husband died. The joint power of appointment was never exercised, but by his will the husband exercised the testamentary power and directed the division of the trust fund into four equal shares, one such share to be held on trust for each of his three daughters including Edith, and the remaining share for three grand-daughters equally, for the respective lives of such daughters and grand-daughters, with cross-remainders. ROXBURGH, J., held that the appointment, except in regard to the life interests so appointed, was invalid. On Mar. 29, 1941, the said Edith Thomson died, and in order to apply the provisions for hotchpot it became necessary (inter alia) to value her life interest.

Belsham for the plaintiff, one of the trustees of the settlement.

Myles for the first defendant, a daughter of the appointor, an appointee and the administrator of the estate of Edith Thomson.

Burnett-Hall for the second defendant, beneficially interested through the estate of a deceased son of the appointor.

H. E. Francis for the third, fourth and fifth defendants, two grand-daughters (appointees) and the daughter of a deceased grand-daughter (also an appointee).

ROXBURGH, J.: The question which I have to determine is whether for the purpose of the hotchpot clause, Edith's life interest is to be valued on the footing of events which in fact happened, because it is now known that her life interest lasted for some eight years and no longer, or whether it is to be valued in accordance with her expectation of life as at Mar. 22, 1933, when her life interest fell into possession.

- The question has been the subject of considerable conflict of authority.
- A** The first case of importance is *Re Heathcote* (1). It is true that in that case all the life interests were still in being at the date when the application for valuation was made, and, accordingly, the point which I have to determine did not directly arise for decision, but I cannot help thinking, though the report is very short, that the learned judge, KEKEWICH, J., did take the present question into account in reaching his decision, because his words, I think, show that he realised that,
- B** if the actual duration of the life interest was relevant, then the valuation was premature because he said that ([1891] W.N. 10):

“ . . . the life interest of the daughters must be brought into hotchpot and at once valued. It was fair to the other children that they should have their interests in the trust fund immediately ascertained. The value of the life interests must be calculated, not by reference to the duration of them, but by an actuarial valuation of them at the time when they first took effect, that is, at the death of the settlor.”

- C** That case is plain authority for the proposition that where all the life tenants are alive, as was the case here in 1933 when their interests fell into possession, any one of them could have insisted on a valuation on the footing of their respective expectations of life. Therefore, if a different principle is to be applied
- D** now, the result must be that the quantum of the beneficial interests is made to depend on the time when some beneficiary thinks fit to apply to the court. A variation in beneficial interest on such a basis seems to me to be unsatisfactory in principle, and this circumstance weighs with me in making my way amidst the conflicting authorities.

- E** The next case of importance is the Irish case of *Re Westropp* (2), decided in the Land Court by Ross, J. There the very point which I have to determine did arise. On Mar. 2, 1866, the life tenant (and appointor) on whose death the hotchpot provision had to operate, died. George, who took the next life interest, died on Aug. 16, 1888, long before the matter came before the court. Accordingly, it was known exactly how long his life interest had subsisted at
- F** the time when the matter had to be decided. None the less, Ross, J., said that the proper way to ascertain the value of George's interest for the purpose of hotchpot was by obtaining an actuarial calculation of its value as at the date of the death of the appointor. At the end of his judgment he declared that George's life interest was to be valued as at the date of the appointor's death. That is a direct authority, although not binding on me.

- G** ASTBURY, J., discussed that case and *Re Heathcote* (1) in *Re West* (3). There the life interest never fell into possession at all, because the reversionary life tenant died before the first life tenant. ASTBURY, J., decided that no value should be put on the life interest which failed, partly as a matter of construction and partly because, in his view, the principle in *Re Westropp* (2) was not applicable to such a case.

- H** It cannot possibly be said in the present case that the life interest failed. It in fact existed for eight years. Accordingly, *Re West* (3) is no decision on facts such as those of this case. ASTBURY, J., however, criticised *Re Westropp* (2), and his criticism was the subject-matter of comment by EVERSLED, J., in *Re North Settled Estates* (4). The remarks of EVERSLED, J., which I am about to cite, were unquestionably obiter. None the less, I attach great weight to them and, if I may so say with respect, I agree with them, except that I propose to alter

the punctuation in one sentence in a manner which I am sure the learned judge intended. Dealing with the hotchpot cases he said ([1946] Ch. 16):

"I am inclined to think that the authorities go no further than this: that it is proper and legitimate, when the date on which the valuation has to be made is later than events which have in fact happened material to the value[,] to take those events into account, but prima facie it is not legitimate to take into account matters of fact occurring after the date which is the material date for valuing the life interest for hotchpot purposes."

I have deleted the comma after the word "happened", and have added a comma after the word "value". Counsel for the first defendant relied on *Re Bradberry* (5) and the line of cases relating to annuities, but there is, I think, a fundamental distinction between such cases and the hotchpot cases. Again, with respect, I adopt the differentiation which EVERSLED, J., drew (*ibid.*, 18):

"It is, I think, important to bear in mind that in such a case as *Re Bradberry* (5), the need for making any valuation at all and the right on the annuitant's part to have a valuation made was not something which at any rate necessarily existed at any prior time. On the death, for example, of the testator it might or might not be that the estate would turn out to be insufficient. The purpose of the valuation was not for giving effect to the testamentary dispositions, but for doing, to the best of the court's ability, justice between the beneficiaries at a time when it had been discovered that the testator's benefactions were no longer capable of being carried exactly into effect."

In my judgment, that distinction is sound. In the present case the valuation is required in order to carry out the disposition of the settlement. The date at which it ought to be carried out is the date when the life interest fell into possession. In my judgment, it would be a strange thing if a different value was put on the life interest because of the accident that nobody came to the court to have a valuation made until the life tenant had died. Accordingly, in my judgment, the life interest must be actuarially valued as on Mar. 22, 1933.

The next question is whether the value of the life interest ascertained in the manner I have directed ought to be brought into hotchpot with interest at the rate of four per cent. per annum. I do not think that interest comes into this matter. Let me take the simplest illustration, which, I think, represents the essential features of the present case. Two persons are entitled in default of an appointment. An appointment of a life interest in the whole is made to one of them. The effect of that transaction is this. Apart from the appointment, the second of the two would be entitled to half the income and capital straightaway. The effect of the appointment is to deprive him of his half of the income during the life of the appointee, but that is precisely the thing for which he received compensation by getting a larger share of the capital. He gets no income during the life of the appointee. On the other hand, on the death of the appointee he gets more than one-half of the fund. It is true that it is only a rough and ready compensation, because the life tenant may have a short life, in which case the other gains, or the life tenant may have a long life, in which case the other loses, but that is inherent in a prospective actuarial calculation. It seems to me that there can be no question of waiting until the death of the life tenant and then considering whether some interest ought to be debited to the deceased life tenant on the footing of the actual duration of the life tenancy.

Order accordingly.

Solicitors: *Mackrell, Maton & Co.* (for all parties).

[*Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.*]

LINCOLN COUNTY COUNCIL (PARTS OF LINDSEY)
v. HENSHALL AND OTHERS.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Lynskey and Parker, JJ.),
April 27, 1953.]

Town and Country Planning—Enforcement notice—Development prior to July 1, 1948—Town and Country Planning Act, 1947 (c. 51), s. 23 (1), s. 75 (1).

A A local planning authority served enforcement notices under s. 23 (1) of the Town and Country Planning Act, 1947, on the owners and an occupier of certain fields requiring them to discontinue the use of the fields as sites for structures adapted or used for dwelling or camping purposes. The use to which the notices were intended to refer occurred before July 1, 1948 (the day when the Act came into force), but it was not in contravention of previous planning control within s. 75 (1) of the Act, and no complaint was made of any development after July 1, 1948.

B HELD: an enforcement notice under s. 23 (1) could only refer to development of land which had been carried out after July 1, 1948, and, therefore, the notices were bad and could be quashed under s. 23 (4).

C FOR THE TOWN AND COUNTRY PLANNING ACT, 1947, s. 23 and s. 75, see HALSBURY'S STATUTES, Second Edn., Vol. 25, pp. 524, 583.

Case referred to:

(1) *Mead v. Plumtree*, [1952] 2 All E.R. 723; [1953] 1 Q.B. 32; 116 J.P. 589.

D CASES STATED by county of Lincoln (Parts of Lindsey) justices.

At a court of summary jurisdiction sitting at Skegness on Dec. 10, 1952, the respondents, Louis Hector Henshall, the Nottingham Brewery Co., Ltd., and the Wallace Holiday Camp, Ltd., preferred complaints under s. 23 (4) of the Town and Country Planning Act, 1947, against the appellants, the council of the county of Lincoln, the local authority for the purposes of the Act, that on E May 25, 1951, they had served on the first two respondents, and on June 25, 1951, on the third respondents, enforcement notices under s. 23 (1) of the Town and Country Planning Act, 1947, requiring them to discontinue, or secure the discontinuance of, the use of certain fields as sites for any structure or structures adapted or used for dwelling or camping purposes or for any structures ancillary thereto.

F It was admitted or proved that the appellants served an enforcement notice on each of the respondents, and that the first two respondents were the owners, and the third respondents were the occupiers, of the land referred to in the notices. The development to which the notices were intended to refer occurred prior to July 1, 1948, and no complaint was made of any development after that date.

G It was contended on behalf of the respondents that the notices were bad in law and of no effect, since they did not specify any development complained of after July 1, 1948, and that s. 75 of the Town and Country Planning Act, 1947, did not avail the appellants as it merely provided the machinery whereby an enforcement notice could be served in respect of such development. It was contended on behalf of the appellants that the notices specified the develop- H ment which was alleged to have taken place without planning permission, that it was not necessary for the date when such development occurred to be specified, and that the notices were effective.

The justices quashed the notices as being bad in law and the appellants appealed.

Percy Lamb, Q.C., and *W. L. Roots* for the appellants.
Harold J. Brown for the respondents.

LORD GODDARD, C.J.: These are three Cases which raise exactly the same point and are stated by justices for the Parts of Lindsey before whom complaints were preferred by the respondents against the appellants, the local planning authority for the purposes of the Town and Country Planning Act, 1947, for that they had served on the respondents under the Town and Country Planning Act, notices which, they alleged, were bad.

Section 23 (1) of the Town and Country Planning Act, 1947, provides:

"If it appears to the local planning authority that any development of land has been carried out after the appointed day without the grant of permission required in that behalf under this Part of this Act . . . the local planning authority may within four years of such development being carried out, if they consider it expedient so to do having regard to the provisions of the development plan and to any other material considerations, serve on the owner and occupier of the land a notice under this section."

Sub-section (2) provides:

"Any notice served under this section (hereinafter called an 'enforcement notice') shall specify the development which is alleged to have been carried out without the grant of such permission as aforesaid . . . and may require such steps as may be specified in the notice to be taken . . . for restoring the land to its condition before the development took place . . . and in particular any notice may, for the purpose aforesaid, require the demolition or alteration of any buildings or works, the discontinuance of any use of land, or the carrying out on land of any building or other operations."

By sub-s. (4):

"If any person on whom an enforcement notice is served under this section is aggrieved by the notice, he may, at any time within the period mentioned in the last foregoing sub-section, appeal against the notice to a court of summary jurisdiction for the petty sessional division or place within which the land to which the notice relates is situated; and on any such appeal the court—(a) if satisfied that permission was granted under this Part of this Act for the development to which the notice relates, or that no such permission was required in respect thereof, or, as the case may be, that the conditions subject to which such permission was granted have been complied with, shall quash the notice to which the appeal relates . . ."

That deals with development which has been carried out after the appointed day, but there is a provision in s. 75 which enables enforcement notices to be served in respect of the contravention of previous planning control. Therefore, if any work has been carried out in contravention of previous planning control, the same class of notice containing the same requirements can be served as under s. 23. Section 75 (5) provides:

"In relation to an enforcement notice served by virtue of this section, s. 23 (4) of this Act shall have effect as if for para. (a) thereof there were substituted the following paragraph:—'(a) [the court of summary jurisdiction], if satisfied that the works or use to which the notice relates are not works or a use to which s. 75 of this Act applies, shall quash the notice to which the appeal relates'."

An enforcement notice is not a statutory notice, but it has to comply with the provisions of the Act. The notices in the present case were headed: "The Town and Country Planning Act, 1947" (which did not come into force until July 1, 1948). It was alleged that in certain fields

"(1) . . . development has been carried out (within the meaning of

the above Act) by changing the use of the said land from use for the purpose of agriculture to use as a site or as sites for structures adapted or used for dwelling or camping purposes and other structures ancillary thereto; (2) no planning permission has been granted for the said development; (3) the county council of Lincoln, Parts of Lindsey, consider it expedient to serve this enforcement notice upon you pursuant to s. 23 of the Town and Country Planning Act, 1947."

A On the back of the notices was printed s. 23 (3) and (4). There was no reference there to s. 75, and, presumably, therefore, on the service of the notices alleging that development had been carried out after the appointed day the provisions of s. 23 (4) applied, notice of appeal could be given, and, among other things, the court could quash the notices if it appeared that no permission was required in respect thereof.

B When the case came before the justices it was admitted that the notices were intended to refer to a development which had occurred before July 1, 1948. Obviously, therefore, s. 23 did not apply because that section only refers to development of land which has been carried out after July 1, 1948. But it is now said that, under s. 75, if development has been carried out in

C contravention of previous planning permission, an enforcement notice must be served, and then the provisions of s. 75 apply and the justices can only quash the order if they are satisfied that the works or a use to which the notice relates are not works or a use to which s. 75 applies. No reference was made to s. 75, and an enforcement notice, if it is given by virtue of s. 75, must refer, not to development carried out after the appointed day without regard to permission, but to development carried out in contravention of previous planning control,

D which is quite a different thing. On the hearing of the case the respondents showed that the work was not in contravention of previous planning control. These notices were intended to refer to work which was done before July 1, 1948, and so should be under s. 75 and not under s. 23, that is, they must be given under the machinery of s. 23 as applied by s. 75—doing work in contravention of previous planning control, and not doing work without having

E obtained planning permission.

Counsel for the appellants objects that the justices had no power to quash because we have held in *Mead v. Plumtree* (1) that the provisions of s. 23 are such that an appeal is not given under s. 23 (4) on the ground that the notice is bad, but the justices can only quash or vary the notice on certain specified grounds. Otherwise the objection has to be taken when a person is prosecuted.

F The justices had power to quash in the present case because no such permission was required in respect of work which was done before July 1, 1948. If that work was done in contravention of planning control which existed at the time it was done, that should have been alleged and the notices should have so specified. The notices served would only be appropriate if work had been done after July 1, 1948, without obtaining permission. For these reasons, the justices

G came to a perfectly proper decision and the appeal must be dismissed.

LYNSKEY, J.: I agree.

PARKER, J.: I agree.

Appeal dismissed.

H Solicitors: *Taylor, Jelf & Co.*, agents for *H. Copland*, clerk to Lincoln County Council (for the appellants); *Clifford-Turner & Co.*, agents for *Frearson, Son & Sayer*, Skegness (for the respondents).

[Reported by G. A. KIDNER, Esq., Barrister-at-Law.]

LESTER v. BALFOUR WILLIAMSON MERCHANT SHIPPERS, LTD.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Lynskey and Parker, JJ.), April 21, 24, 1953.]

Food and Drugs—Misleading label—Sale of tins of food—Labels bearing untrue statement of minimum weight—Sale by agents “for account of” foreign principals—Liability of agents for “act or default”—Pre-packed Foods (Weights and Measures: Marking) Order, 1950 (S.I., 1950, No. 1125), art. 6 (3).

Agent—Signature “for account of our [disclosed] principal”—Liability of principal for defect in goods sold.

The respondents were charged under the Pre-packed Foods (Weights and Measures: Marking) Order, 1950, art. 6 (3), with selling by retail certain tins of foodstuffs the labels on which did not bear a true statement of the minimum net weight of the contents of the tins. The tins were part of a consignment sold to C.A., Ltd., by the respondents “for account of our principal”, the S. Canning Co., Ltd., who carried on business in South Africa.

HELD: on the true construction of the contract between the respondents and C.A., Ltd., the respondents were selling as agents for disclosed principals and were not the sellers under the contract, and, therefore, they had committed no “act or default” within art. 6 (3) of the order.

Per curiam: had the respondents been the “sellers” they would not have been able to avoid liability even if they had never had possession nor the right to possession of the goods.

Gadd v. Houghton (1876) (1 Ex.D. 357) and observations of ATKIN, L.J., in *Ariadne S.S. Co., Ltd. v. J. McKelvie & Co.* ([1922] 1 K.B. 535), applied.

FOR THE PRE-PACKED FOODS (WEIGHTS AND MEASURES: MARKING) ORDER, 1950, art. 6 (3), see HALSBURY'S STATUTORY INSTRUMENTS, Vol. 9, p. 212.

Cases referred to:

- (1) *Lennard v. Robinson*, (1855), 5 E. & B. 125; 24 L.J.Q.B. 275; 119 E.R. 428; 1 Digest 650, 2695.
- (2) *Universal Steam Navigation Co. v. McKelvie (J.) & Co.*, [1923] A.C. 492; 92 L.J.K.B. 647; 129 L.T. 395; *affg. S.C. sub nom. Ariadne S.S. Co., Ltd. v. McKelvie (J.) & Co.*, [1922] 1 K.B. 518; 91 L.J.K.B. 408; 126 L.T. 434; Digest Supp.
- (3) *Gadd v. Houghton*, (1876), 1 Ex.D. 357; 46 L.J.Q.B. 71; 35 L.T. 222; 1 Digest 631, 2546.

CASE STATED by Hastings justices.

At a court of summary jurisdiction sitting at Hastings on Nov. 20, 1952, the appellant, Norman Phillips Lester, town clerk of Hastings, preferred seven informations against the respondents, Balfour Williamson Merchant Shippers, Ltd., charging that on Oct. 13, 1952, at seven addresses in Hastings and St. Leonards-on-Sea, they did sell by retail to Claude Greenwood Adams various numbers of tins of Sinovich brand beans in tomato sauce with Vienna sausages the labels on which did not bear a true statement of the minimum net weight of the contents of the said tins, contrary to the Pre-packed Foods (Weights and Measures: Marking) Order, 1950.

It was proved or admitted that on Oct. 13, 1952, Claude Greenwood Adams, an inspector of weights and measures for the county borough of Hastings, visited the premises of seven grocers where Sinovich brand beans in tomato sauce with Vienna sausages were displayed for sale and purchased one or more tins at each shop. At each shop he weighed the remainder of tins displayed for sale and of the 215 tins weighed, 159 were found to contain less than the

stated weight of one pound, four ounces. The tins were part of a consignment of five hundred cartons of Sinovich brand beans in tomato sauce with Vienna sausages sold under a contract dated Oct. 31, 1951, to wholesalers, Charles Arkcoll, Ltd., by the respondents on account for their principals, the Sinovich Canning Company, Ltd., who carried on business in South Africa. Neither the right to physical possession nor the right to take possession of the tins had been reserved to the respondents under the contract of sale. The tins

- A were cleared through the customs and sold to retailers by Charles Arkcoll, Ltd.
- On behalf of the appellant it was contended that the respondents had committed the act of selling, and that the fact that they had not had physical possession of the tins nor the right to take possession of them did not enable them to escape criminal liability for the sale of the goods which did not comply with the requirements of the Pre-Packed Foods (Weights and Measures: Marking) Order, 1950. It was contended on behalf of the respondents that the mere act of selling was not sufficient to bring them within the provision in art. 6 (3) of the order that an offence against the order was due to their "act or default".

The justices dismissed the informations and the appellant appealed.

Paul Wrightson for the appellant.

- C *Crichton, Q.C.*, and *E. L. Gardner* for the respondents.

LORD GODDARD, C.J.: I am of opinion that this appeal must be dismissed. Though the court is deciding in favour of the respondents on entirely different grounds, I can well understand the decision of the justices, because, if there were any persons concerned in the sale of these goods whom it was shown had no opportunity for weighing them, it was the respondents.

- D The proceedings were taken under the Pre-Packed Foods (Weights and Measures: Marking) Order, 1950, and that order incorporates in it what is generally referred to as the third-party procedure which appears in the Food and Drugs Act, 1938, and is now well known. By art. 6 it is provided:

- E " (1) A person against whom proceedings are instituted in respect of an infringement of any provisions of this order shall, upon information duly laid by him and on giving to the prosecution not less than three clear days' notice of his intention, be entitled to have any person to whose act or default he alleges that the infringement was due brought before the court in those proceedings and if, after proof of the infringement, the original
- F defendant proves that it was due to the act or default of that other person, that other person may be convicted of the offence, and, if the original defendant further proves that he has used all due diligence to secure that the provisions in question were complied with, he shall be acquitted of the offence . . . (3) Where it appears to the Board of Trade or any other authority entitled to institute proceedings for an infringement of this
- G order that an offence has been committed in respect of which proceedings might be instituted for an infringement of this order against some person and the Board or that other authority are reasonably satisfied that that offence was due to an act or default of some other person and that the first-mentioned person could establish a defence under para. (1) of this article they may cause proceedings to be instituted against that other person without first causing proceedings to be instituted against the first-
- H mentioned person . . . "

The retailer, who would be the person ordinarily proceeded against first, can give the specified notice and bring in a third party, and then he would have to establish the defence that that third party was liable and he himself had exercised all reasonable care, and under this order the local authority, without considering whether the retailer or the wholesaler has exercised reasonable care, can go straight to any person in the chain and take proceedings against

him. When proceedings are taken under these Acts, the act or default which is proved in nearly all the cases is the mere act of selling a defective article. It does not matter whether the person charged has been guilty of negligence or not. He may be acting in the most perfect good faith; the order makes the sale of the defective article, whatever the defect, an offence. Under the present order if a person sells a tin under weight, he is liable, but he may be able to show that somebody else is liable and that that person's act or default is the real cause of the wrongful sale. It is enough for him to show that the goods were sold to him by somebody else under the description under which he has sold them. A

In the court below the only point taken on behalf of the respondents was that the mere act of selling was not sufficient to bring them within the words "act or default" in art. 6 (3), and no other act or default had been or could be committed by the respondents as they had never had physical possession or the right to physical possession of the goods. The justices were of opinion that it must be proved to the satisfaction of the court that the deficiencies alleged were committed by either the act or the default of the respondents, and on the evidence for the prosecution they were satisfied that the respondents never had physical possession of the goods or the opportunity of taking physical possession and in consequence it could not be said that they committed any act or default that would have justified them (the justices) calling upon the respondents, and they, accordingly, dismissed the summonses. B C

With all respect to the justices—although I can well understand their feeling that it was hard to convict the respondents, who never had a chance of examining the goods—if the respondents had been the sellers, they would have been liable, but reference to the contract shows that the respondents were not the sellers, but were simply acting as brokers. The contract starts in this way: D

"Messrs. Charles Arkcoll, Ltd. Dear Sirs, We have this day sold to you for account of our principal five hundred cartons . . .",

of these goods, and it discloses the principals as being Messrs. Sinovich of South Africa. That shows that the respondents were not the sellers. They were selling on behalf of disclosed principals, and they were making a c.i.f. contract under which there was to be payment of cash against documents. The marine and war risk insurance was to be covered by the sellers for the c.i.f. contract price. The respondents, undoubtedly, handled some of the documents and would pass them on, but they would get no right to take possession of the goods or examine them. E

It has been argued that the respondents cannot be heard to say they did not sell as principals. Many years ago, one hundred years ago, when *Lennard v. Robinson* (1) was decided, that might have been a very good argument, but the law has moved a long way since then. The House of Lords has said expressly that *Lennard v. Robinson* (1) is not correct law, and it seems to me now that the cases show that what you have to find is whether in the contract the person signing as seller or buyer, or whatever it may be, is signing as principal or whether he is signing as agent. It does not matter whether the qualification of his liability, if he be only an agent, is found only in the body of the document or whether it is found by words added afterwards for signature. ATKIN, L.J., put it extremely clearly in *Ariadne S.S. Co., Ltd. v. J. McKelvie & Co.* (2) ([1922] 1 K.B. 535): F G

"But when the assent of the party sought to be charged is proved, it matters not what the terms of the contract expressed in the body of the document may be. Signature unconditionally appended is proof of unconditional assent to the terms recorded in the body of the contract. If the body of the contract records that the signer is a party, or leaves the name of the party to be inferred from the signature, the signature will be proof that the signer has assented to a contract made with him. The contract H

may, however, record that the contract is made between A. and B. acting by his agent C. and may be signed by C., in which case C. has assented to a contract between A. and not C. but C.'s principal B. But the assent signified by the signature may be qualified so as to show that the signer is not assenting unconditionally to the contract, but is assenting in a representative capacity on behalf of a principal . . . Some confusion, I think, has been introduced into the cases by not sufficiently distinguishing between cases of construction of the body of the contract and cases turning on the proof of assent in the signature. There can be little doubt that the law on the matter has not been uniformly stated and that it has required some time to settle it. What words in the body of the contract are sufficient to negative personal liability, and what words qualifying signature are sufficient to negative assent as principal were, up to 1876, in doubt. But since June, 1876, when the case of *Gadd v. Houghton* (3) was decided in the Court of Appeal by JAMES, MELLISH and BAGGALLAY, L.JJ., and QUAIN and ARCHIBALD, J.J., I have always understood the law to be that the words 'on account of' and the words 'as agents' are conclusive, when qualifying the signature to negative liability as principal, and that whether the actual principal is disclosed or not . . . As is plain from cases prior to *Gadd v. Houghton* (3) and from the judgment of ARCHIBALD, J., in that case, the qualification of the signature 'as agents' had been usual before 1876 to negative personal liability. That decision merely gave it final authority. To my mind it is irrelevant to consider whether the qualifying words occur more than once in the document on the principle that 'what I say three times is true', but what I say once is doubtful. If the words qualify the signature they qualify the assent and nothing more matters. It follows from what I have said that in my opinion the case of *Lennard v. Robinson* (1), decided in the year 1855 while the law was still unsettled, was wrongly decided, and should no longer be treated as an authority."

Gadd v. Houghton (3), to which the learned lord justice in that case referred, was a case where fruit brokers in Liverpool gave a fruit merchant the following sold-note: "We have this day sold to you on account of James Morand & Co., Valencia, two thousand cases Valencia oranges, of the brand James Morand & Co., at 12s. 9d. per case free on board . . ." and signed it without any addition. The purchaser having brought an action against the brokers for non-delivery of the oranges, it was held, reversing the decision of the Exchequer Division, that the words "on account of James Morand & Co.", showed an intention to make the foreign principals, and not the brokers, liable, and that the brokers were not liable upon the contract. That case was not only approved and explained by ATKIN, L.J., but, when the *Ariadne* case (2) went to the House of Lords [reported under the title of *Universal Steam Navigation Co. v. J. McKelvie & Co.* (2)] *Gadd v. Houghton* (3) was expressly approved, and that must be taken to be the law.

Therefore, it follows that the respondents did not acquire rights under this contract nor incur liabilities as between themselves and the buyers. They could not have brought an action against Charles Arkcoll, Ltd., because they would have been met at once with the statement: "You were not the principals in this contract. There is no contractual nexus between us because you contracted as agents for the Sinovich company". In the same way, the respondents could not have been made liable by Charles Arkcoll, Ltd. under the contract because there was no contractual nexus—they were not the sellers. Therefore, it seems to follow clearly that there was no act or default on the part of the respondents causing the retailers to be in possession of these goods which were under weight when the inspector bought them. If they had been the sellers, even though they had never handled the goods, they would

have been liable, but, as they were never the sellers, I cannot see how it can be said that there was any act or default on their part which made them liable. Counsel for the appellant has argued that the respondents held an import licence which enabled Sinovich Canning Co. to send the goods in, and, therefore, they must be liable, but the court is unable to accept that argument. As has been pointed out, the goods were imported when there was an open licence, but we need not go into that because, in my opinion, clearly that could make no difference. The consequence is that the justices came to a right decision, though on wrong grounds. I do not want it to be thought that this court is departing from the long line of authorities which shows that in these cases where mens rea is not an element of the offence, or, as I prefer to put it, where the doing of the act itself supplies the mens rea, it matters not whether the person knew he was committing an offence, or intended to commit an offence, or had an opportunity of finding out whether he was committing an offence. If the respondents had been the sellers in the present case they would have been liable, but I am very glad that the decision we are able to give is one which seems to me to be consistent with justice. It is not necessary for the court to pronounce on the question whether Charles Arkcoll, Ltd. would have had any defence in this case. I am not going into that point because it does not concern the court. The only question which concerns the court is whether the respondents were shown to be guilty of an act which caused these offences. In my opinion, they were not, and, therefore, the justices came to a right decision, though for the wrong reasons, and this appeal must be dismissed.

LYNSKEY, J.: I agree.

PARKER, J.: I agree.

Appeal dismissed.

Solicitors: *Sharpe, Pritchard & Co.*, agents for *N. P. Lester*, town clerk, Hastings (for the appellant); *Neve, Beck & Co.* (for the respondents).

[Reported by MICHAEL MALONEY, ESQ., Barrister-at-Law.]

Re GESTETNER (deceased). BARNETT AND OTHERS *v.* BLUMKA AND OTHERS.

[CHANCERY DIVISION (Harman, J.), April 14, 15, 1953.]

Power of Appointment—Unascertainable class of objects—Uncertainty—Validity of power.

A settlor conveyed a fund to trustees on trust for a specified class of persons who, however, were not ascertainable at any given time. By cl. 3 of the settlement the trustees were directed for an initial period therein defined: "(a) . . . to hold so much of the income . . . as the trustees may think fit on discretionary trusts for the members of the specified class and to accumulate the balance; (b) to hold the capital of the trust fund for such member or members of the specified class as the trustees may appoint", and, by cl. 4 (a), after the initial period as to the income of the fund, "on trust to pay the same to or apply the same for the maintenance or benefit of such member or members of the specified class as the trustees from time to time determine . . ." Clauses 3 and 4 contained a remainder over in default of appointment to certain persons who were also included among the members of the specified class.

Held: where there was a duty on the donee of a power to appoint among a number of living persons, the objects of the power must be ascertainable, or the power would be void for uncertainty, but, if the power be one which did not involve such duty, the fact that the power was exercisable in favour of a definite, though unascertainable, class did not make the power

bad so long as it was possible to ascertain whether or not any living person was a member of that class; in the present case there was no duty on the donees of the power to make an appointment, the extent of their duty being to consider from time to time the merits of the known objects; and, therefore, the trusts of the settlement were not invalid for uncertainty.

Re Park ([1932] 1 Ch. 580), *Re Jones* ([1945] Ch. 105), and *Re Ogden* ([1933] Ch. 678), applied.

A *Blight v. Hartnoll* (1881) (19 Ch.D. 294), distinguished.

AS TO POWERS OF APPOINTMENT, see HALSBURY, Hailsham Edn., Vol. 25, pp. 513-525, paras. 929-953.

Cases referred to:

- B (1) *Re Park*, [1932] 1 Ch. 580; 101 L.J.Ch. 295; 147 L.T. 118; Digest Supp.
 (2) *Re Jones*, [1945] Ch. 105; 115 L.J.Ch. 33; 173 L.T. 357; 2nd Digest Supp.
 (3) *Re Ogden*, [1933] Ch. 678; 102 L.J.Ch. 226; 149 L.T. 162; Digest Supp.
 (4) *Blight v. Hartnoll*, (1881), 19 Ch.D. 294; 51 L.J.Ch. 162; *sub nom. Re Blight*, 45 L.T. 524; 37 Digest 109, 421.

C ADJOURNED SUMMONS to determine, inter alia, whether the beneficial trusts declared by the settlement concerning the capital and income of the property thereby settled were valid and effective or whether the same were wholly void for uncertainty or otherwise, and, if the said trusts were not wholly void, (a) whether the power of appointment conferred on the plaintiffs by cl. 3 (b) of the settlement was valid and effective or whether the same was void for uncertainty or otherwise, and (b) whether the trust or power of disposition among the members of the specified class defined by the settlement which D was contained in cl. 3 (a) thereof was valid and effective or whether the same was void for uncertainty or otherwise.

E By a voluntary settlement, dated Apr. 4, 1951, the settlor, Sigmund Gestetner, after reciting that he was desirous of making provision for the members of the specified class thereafter defined and had for that purpose paid £100,000 to the trustees of the settlement, provided by cl. 3 as follows:

"The trustees are to hold the trust fund . . . upon the following trusts
 (a) During the period (hereinafter called 'the initial period') from the date of the settlement until the expiration of five years [or such longer time as is therein mentioned] or until the prior death of the settlor to hold so much of the income of the trust fund . . . as the trustees may think
 F fit on discretionary trusts for the members of the specified class and to accumulate the balance; (b) to hold the capital of the trust fund for such member or members of the specified class as the trustees may appoint . . . (c) the trustees are empowered to settle for the benefit of any member or members of the specified class any part of the trust fund appointed
 G under the provisions of cl. 3 (b) . . . (d) subject as aforesaid upon trust for such of the children of the settlor then living or thereafter to be born as attain the age of twenty-one years or die under that age leaving issue him or her surviving if more than one in equal shares and in default of any such child then upon trust for the J.N.F. charitable trust."

It was provided by cl. 4:

H "As to the income of the trust fund arising after the expiration of ('the initial period') . . . (a) on trust to pay the same to or apply the same for the maintenance or benefit of such member or members of the specified class as the trustees from time to time determine . . . (b) subject to and in default of such determination as is hereinbefore provided by sub-cl. (a) hereof the trustees shall hold the said income or the undisposed portion thereof in trust to pay such income to or apply the same for the maintenance or benefit of such of the children and remoter issue of the

settlor as are for the time being in existence and if more than one in equal shares per stirpes . . .”

with remainder over to the J.N.F. charitable trust.

Clause 5 of the deed defined the specified class as including four named living persons, the descendants of the settlor's father, the descendants of the settlor's uncle, any widow or widower of the four named persons, a number of specified charitable institutions, any person who was an ex-employee of the settlor or his wife or the widow or widower of a former employee, and any person who was for the time being a director or employee or the wife or husband or the widow or widower of a former director or employee of Gestetner, Ltd. or of any company of which the directors for the time being include any one or more of the persons who are for the time being the directors of Gestetner, Ltd., excluding the settlor, his wife and the trustees.

In September, 1951, the trustees, in exercise of their powers, paid a sum of money to the Weizmann Institute Foundation, one of the charities named in the specified class who, as a charity, claimed repayment of the income tax deducted at source from the said payment. Such repayment was refused by the Inland Revenue who contended that the trusts of the settlement were void on the ground that the membership of the specified class was so wide as to render the trusts of the settlement uncertain.

J. A. Wolfe for the trustees of the settlement, the plaintiffs.

Russell, Q.C., and *R. R. A. Walker* for the first two defendants representing the specified class.

Sir Andrew Clark, Q.C., and *E. I. Goulding* for the third defendant, the settlor.

Raymond Jennings, Q.C., and *M. J. Albery* for the infant children of the settlor and the J.N.F. charitable trust, the fourth, fifth, sixth and seventh defendants.

J. H. Stamp for the Commissioners of Inland Revenue.

HARMAN, J.: This is a point arising out of a voluntary settlement made by one Sigmund Gestetner. Nobody interested under the settlement wishes to upset it, but the point has arisen because the Inland Revenue, when asked by a charity, to whom money had been paid by the trustees in exercise of their discretion, to refund the income tax which the trustees had borne, declined to do so on the ground that the whole trusts were void, and, therefore, the money was the settlor's own money by way of resulting trust, and, that being so, the money of an individual given away, as this must have been given away, to a charity not under a covenant did not confer any right on the charity to recover the tax paid. The settlor has no desire to resile in any way from the act of bounty which he has performed, but the trustees were in a position of some difficulty because their consideration of the suitability or otherwise of any distribution might be very much affected by income tax questions. Apart from that, there are infants interested in remainder under the settlement, and, in theory, at any rate, they could, if so minded, accuse the trustees of a breach of trust if the discretion which they exercised was a bad one. The trustees have, therefore, taken out this summons in which the first question is whether the trusts are good or whether they are touched by the vice of uncertainty and, therefore, invalid.

The specified class defined in cl. 5 of the settlement is one which, it is admitted, is not ascertainable at any given time, because it is a fluctuating body. Any one of the six directors of Gestetner, Ltd., for instance, may tomorrow assume a new directorship which would bring in a new stream of possible objects of the trustees' discretion. The specified class includes descendants of the settlor's father and uncle, and it will be found that some of those persons will take the fund if the trustees do not distribute it among other members of the class or those members themselves. In other words, the members of the class to

take in default of appointment are also some of the objects of the power. The provisions of cl. 3 (a) impose no duty on the trustees to distribute any more of the income than they shall think fit; the rest of it they will accumulate. That clause appears to be an ordinary power. The rest of the clause goes on to deal with the capital, but logically I think one must deal with the income first. Clause 4 (a) directs that after the period of the first five years the trustees shall hold the income of the trust fund on trust to pay the same to or apply the same for the maintenance or benefit of such member of the specified class as the trustees determine. There, on the face of it, is a trust to apply the whole of the income; the clause does not say "such part of the income as they think fit". Then follow various detailed provisions of an administrative nature which I do not consider material. Clause 4 (b) provides that, if the income be not distributed, it is to go to children who would be included among the objects of the power of distribution. That is the trust of the income, and it is to continue for a period limited by reference to the rule against perpetuities. In the meanwhile, without prejudice (so to speak) to this arrangement, the trustees are to hold the capital of the fund for such members of the specified class and in such shares and proportions as the trustees may in writing appoint, and they may settle portions of the capital if they are minded so to do. Finally, cl. 4 (c) provides that, subject to any and every exercise of any power hereby or by law given to the trustees, the trustees shall stand possessed of the trust fund on trust for such of the children of the settlor who attain the age of twenty-one, and so forth—again there is a limited number of persons who are also objects of both the discretionary powers.

- It is said on behalf of the Crown and also by counsel representing infants interested in default of appointment, that the power of selection given to the trustees, being a power coupled with a duty, is bad because it is impossible, as it admittedly is, to know the limits of the area of selection—that is to say, although the trustees can at any moment tell whether John Doe or Richard Roe is a person within the power, they cannot tell how many more people there may be within it. It is said that a power of this sort, if it be not limited to ascertainable objects, is bad because the trustee cannot perform his duty of considering the merits and demerits of the objects unless he knows who they are. That may turn, it seems to me, on the question whether this is, in fact, a power coupled with a duty, a phrase which I consider to be one of art. If a power be a power collateral or a power appurtenant, one which does not import a trust on the conscience of the donee, I do not think it can be the law that it is necessary to know of all the objects in order to appoint to one of them. If that were so, many appointments which are made every day would be bad. It must often be uncertain whether there will be further objects coming into existence. It may often be uncertain what objects are in existence, but, in an ordinary family settlement, the fact that a settlor did not know whether one of his sons had married and had children could not possibly make the exercise by him of a power of appointment in favour of those grandchildren of whose existence he did know bad. On the other hand, if it be the duty of the trustee to distribute the fund among a certain number of persons, his task being to select which of those persons shall be the objects of bounty, it seems to me there is much to be said for the view that he must be able to review the whole field in order to exercise his judgment properly.
- There appears to be very little authority on this point. It seems to be the law that a power may be a general power, which has often been held the equivalent of property because the donee can exercise it in his own favour, or it can be a special power, namely, a power to benefit a known and defined class of persons, or it can be something between the two. In *Re Park* (1) there was a power to appoint to anyone other than the donee herself, and the learned judge held that to be good. In *Re Jones* (2), before VAISEY, J., there was a

power to appoint to anyone, being a person and not a corporation, living at the death of the donee, that is to say, any individual alive at his death. That was not a general power, but it was, nevertheless, held to be a good one. It follows, in my view, that a power may be good although it is exercisable in favour of an indefinite class, but CLAUSON, J., was careful to say at the beginning of his judgment in *Re Park* (1) that there was no trust or obligation on the donee, Jane Armstrong, in that case. He said ([1932] 1 Ch. 582):

“Now Jane Armstrong is not a trustee. If she refused to act in the matter the court could not appoint another person to act in her place.”

In other words, she had a power collateral which was hers absolutely to exercise or not as she chose.

The same was true in *Re Jones* (2). It is, on the other hand, to be inferred, I think, from *Re Ogden* (3), that in a case where there is a duty on a trustee to select from a number of persons which of them shall be the recipients of the donor's bounty, there must be certainty among those recipients. In that case, the testator bequeathed a fraction of his residuary estate to Sir Herbert Samuel to be by him distributed among such political federations or bodies in the United Kingdom having as their objects or one of their objects the promotion of Liberal principles in politics as he should in his absolute discretion select and in such shares and proportions as he should in the like discretion think fit. Sir Herbert Samuel stated that he was able to ascertain all the bodies in the United Kingdom that fell within the description of the bequest, and LORD TOMLIN, sitting as a judge of the Chancery Division, held that the power was good, but he so held because it was not uncertain having regard to the evidence that the donee could ascertain all the objects. He said ([1933] Ch. 682):

“... all that I have to consider is, whether there is such uncertainty in the field of selection that it is impossible for the selector to determine from which institutions he is to select. If so, the bequest is bad on the ground of uncertainty. The question is one of degree in each case, whether, having regard to the language of the will, and the circumstances of the case, there is such uncertainty as to justify the court in coming to the conclusion that the gift is bad.”

He then states what the field is, and continues (*ibid.*):

“I have the evidence of Sir Herbert Samuel, who has referred to a number of bodies which come within the description, and who states that, in fact, he can ascertain by inquiry all the bodies that can come within that description, and I take the view that upon that evidence, and the language of the will, and having regard to the principles laid down from time to time, there is certainty here in the field of selection.”

That decision turned on the view of the judge that he could accept the evidence of Sir Herbert Samuel that the totality of the objects was ascertainable; had he not had that evidence, he would have held the power to be bad. There was no gift over, and Sir Herbert Samuel had an absolute duty to distribute a share of the residue. He merely had the right to say to whom, among a number of persons, he would distribute it. If, therefore, all those persons had joined together and had agreed to take it in equal shares, they could have put an end to Sir Herbert's discretion. They could have come to the court and had the fund distributed equally between them. That being so, it was in effect a gift to all of them in such proportions as Sir Herbert should select. One can see, therefore, that certainty among the objects was a necessity.

There is one other authority on this matter, and that is the great authority of FRY, J., in *Blight v. Hartnoll* (4), in which a power was given to one Christiana Hartnoll to appoint among a class of grandchildren living at a certain date. The learned judge said (19 Ch.D. 300):

“The result is, that the proceeds of the property are to be distributed

amongst such of the grandchildren as should be living at the time of the sale, in such proportions as Christiana Hartnoll should by her will appoint."

He held that power to be bad because it infringed, in the event, the rule against perpetuities, but he went on to say that there was a second fatal objection to it (*ibid.*, 301):

A "The second objection, which I think is equally fatal, is this, that Christiana Hartnoll exercised a power of appointment amongst a class of persons who were not ascertained at the time she exercised it. The class were to be the grandchildren living at the satisfaction of the mortgages and the annuities. Neither mortgages nor annuities had been satisfied when she made the appointment, and she did not therefore know between whom she was to appoint. I think that where a power of appointment amongst
B a class of people is given, the appointor must know the class—must be able to ascertain the class amongst whom he or she is so to divide the property. It is a discretionary power to be exercised with reference to the respective circumstances and merits of the persons who are to take, and that cannot be exercised where the persons are not known."

C That statement has been criticised by SIR GEORGE FARWELL in his book on powers, and the criticism is indorsed by his son, the editor of FARWELL ON POWERS, 3rd ed., p. 168, and it does seem to me that the statement is too wide. If the power be a power not involving any duty on the donee of it, he may appoint or not as he chooses. He may release the power or appoint to one object without knowing whether or not there is another one, but it is a different matter where there is a duty, and the question, therefore, is whether here there is a duty
D and, if so, what it is.

It is suggested that one of the criteria was whether this power could be released. It seems to me, however, that any power given to trustees for the time being cannot be released by the trustees at the moment. Apart from that, there is in this case an express power in the trustees to exclude members from the specified class, but not so that no members of the specified class remain.
E In other words, they are not entitled entirely to release the power. That means that they are bound to consider at all times during which the trust is to continue whether or no they are to distribute any, and, if so, what, part of the fund, and to whom they should distribute it. To that extent I have no doubt that there is a duty on these trustees, and that a member of the specified class might, if he could show that the trustees had deliberately refused
F to consider any question of the want or suitability of any member of the class, procure their removal. However, there is not, as in *Re Ogden* (3), any duty on the trustees to distribute either income or capital among the members of the specified class, and, if all those members joined together, they could not divide the fund between them, because there is still the class to take in default of appointment, and the deed shows on the face of it that there is no obligation
G on the trustees to do more than consider from time to time the merits of such persons of the specified class as are known to them, and, if they consider them meritorious, to give them something. The settlor had good reason to trust the persons whom he appointed as trustees, I have no doubt, but I cannot see that there is here such a duty as makes it essential for these trustees, before parting with any income or capital, to survey the whole field and consider
H whether A is more deserving of bounty than B. That is a task which is, and which must have been known to the settlor to be, impossible, having regard to the ramifications of the persons who might be members of this class.

If, therefore, there is no duty to distribute, but only a duty to consider, it does not seem to me that there is any authority binding on me to say that this whole trust or this whole power is bad. In fact, as has been admitted, there is no difficulty in ascertaining whether any given postulant is a member

of the specified class; if that could not be ascertained, the matter would be quite different, but of John Doe or Richard Roe it can be postulated whether he is or is not eligible to receive the settlor's bounty. There being no uncertainty in that sense, I am reluctant to introduce a notion of uncertainty in the other sense by saying that the trustees must survey the world from China to Peru when there are perfectly good objects of the class before them in England. Consequently, I am not minded to upset the scheme put forward by the settlor on the ground of uncertainty. It does not, in fact, exist, in so far as it is quite certain who are objects of the power. What is not certain is how many objects there are beyond those, but it does not seem to me that that will produce such a vice in a trust worded in this way. I, accordingly, declare that the trust is a valid one. *Order accordingly.*

Solicitors: *Herbert Oppenheimer, Nathan & Vandyk* (for the plaintiffs, the first two defendants, the third defendant and the fourth, fifth, six and seventh defendants); *Solicitor of Inland Revenue.*

[Reported by MISS PHILIPPA PRICE, Barrister-at-Law.]

R. v. WEBB.

[COURT OF CRIMINAL APPEAL (Lord Goddard, C.J., Lynskey and Parker, JJ.), April 27, 1953.]

Criminal Law—Sentence—Other offences taken into account—Breach of probation order—Sentence for original offence—Criminal Justice Act, 1948 (c. 58), s. 12 (1).

In sentencing the appellant, who had pleaded Guilty to charges of house-breaking and larceny, the deputy chairman of quarter sessions took into consideration twenty-eight other offences, and, in addition, a breach of a probation order, but he did not deal with the appellant for the offence for which the probation order was made.

HELD: under s. 12 (1) of the Criminal Justice Act, 1948, a conviction for which the offender is placed on probation is not to be regarded as a conviction for the purposes of other proceedings, and, therefore, it was wrong to take the breach of probation into consideration; the appellant should have been sentenced to a separate sentence for the offence for which the probation order was made so that, under the proviso to s. 12 (1), that offence in future could rank as a conviction.

FOR THE CRIMINAL JUSTICE ACT, 1948, s. 12 (1), see HALSBURY'S STATUTES, Second Edn., Vol. 28, p. 363.

Cases referred to:

- (1) *R. v. Tremayne*, (1932), 23 Cr. App. Rep. 191; Digest Supp.
- (2) *R. v. Hobson*, (1942), 29 Cr. App. Rep. 30; 2nd Digest Supp.
- (3) *R. v. Nicholson* (No. 2), (1947), 32 Cr. App. Rep. 127; 2nd Digest Supp.
- (4) *R. v. Neal*, [1949] 2 All E.R. 438; [1949] 2 K.B. 590; 113 J.P. 468; 2nd Digest Supp.

APPEAL against sentence.

The appellant was convicted on Jan. 30, 1953, at Essex Quarter Sessions on three counts of an indictment charging him with housebreaking and larceny, and was sentenced to five years' imprisonment on each count to run concurrently.

No counsel appeared.

LORD GODDARD, C.J., read the following judgment of the court. The appellant pleaded Guilty at Essex Quarter Sessions to three charges of

housebreaking and larceny, and twenty-eight other offences were taken into consideration. In addition—and this is what makes this case one of some importance—a breach of probation was taken into consideration. The learned deputy chairman had his attention brought to the breach of probation and said that he was taking it into consideration. He passed three sentences of five years' imprisonment, all being concurrent, but not one of those sentences related to the breach of probation.

- A The court desires to call the attention of all the courts exercising criminal jurisdiction to a matter which arises under s. 12 of the Criminal Justice Act, 1948. By sub-s. (1) of that section it is provided that a conviction for which the offender is either placed on probation or is granted an absolute or a conditional discharge shall be deemed not to be a conviction for any purpose other than the purposes of the proceedings in which the order is made and of any subsequent proceedings which may be taken against him under the foregoing provisions of the Act. The sub-section contains a proviso that, whenever an offender, who was aged not less than seventeen at the time of the conviction for which he was placed on probation or conditionally discharged, is subsequently sentenced for that offence under that part of the Act, that is to say, under s. 8, the provisions of s. 12 (1) shall cease to apply to the conviction. One of the effects of these provisions is that a conviction resulting in an order of probation or conditional discharge cannot rank as a conviction under s. 21 (1) (b) of the Act for the purpose of imposing thereafter a sentence of corrective training, unless by reason of a subsequent offence a sentence is imposed for the earlier one.*

- D It appears that it happens not infrequently that when a person subject to one of these orders is brought up for a subsequent offence the court sentences him for the latter offence and at the same time says that it takes into account the breach of the probation order or of the conditional discharge. That was done here because the appellant was on probation at the time he committed the offences. It must, however, be borne in mind that the practice of taking other offences into account, however beneficial and advantageous to an offender, is based merely on convention and has no statutory foundation. It arose entirely from a desire to give prisoners a clean sheet when they came out of prison and to obviate the necessity or chance of their being re-arrested and charged and again returned to prison. But a sentence which the court states takes other offences into consideration is still, in law, only passed for the offence with which the court is actually dealing. Thus, if a conviction only carries a sentence of, say, twelve months, the court cannot pass a larger sentence by taking other offences into consideration: see *R. v. Tremayne* (1) and *R. v. Hobson* (2). It has also been held that when the conviction has been quashed on appeal the prisoner may be subsequently indicted and tried for offences which the court took into consideration as there had been no conviction of those offences and so no plea of *autrefois* convict could be raised: *R. v. Nicholson* (No. 2) (3); *R. v. Neal* (4) ([1949] 2 All E.R. 443).

- G It is, therefore, undesirable, and, indeed, wrong, to take breaches of probation or of conditions of discharge into consideration. They should be separately dealt with and separate sentences passed so that the original offences may rank as convictions, as they will by virtue of the proviso to s. 12 (1). There may be cases in which a court would think fit to make the sentences for the original and subsequent offences concurrent, but it would seem desirable that this power should only be used exceptionally. It is most important that an offender should be made to realise that discharge, whether on probation or conditionally, is not a mere formality, and that a subsequent offence committed during the operative period of the order will involve punishment for the crime for which he was originally given the benefit of this lenient treatment. The court will

* See *R. v. Stobhart* ([1951] 2 All E.R. 753).

now impose a sentence for the breach of probation so that it may in future rank as a conviction. They will make the sentence on the first count one of three years, on the other two counts the sentences will be five years, and for the breach of probation the sentence will be two years, all the sentences to run concurrently. The appeal is dismissed.

Sentence varied.

[Reported by G. A. KIDNER, Esq., Barrister-at-Law.]

DUMMER v. BROWN AND ANOTHER.

[COURT OF APPEAL (Singleton, Jenkins and Morris, L.J.J.), April 15, 1953.]

Negligence—Fatal accident—Summary judgment—Defence mere denial of negligence and damage—Tribunal to assess damages—R.S.C., Ord. 14, r. 1.

The plaintiff claimed damages under the Fatal Accidents Acts in respect of the death of her husband which she alleged to be due to the negligence of the defendants, the owner and the driver of a motor coach, and she filed the statement of claim with the writ in accordance with R.S.C., Ord. 3, r. 6 (4). The defendants, by their defence, merely denied negligence and the damage. The plaintiff thereupon applied under R.S.C., Ord. 14, r. 1, for leave to sign judgment, the damages to be assessed by a writ of inquiry. In support of that application the plaintiff filed an affidavit in which she stated that the defendants were liable for negligence "particulars whereof appear by the statement of claim" and that at assizes in May, 1952, the driver had pleaded Guilty to a charge of dangerous driving of the motor coach, matters which were not within her own knowledge. Neither defendant filed an affidavit in reply.

HELD (SINGLETON, L.J., dissenting): since the defendants had not shown that they had any reasonable defence to the action on the issue of liability, the only real issue was the quantum of damages, and, therefore, the provisions of R.S.C., Ord. 14, r. 1, were applicable; although the plaintiff's affidavit was open to criticism, it disclosed an admission of liability by the driver; and, in the absence of any affidavit in reply and it being admitted that the driver was the servant of the first defendant, the plaintiff's affidavit sufficed to enable the court in the exercise of its discretion to grant the plaintiff leave to sign judgment against both defendants.

Per SINGLETON, L.J.: The procedure under Ord. 14, r. 1, should be applied in an action under the Fatal Accidents Acts or an action for damages for personal injuries only in a very unusual case, and the affidavit verifying the cause of action under Ord. 14, r. 1, should be in proper form, the cause of action being verified by someone who knows the facts, which the affidavit in the present case was not.

It was ordered that the damages should be assessed by a judge of the High Court at assizes.

AS TO SUMMARY JUDGMENT, see HALSBURY, Hailsham Edn., Vol. 26, pp. 49-51, paras. 77-80; and FOR CASES, see DIGEST, Practice, pp. 277-299, Nos. 119-297.

Case referred to:

(1) *Hollington v. Hewthorn & Co., Ltd.*, [1943] 2 All E.R. 35; [1943] K.B. 587; 112 L.J.K.B. 463; 169 L.T. 21; 2nd Digest Supp.

APPEAL by defendants against an order of McNAIR, J., in chambers, dated Mar. 13, 1953.

By her statement of claim, which was delivered with the writ, the plaintiff, suing as administratrix and on her own behalf, alleged that her husband was

travelling as a passenger in a motor coach owned by the first defendant, Benjamin Hugh Brown, and driven by his employee, the second defendant, Albert Claude Sell, when the coach collided with a telegraph pole on the offside of the road, thereby causing her husband injuries from which he died, and she claimed damages on the ground of the negligence of the second defendant while acting as servant or agent of the first defendant. Except for an admission that on the date of the accident a motor coach belonging to the first defendant was being driven by the second defendant along the road as alleged, the defendants by their defence denied the allegations in the statement of claim. The plaintiff applied under R.S.C., Ord. 14, r. 1, for leave to sign judgment against the defendants, the damages to be assessed on a writ of inquiry. On Feb. 20, 1953, Master BAKER dismissed the application. The plaintiff appealed, and on Mar. 13, 1953, McNAIR, J., in chambers allowed the appeal and made an order granting the plaintiff leave as sought. The defendants appealed against that order.

Stephen Chapman for the defendants.

N. MacDermot for the plaintiff.

SINGLETON, L.J.: This is an appeal by the defendant in the action against an order of McNAIR, J., made on Mar. 13, 1953. The plaintiff sues as administratrix of her late husband and on her own behalf. The first defendant is the owner of a motor coach, and the second defendant is the driver who was employed by the first defendant. According to the statement of claim, the deceased was travelling as a passenger in the first defendant's motor coach along Bromham Road at Gallows Corner in the county of Bedford when the coach collided with a telegraph pole on the offside of the road and the deceased was thrown from the coach to the ground so that he received injuries from which he died the same day. At the time of this accident, the second defendant was the driver of the coach. It is alleged in para. 2 of the statement of claim that the accident and the death of the deceased were due to negligence on the part of the second defendant, who, at the time, was acting as servant or agent of the first defendant, and particulars of negligence are given. The particulars required by the Fatal Accidents Act, 1846, are set out. The defence, which was delivered on Feb. 6, 1953, puts the plaintiff to proof of the matters alleged in paras. 1, 4 and 5 of the statement of claim, and continues:

"(2) Save that on the date alleged a motor coach belonging to the first defendant was being driven by the said second defendant along Bromham Road in the county of Bedford no admissions are made of any of the matters alleged in para. 2 of the statement of claim. (3) The defendants deny that they were negligent as alleged, or at all. (4) The damage and loss alleged are denied and save as is expressly admitted herein each and every allegation made in the statement of claim is denied as though each of them were here set out and separately traversed."

It used to be taught that one object of the pleading was to let the other side know what your case was. That practice may not have been followed at all times. It certainly could be said of this defence (which was not settled by counsel for the defendant) that it tells no one anything. It puts everything in issue except that the coach was on the highway and no one can tell from the defence what case the defendants will put forward at the trial or what the issues are. It may be said, as counsel for the defendants argued, that the defendants were saying: "The onus is on the plaintiff. Let her prove her case. We are entitled to put everything in issue". That is what they did.

The statement of claim was delivered with the writ in accordance with the provisions of R.S.C., Ord. 3, r. 6 (4). On Feb. 20, 1953, the plaintiff launched an application under R.S.C., Ord. 14, r. 1, that she be at liberty to sign judgment in this action against the defendants, damages to be assessed on a writ of

inquiry. The master dismissed that application. The plaintiff appealed to McNAIR, J., in chambers and the order of the learned judge was:

"It is ordered that the said appeal be allowed and that the plaintiff be at liberty to sign judgment against the defendants for damages to be assessed and costs, including the costs of this appeal, to be taxed."

The defendants appeal against that order of McNAIR, J., and counsel on their behalf submits that the order of the master was right and that the order of McNAIR, J., should be set aside. It is to be observed that on that application it was asked that the damages should be assessed by way of a writ of inquiry. It was pointed out to this court that under R.S.C., Ord. 14, r. 7A, the assessment of damages may be made in such way as the judge may direct.

The application of the provisions of R.S.C., Ord. 14, r. 1, to an action for damages under Lord Campbell's Act, or, indeed, to any motor car accident case, strikes one, at first, as unusual, to say the least. I do not know that the procedure has ever been applied until this case. It may have been, but I have never heard of it, and I cannot find that there is any record of it. None the less, if it is right, there is no reason why it should not be adopted merely because it has not been adopted until now. R.S.C., Ord. 14, r. 1 (a), reads:

"Where the defendant appears to a writ of summons specially indorsed with or accompanied by a statement of claim under Ord. 3, r. 6, the plaintiff may on affidavit made by himself or by any other person who can swear positively to the facts, verifying the cause of action and the amount claimed (if any liquidated sum is claimed), and stating that in his belief there is no defence to the action except as to the amount of damages claimed if any, apply to a judge for liberty to enter judgment for such remedy or relief as upon the statement of claim the plaintiff may be entitled to. The judge thereupon, unless the defendant shall satisfy him that he has a good defence to the action on the merits or shall disclose such facts as may be deemed sufficient to entitle him to defend the action generally, may make an order empowering the plaintiff to enter such judgment as may be just, having regard to the nature of the remedy or relief claimed."

The amendment to R.S.C., Ord. 3, r. 6, in 1933 (R.S.C. (No. 1), 1933) brings the possibility of this class of claim being dealt with under R.S.C., Ord. 14, r. 1, into being. The wording of the rule is sufficiently wide to cover it, but one thing which is clear is that the granting of the request of the plaintiff that he should have summary judgment is discretionary in the judge—the judge *may* make an order. R.S.C., Ord. 14, r. 1, was intended as a means by which the plaintiff could obtain speedy judgment when a defendant had no defence or when a defendant had nothing that looked like a defence. It is said by counsel for the plaintiff that in the circumstances of this case there is no answer to the plaintiff's claim except as to the amount of damages which should be awarded, and he submitted to this court that the order of McNAIR, J., was right, and that, if this practice were followed, considerable costs would be avoided. I am not sure that this is wholly right. I do not think it is wise that in a case under Lord Campbell's Act the damages should be assessed by a sheriff's jury. Apart from the amount of the damages, there arises in such a case the apportionment of damages. I think it is better in such a case, a case of difficulty, that the damages should be assessed by a judge of the High Court. Thus, I regard it as desirable that the case should in any event remain for trial in the High Court. If it is said that the costs of the trial will be much less if the question of liability is disposed of. Again I am not so sure that that follows. I do not think that it would be necessary for the plaintiff to have many witnesses as to facts if she were armed at the trial with evidence that the coach in which the deceased was riding went to its wrong side of the road

and struck a tree or telegraph pole, and also with proof of the conviction on his own confession of the motor coach driver on a charge of dangerous driving. I ought to say that we were told that the driver was prosecuted on a charge of manslaughter and committed to the assizes at Bedford on that charge, and after some discussion it was decided he should plead Guilty to a charge of dangerous driving. He did so, and he was sentenced to imprisonment and was disqualified from driving for a considerable period. Thus, it looks as though

A there was negligence on the part of the driver. Counsel for the defendants, in the course of his argument, told us that the driver was acting within the scope of his employment. On that it appears as though a case can be made against the employer as well.

Counsel for the plaintiff put the case in support of the order of McNAIR, J., in this way. He said: "I have proved that there was an admission of dangerous driving on the part of the driver and it is agreed that that dangerous driving occurred at the time that the deceased was killed. I have thus given evidence of negligence on the part of the driver and that entitles me to judgment against the driver on his plea of Guilty which is an admission by him. If I am entitled on behalf of the plaintiff to judgment against the driver, it follows that the employer is vicariously responsible and I am entitled to judgment against him also". That seems to me to raise a position of some little difficulty. On a trial the employer could have objected that the admission of the driver was not evidence against him for he was not his (the employer's) agent to make admissions. There would remain not only that question to be decided, but, if the evidence were received and admitted and if it were decided on that admission that the driver was responsible in damages, there would remain the question of vicarious responsibility on the part of the employer. It is said that R.S.C., Ord. 14, r. 1, does not provide suitable procedure for determining that question and that the court ought not on this procedure to give judgment against the employer even if it thought that a judgment against the driver himself was warranted. Those are some of the difficulties which occur and I think they are formidable difficulties.

D

E After hearing argument on both sides, I myself think that the provisions of R.S.C., Ord. 14, r. 1, are wide enough to cover this class of case, but I would keep it to the most simple case and I would not apply the provisions of that rule to a case involving any complication or difficulty because of the general practice which has been followed that it is only in a case where there is clearly no defence that judgment ought to be given against a defendant under the provisions of R.S.C., Ord. 14, r. 1.

F

There is a further difficulty in this case. It is not only that there are two defendants against whom the plaintiff asks for judgment, but the affidavit in support is not sufficient. The affidavit follows the Form No. 23 (a) in the ANNUAL PRACTICE, App. B. The old form which provided for the normal case under R.S.C., Ord. 14, when an effort was being made to get summary judgment in respect of a debt owed by the defendant was:

G

"(1) The defendant . . . is justly and truly indebted to me in the sum of £ . . . for . . . and was so indebted at the commencement of this action. The particulars of the said claim appear by the indorsement on the writ of summons in this action. (2) I verily believe that there is no defence to this action."

H It is necessary, as the early part of R.S.C., Ord. 14, r. 1 (a), shows, that there should be an affidavit and the words of the rule are:

" . . . the plaintiff may on affidavit made by himself or by any other person who can swear positively to the facts, verifying the cause of action and the amount claimed (if any liquidated sum is claimed), and stating that in his belief there is no defence to the action except as to the amount

of damages claimed if any, apply to a judge for liberty to enter judgment for such remedy or relief . . .”

The affidavit in this case was sworn by the plaintiff. I bear in mind that counsel informed the court that he had told McNAIR, J., that he was ready and willing to amend para. 2 of that affidavit or to put in a further affidavit to meet that which was raised as to para. 2. It seems to me that, if there is to be a complete change in procedure and if R.S.C., Ord. 14, is to be applied to an action for damages for negligence based on Lord Campbell's Act, the affidavit must be in proper form by the plaintiff or by some other person who can swear positively to the facts verifying the cause of action. I do not find that from the affidavit of the plaintiff. I am going to read the whole of it. Paragraph 1 says:

“I, Beatrice Mary Dummer of 128 Honey Hill Road, Bedford in the county of Beds., widow, make oath and say as follows: (1) The defendants are liable under the Fatal Accidents Act, 1846, and the Law Reform (Miscellaneous Provisions) Act, 1934, for damages for personal injuries to and for the death of William Richard Dummer deceased caused by the negligent driving of the defendant Albert Claude Sell acting as the servant or agent of the defendant Benjamin Hugh Brown on or about Mar. 22, 1952, particulars whereof appear by the statement of claim in this action and were so liable at the commencement of this action.”

The plaintiff says the defendants are liable under the Fatal Accidents Act, 1846, for negligence. That is not verifying the cause of action. She was not there, so far as I know. She does not say that she was. She deposes on oath to the fact that the defendants are liable for negligence. That may very well be so, but that paragraph of the affidavit, in my view, does not verify the cause of action. Then para. 2 reads:

“At the Bedford Summer Assizes held in May, 1952, the defendant Albert Claude Sell pleaded Guilty to a charge of dangerous driving of a motor coach in which the said William Richard Dummer deceased was a passenger at the time of his death and the said Albert Claude Sell was sentenced to ten months' imprisonment.”

It was pointed out in the course of the argument that that was not the strict way to prove a conviction, but counsel submitted that he was entitled to prove an admission in that way. That paragraph of the affidavit does not say that the plaintiff was present when the plea of Guilty was entered. She may have been, but it does not say so. As to that, counsel said he had offered to have a further affidavit sworn, if necessary. In para. 3 the plaintiff deposes:

“I verily believe that there is no defence to this action save as to the amount of damages.”

That is all that was before the court apart from the pleadings. It should be made clear that it is only in a very unusual case that this procedure can be applied to an action under Lord Campbell's Act or to an action for damages for personal injury. If it is to be applied, the affidavit ought to be in strict form verifying the cause of action. This affidavit, in my view, does not do that. I have sympathy with the position of a plaintiff in such a case who, deprived of her breadwinner, has to wait a long time until an action comes on for trial, and has to wait in uncertainty whether the action is to be fought or not. I would much rather, in a case of this kind, see the position of the defendants made clear by their pleading, but they are entitled to deny negligence and to ask that the plaintiff shall prove her case against them. If this procedure be available and an affidavit in proper form is put on the file and no reply comes from the defendants, it may well be that someone looking at their defence and endeavouring to find out what defence they may have may come to the conclusion that they have not got one. I should, perhaps, not say it, but I should think it extremely doubtful if this case will ever be fought on

the question of liability. In such a case it may be desirable that an admission be made in good time. Otherwise, the plaintiff may be advised to administer interrogatories, and more expense will be incurred. I think it was undesirable that this application should have been made in a case in which there were two defendants, and I think, further, that if it were to be made the affidavit ought to have been in proper form and the cause of action ought to have been verified by someone who knew the facts. I do not regard it as sufficient for the purpose.

A For these reasons I should be disposed to allow this appeal and to direct that the order of McNAIR, J., be set aside, but as the other members of the court take a different view the appeal will be dismissed.

JENKINS, L.J.: I have felt some difficulty over this case and it is with hesitation that I have reached a conclusion differing from that stated by my Lord. There is no doubt that R.S.C., Ord. 14, r. 1, in its present form, read in conjunction with R.S.C., Ord. 3, r. 6, in its present form, does enable an action of this kind to be made the subject of proceedings for summary judgment under R.S.C., Ord. 14, r. 1. It is obvious that the proportion of cases of this kind, that is to say, claims in negligence arising out of accidents causing death or personal injuries, which would be suitable subjects for summary procedure, must be small indeed, but, so far as the rules are concerned, there is no procedural reason why that course should not be adopted in a proper case of this class. I need not repeat at length the facts with which my Lord has already dealt, but it is to be observed that the accident giving rise to the claim in the present case was of this nature. The plaintiff's husband, who was killed in the accident, was being conveyed with other passengers in a motor coach belonging to the first defendant and driven by the second defendant. The coach got out of control and ran into a telegraph post, and, as a result, the plaintiff's husband was thrown from the coach and suffered fatal injuries. That is the nature of the accident as pleaded in the statement of claim. The defence puts the plaintiff to proof of all the allegations in the statement of claim, except that it is admitted that, on the date alleged, a motor coach belonging to the first defendant was being driven by the second defendant along the road in question, but the defendants' counsel, in opening the case before us, frankly stated the nature of the accident to have been such as I have described and did not dispute that the coach was the first defendant's coach or that it was being driven by the second defendant as the first defendant's servant.

F In support of the application under R.S.C., Ord. 14, r. 1, the plaintiff swore the affidavit to which my Lord has referred. That affidavit is, no doubt, open to some criticism. Paragraph 1 in general terms sets out the nature of the case and says that particulars of the accident appear by the statement of claim in the action. That paragraph is by no means satisfactory as evidence. It turns on matters which were not within the plaintiff's own knowledge, and it fails to state, in accordance with the rules, the deponent's means of knowledge. Still, for what it is worth, it puts the contents of the statement of claim on oath. The second paragraph says that at the Bedford Summer Assizes held in May, 1952, the second defendant pleaded Guilty to a charge of dangerous driving of a motor coach in which the deceased was a passenger at the time of his death, and the second defendant was sentenced to ten months' imprisonment. It is not in dispute that this somewhat imperfectly expressed paragraph is intended to convey, and it is accepted as conveying, that the plea of Guilty to a charge of dangerous driving related to dangerous driving which took place at the time when the fatal accident which formed the subject of the action occurred. That affidavit, as I have said, is open to criticism, and it may be true that the defendants could have destroyed its effect if they had condescended to answer it by an affidavit on their behalf containing even a slight indication of some real defence on the issue of liability. But that they never attempted

to do. They have adopted a purely passive attitude. They put in the defence to which I have referred which did nothing except traverse in general terms substantially all the allegations in the statement of claim, and, having adopted that passive attitude, they say a case for summary judgment under R.S.C., Ord. 14, r. 1, is not made out. Defendants who take that course do so at their peril and they only have themselves to thank if their reticence results in the court taking an adverse view of their side of the case. That is exactly what seems to have happened here, for the learned judge, reversing the master, came to the conclusion that it was a proper case for summary judgment, and in the exercise of his discretion he made the order accordingly. A

There was a good deal of discussion in the course of the hearing before us as to the admissibility as evidence against the first defendant of the second defendant's plea of Guilty to the charge of dangerous driving, which, of course, would rank as an admission against that defendant. I do not think it is necessary for the present purpose to go into that matter. Let it be conceded that this admission would be no evidence against the first defendant. Nevertheless, it is something towards verifying this claim and something which would have made it proper for the defendants, if they had any real defence on the issue of liability, to file evidence showing what their defence was instead of simply resting on their wholly uninformative pleading. The case is, I think, near the line and may well appeal differently to different minds, as, indeed, appears from the fact that my own view diverges from that of my Lord, but this was essentially a matter for the discretion of the learned judge, and I think there was material before him on which he could properly find, in the exercise of his discretion, that summary judgment could be given. I am fortified in the conclusion to which I have come not only by the frank statement of the nature of the action made by counsel in opening the case for the defendants, but also by the fact that when I ventured to ask him what the proposed defence on the issue of liability might be he was unable to give any answer save that there was a possibility of expert evidence to the effect that some mysterious defect developed in the front wheels of the vehicle and that that was the cause of the accident. If there was any real foundation for this theory it could have been made the subject of an affidavit. B C D E

Looking at the substance of the matter, it seems to me to be reasonably plain that, in truth, there is no defence on the issue of liability, and, if there is no defence, then it seems to me eminently desirable that costs should be saved by going straight to the issue of the quantum of damages. As to the method of assessing the damages, the direction in the order as it stands is simply judgment for damages to be assessed, which I understand would mean a reference to a sheriff's jury. The suitability of such a tribunal to assess damages in a somewhat difficult case of this sort is, perhaps, open to question, and for my part in order to get over that difficulty I would be willing to consider any suggestion that counsel may wish to make as to some alternative method of assessing damages. For these reasons I am not prepared, for my part, to disturb the order made by McNAIR, J., except as regards the method of assessing damages, and I would confirm his order with whatever modification on that point which may, after discussion, be found to be proper. F G

MORRIS, L.J.: I have reached the same conclusions as those which have been expressed by JENKINS, L.J. I need hardly say that it is with reluctance that I find myself arriving at a view which diverges from that expressed by SINGLETON, L.J., but, having given to this matter the best consideration that I can, I have formed the clear view that I would support the decision of McNAIR, J. H

When the claim was presented against the defendants, a joint defence was put in on their behalf. In para. 2 of that defence it was said as follows:

"Save that on the date alleged a motor coach belonging to the first

defendant was being driven by the said second defendant along Bromham Road in the county of Bedford no admissions are made of any of the matters alleged in para. 2 of the statement of claim."

It may be that, if evidence were given, or an admission made, that a car belonging to one person was being driven on the road by another person, the inference would be drawn, though it could be rebutted, that the person driving was driving as the servant or agent of the owner. In this case it is unnecessary

- A to consider any such aspect of the matter, for counsel for the defendants, in opening this appeal, very fairly and frankly stated that it was not disputed by him that the second defendant was in fact driving the motor coach while acting in the course of his employment as a servant of the first defendant. When the defence was delivered the plaintiff considered that she could show that the second defendant had made what was tantamount to an admission of liability. That being so, the procedure under R.S.C., Ord. 14, r. 1, was adopted. It is probable that there will be few cases in claims of this nature in which the facts and circumstances will be such as to enable this course to be followed, but the wording of R.S.C., Ord. 14, r. 1, is apt to cover the situation in the present case. Speaking for myself, I think there may well be circumstances in which a saving of costs and a saving of public time and the time of witnesses may be effected if the facts are such as to warrant this procedure being adopted.

The plaintiff, in presenting the summons under R.S.C., Ord. 14, r. 1, filed an affidavit to which reference has been made. I agree that the affidavit is in many respects defective, but we have been told by counsel that he accepted and acknowledged that the affidavit was defective and that before McNAIR, J., he offered to file a further affidavit which would correct the defects in the

- D existing affidavit. We are further told that any point based on the defects in the affidavit was virtually abandoned before the learned judge by counsel who then appeared for the defendants, and that it was agreed that the plea of Guilty to dangerous driving was made by the second defendant in reference to the time and the event that lead to the death of the deceased. It seems to me that matters concerning an admission such as was made by counsel were matters for the learned judge and were within his discretion. He was satisfied that it was shown that the second defendant had pleaded Guilty to dangerous driving in reference to the event which brought about the death of the deceased. It has not been said by counsel who now appears for the defendants that the admission made by the second defendant, an admission made in the face of the court, of guilt of the act of dangerous driving, was not an admission
- F that included within it an admission of negligence. It seems to me clear that it did include such an admission.

We were referred by counsel for the plaintiff to *Hollington v. Hewthorn & Co., Ltd.* (1). In that case, in an action arising out of a collision between two motor cars on the high road in which the plaintiff alleged negligence on the part of the defendants' driver, the plaintiff sought to give evidence of a conviction of the defendants' driver of careless driving at the time and place of the collision. It was held by this court that the evidence of the conviction was inadmissible. In the course of his judgment, GODDARD, L.J., said ([1943] 2 All E.R. 42):

- H "Proof by a witness present at the trial of the confession is admissible, because an admission can always be given in evidence against the party who made it. In the present case, had the defendant before the magistrates pleaded Guilty, or made some admission in giving evidence that would have supported the plaintiff's case, this could have been proved, but not the result of the trial."

It seems to me, therefore, that, once the learned judge was satisfied by the evidence before him, he had satisfactory proof that the second defendant had made an admission of negligence, and that that admission was such as to entitle

the plaintiff to judgment. It has, of course, to be pointed out that it was open to the second defendant to put in an affidavit. He did not choose to do so. If there had been anything at all that he had desired to raise which presented some triable issue he was entitled to raise it, and he could have done so. He did not put in an affidavit at all. The same applies to the first defendant. He had the opportunity, of which he did not avail himself, of putting in an affidavit. It is well known that if a triable issue is raised in affidavits then the court will not, in proceedings under R.S.C., Ord. 14, r. 1, adjudicate on those issues, but will say that they must be determined in the usual way at a trial. Neither defendant had anything that he desired to raise. That being so, the second defendant had made an admission which was an admission of liability. There is no question, in my view, of evidence being given which was inadmissible against the first defendant. The evidence which was given was clearly admissible against the second defendant and proved liability as against him. Once liability as against him was established, then the admission that he was acting in the course of his employment was enough to warrant giving judgment against both defendants.

The summons had asked for damages to be assessed by a writ of inquiry. I agree that there may be some disadvantages in that method of assessing damages in a case of this kind, but that was a matter for the parties. The plaintiff was content for damages to be assessed in that way, and the defendants were content. Either defendant could have suggested an alternative method. Had a suggestion been made, I gather that counsel for the plaintiff would have agreed that there should be a hearing before a judge. In my judgment, R.S.C., Ord. 14, r. 1, is applicable in this case and, speaking for myself, I think it was proper to invoke the procedure. I think, therefore, that McNAIR, J., was warranted in making the order which he made.

Appeal dismissed. Damages to be assessed by a judge of the High Court at Bedford Assizes.

Solicitors: *Fletcher, Napper & Co.*, agents for *Dixon, Martell & Co.*, Bedford (for the plaintiff); *Berrymans* (for the defendants).

[Reported by MISS PHILIPPA PRICE, Barrister-at-Law.]

BRIDGMAN v. STOCKDALE AND ANOTHER.

[QUEEN'S BENCH DIVISION (Ormerod, J.), April 21, 22, 23, 1953.]

Slander—Privilege—Qualified privilege—Words alleging cheating in examination to qualify for professional appointment—Statement made by invigilator to remainder of examinees—No reflection on plaintiff in way of trade or profession.

B. was a qualified electrical engineer, and in the course of his business training underwent with other trainees a course of instruction at the premises of the F. Motor Co., Ltd. S., an employee of the F. Motor Co., was in charge of the course and acted as invigilator at an examination at the end of it. During the examination, B. with permission left the room, and, when he returned, made certain alterations to his paper. On reading through B.'s paper after B. had finally left the room, S. (unjustifiably but without malice) came to the conclusion that B. had been cheating, and announced to the remainder of the examinees: "This fellow B. has cribbed and will get no marks in consequence". In an action brought by B. for slander,

HELD: S. had acted in good faith and, as instructor, examiner and invigilator, he had a common interest with the examinees to ensure the fair conduct of the examination, and, by virtue of that common interest, he had the moral duty or right to inform the examinees if he thought one examinee was taking an unfair advantage; and, therefore, the occasion was

privileged, and, there being no evidence of malice, the communication was privileged and the action must fail.

Per curiam: Even if the occasion were not privileged, the words complained of were not said of B. in the way of his profession or business. The words would not bear the innuendo that he was so incompetent as an engineer that he had to resort to cheating to pass the examination, nor that he was such an idle person that he did not take the trouble to learn the subject-matter of the course of instruction, nor that the words complained of were said of him in the way of his business as a trainee qualifying for an appointment. In consequence, in the absence of proof of special damage, B. would still not have been entitled to recover.

AS TO WHAT IS A PRIVILEGED OCCASION, see HALSBURY, Hailsham Edn., Vol. 20, pp. 470-476, paras. 573, 574; and FOR CASES, see DIGEST, Vol. 32, pp. 118-135, Nos. 1500-1653.

ACTION for slander.

The plaintiff, who was a qualified electrical engineer, was employed by Messrs. F. Perkins, Ltd., manufacturers of diesel engines. As part of his training, the plaintiff was sent on a course by his employers at the premises of the Ford Motor Co. (the second defendants). Five other trainees were taking the course with the plaintiff and instruction was given by Stockdale, the first defendant, who was employed by the Ford Motor Co. At the end of the course, the trainees underwent a written examination, and the first defendant acted as invigilator. After forty minutes, the plaintiff, having already to all intents and purposes (as he alleged) completed his paper, felt the need to relieve himself, and asked the first defendant for permission to leave the classroom. He was allowed to do so, and when he returned the plaintiff spent some time going through his paper and making certain alterations. At the end of the examination, he handed in his paper and left the classroom. After the plaintiff had left, the first defendant examined the plaintiff's paper and announced to the class: "This fellow Bridgman has cribbed and will get no marks in consequence."

The first defendant's evidence was that, when the plaintiff left the room, he had only written to the end of question three and that when he returned the first defendant noticed that he began to interline something in question three. This aroused his suspicions that the plaintiff had looked up the answer to the question when he was out of the room. On examining the plaintiff's paper when it was handed in, the first defendant found that the plaintiff had written in the essential part of the answer and the words inserted were practically identical with notes that the first defendant had dictated during the course. He then made the statement to the class of which the plaintiff complained. On returning to his work with F. Perkins, Ltd., the plaintiff was told to draw a fortnight's wages from the cashier and was dismissed. Later, the plaintiff heard about the allegations that had been made about him by the first defendant and came to the conclusion that he had been dismissed on account of a report by an official of the Ford Motor Co. to his employers, F. Perkins, Ltd., that he had cheated in an examination.

HIS LORDSHIP found as a fact that there was no evidence to support the allegation that a report of the incident had been made by the Ford Motor Co. to F. Perkins, Ltd. The plaintiff had been dismissed for reasons which F. Perkins, Ltd., had not been asked to disclose. In consequence, the losing of his employment which the plaintiff alleged as special damage was not attributable to the words of the first defendant or to any report by the Ford Motor Co. to F. Perkins, Ltd. No other special damage was alleged. At the trial it was not contended that there was any truth in the allegation that the plaintiff had cheated in the examination.

Lloyd-Davies for the plaintiff.

Phillimore, Q.C., and *R. H. W. Dunn* for the defendants.

ORMEROD, J., stated the facts and continued: On those facts I am asked by the defendants to say that this was a privileged occasion and that there was no evidence of malice, and, indeed, malice is not pleaded. It is said, therefore, that no action can lie. After some anxious consideration and after listening to the very full argument of counsel for the plaintiff on this matter, I have come to the conclusion that I ought to find that this was a privileged occasion. In my judgment, there was a common interest, the interest of the invigilator, or, in this case, the examiner and instructor, and the whole class. It was the common interest of all of them to ensure that the examination was carried out properly and fairly and to ensure that one person did not have an advantage over the others. I think, also, that it was the common interest of the first defendant with each and all of the members of the class to ensure that they should know that the examination was being conducted fairly and properly and that if, in fact, one member of the class was taking an unfair advantage, or if the first defendant thought one member of the class was taking an unfair advantage, the rest of the class should be informed of it and that certain consequences might well follow.

In those circumstances, although clearly there was no legal duty on the first defendant to inform the class or anybody else, I think it is proper to say that he had this common interest, and had a moral duty or right to make what he bona fide thought was a proper comment on the conduct of the plaintiff. As I say, it is an extremely unfortunate thing that he did, but I do not think that that in itself prevents the occasion being a privileged one, and I am satisfied here that there is no evidence of malice.

I think I should say that when the case was opened it was suggested on behalf of the plaintiff that for some reason or other the first defendant did not like the Perkins trainees and he rather suggested that they would have to be careful about their conduct. The only reason, I imagine, why that was put before me was to encourage the suggestion that the first defendant would be prone to act in this way from some preconceived inclination to disfavour the pupils from Perkins. I think that there is nothing in that suggestion.

I am satisfied that this was a privileged occasion, that there was no malice, and that in these circumstances the action must fail.

Even if I had thought that this was not a privileged occasion, the plaintiff still has another difficulty in view of my finding that his dismissal was not due to this slander or in fact any slander on the part of the first defendant or the Ford Motor Co., Ltd., and that is that, in the absence of any evidence of special damage, I have to be satisfied that this was a slander of him in the way of his profession or business.

In order to get over this difficulty the innuendo has been pleaded in two ways. First, that the words used mean that the plaintiff, who is a competent and qualified engineer, was in fact so incompetent in his business as an engineer that he had to resort to cheating in order to pass his examination. Alternatively, that he was such an idle fellow that he did not take the trouble to learn any of the matters which were told him in the course of instruction and, therefore, had to have recourse to cheating to pass the examination.

I am far from satisfied that the words used can bear either of those meanings. The suggestion is that he cheated. A man may cheat because he suffers from temporary loss of memory as far as one question is concerned. It does not mean he is incompetent or idle. To suggest that either of those innuendoes is the proper one is straining the ordinary meaning of the words very much more than they can stand. I think the innuendo is that the plaintiff was dishonest and a fraud, and that, I think, is not something said of him in the way of his business. It is simply a remark as to his general character, which, of course, would be defamatory if he could prove special damage.

I think that, even if I found that this was not a privileged occasion, I should find it extremely difficult to come to the conclusion that the words were spoken

of the plaintiff in the way of his trade or business of a trainee qualifying for a particular appointment. It is said of him that in the course of that qualifying he behaved in a dishonest and fraudulent manner. I think that is a reference to his personal, general character. Serious it may well be, but it is not something spoken of him in the way of his profession or business.

Judgment for the defendants.

A Solicitors: *Beckinsales* (for the plaintiff); *Lovell, White & King* (for the defendants).
[Reported by MICHAEL MALONEY, Esq., Barrister-at-Law.]

THOMPSON v. WARD.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Birkett and Romer, L.JJ.), April 20, 21, 1953.]

B *Rent Restriction—Statutory tenant—Non-occupying tenant—Licence to defendant to occupy—Defendant's occupation not to preserve premises for tenant's return—Tenant's right to maintain action for trespass—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (c. 17), s. 15 (1).*

C *Trespass—Premises subject to Rent Restrictions Acts—Non-occupying tenant—Licence to defendant to occupy—Defendant's occupation not to preserve premises for tenant's return—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (c. 17), s. 15 (1).*

D The plaintiff, a widow, was the tenant of a house which was subject to the Rent Restrictions Acts. In 1944 the defendant went to live with him as his wife. In 1949, differences having arisen between the parties, the plaintiff, who was then a statutory tenant, left the house, taking all his possessions with him. The defendant remained in the house with her own furniture, and thenceforward she paid the rent and outgoings. When the plaintiff left the house he was not sure whether he intended to return, but subsequently he re-married and on his re-marriage, if not before, he ceased to have any intention of returning, but he did not give any notice to the landlord under the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 15 (1). In an action by the plaintiff for possession of the premises on the ground that he was still the statutory tenant and that the defendant was a trespasser,

E HELD: on the facts the defendant could not be regarded as a licensee whom the plaintiff had installed in the premises with the particular function of preserving them for his (the plaintiff's) ultimate home-coming, and, whatever might be the position between the plaintiff and his landlord under s. 15 (1) of the Act of 1920, the plaintiff had not retained possession of the premises within the meaning of the sub-section so as to be entitled to be called a statutory tenant, and, therefore, he had no right or interest in the premises sufficient to maintain an action for trespass against the defendant.

G Dicta of ASQUITH, L.J., in *Brown v. Brash & Ambrose* ([1948] 1 All E.R. 925), applied.

Boyer v. Warbey (ante, p. 269), distinguished.

H AS TO STATUTORY TENANCIES, see HALSBURY, Hailsham Edn., Vol. 20, pp. 334, 335, paras. 400, 401; and FOR CASES, see DIGEST, Vol. 31, Replacement, pp. 660, 661, Nos. 7619-7624.

Cases referred to:

- (1) *Keeves v. Dean. Nunn v. Pellegrini*, [1924] 1 K.B. 685; 93 L.J.K.B. 203; 130 L.T. 593; 31 Digest, Replacement, 694, 7865.
- (2) *Brown v. Brash & Ambrose*, [1948] 1 All E.R. 922; [1948] 2 K.B. 247; [1948] L.J.R. 1544; 31 Digest, Replacement, 660, 7619.
- (3) *Skinner v. Geary*, [1931] 2 K.B. 546; 100 L.J.K.B. 718; 145 L.T. 675; 95 J.P. 194; 31 Digest, Replacement, 659, 7612.

- (4) *Brown v. Draper*, [1944] 1 All E.R. 246; [1944] K.B. 309; 113 L.J.K.B. 196; 170 L.T. 144; 31 Digest, Replacement, 661, 7624.
- (5) *King's College, Cambridge v. Kershman*, (1948), 64 T.L.R. 547; 31 Digest, Replacement, 695, 7870.
- (6) *Wiles v. Morse*, (1950), unrep., see 155 Estates Gazette 290.
- (7) *Boyer v. Warbey*, [1953] 1 All E.R. 269; [1953] 1 Q.B. 234; 117 J.P. 106.

APPEAL by the defendant from an order of His Honour JUDGE LEON, made at Willesden County Court, and dated Feb. 2, 1953.

In 1941 the plaintiff became the tenant of a dwelling-house which was within the protection of the Rent Restrictions Acts. In 1944, after the death of the plaintiff's wife, the defendant went to live with the plaintiff. In 1947 the plaintiff became a statutory tenant. In 1949 he left the house, taking all his possessions with him. The defendant remained in the house and paid the rent. The plaintiff claimed possession of the house on the ground that the defendant was a trespasser. He contended that he was at all material times the tenant, that he had allowed the defendant to reside on the premises as a licensee in consideration of services rendered, and that the licence had been determined by notice. The county court judge made an order for possession.

Whipham for the defendant.

Stranger-Jones for the plaintiff.

SIR RAYMOND EVERSLED, M.R.: This is an action for trespass to land. I start with that statement because it is, in my judgment, fundamental to the whole problem which is one of nicety and difficulty arising under the rent restriction legislation. By his particulars of claim the plaintiff alleged that he was at all material times tenant of certain premises known as 17 Buckingham Road, Harlesden. He further alleged that in or about 1947 he allowed the defendant to reside on the premises as a licensee in consideration of services rendered. Finally, he alleged that the licence was determined by notice. It is, I think, unnecessary to go at any length into the relationship which subsisted from 1944 onwards between the plaintiff and the defendant. The services rendered, as I understand it, consisted in this, that in 1944 the defendant came to live with the plaintiff as his wife. About 1947 the happy relations between them were disturbed by the appearance of a lodger who eventually supplanted the plaintiff in the defendant's affections so that in 1949 the plaintiff left the house altogether, taking with him all his possessions. Thenceforward, the defendant remained in occupation of the relevant part of the house with her own furniture exclusively and her own possessions, and she paid all the rent and outgoings. In or about 1947 the contractual tenancy which the plaintiff originally had of the house came to an end, and it is not in doubt that from 1947 to 1949 he was a statutory tenant.

The question in the case is, briefly, whether the effect of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 15 (1), is that there still persists in the plaintiff such a right in respect of the premises as will support an action for trespass. It is necessary to bear in mind that under the older law, and until the impact of the Rent Restrictions Acts, an action for trespass was maintainable only at the suit of him who was in possession of the land, using the word "possession" in its strict sense and including a person entitled to the immediate and exclusive possession. There is, however, no doubt that, whatever be the exact nature of the personal rights of occupation given by the Rent Restrictions Acts, those rights are good against all the world, as SCRUTTON, L.J., observed in *Keeves v. Dean*. *Nunn v. Pellegrini* (1), as long ago as 1924. SCRUTTON, L.J., said ([1924] 1 K.B. 694):

"I take it . . . that he [the statutory tenant] could maintain trespass against any person who entered the premises without his permission."

A good deal of water has flowed under Westminster Bridge since 1924 so far as this legislation is concerned. In 1948 *Brown v. Brash & Ambrose* (2)

A came before this court. In that case a statutory tenant had been convicted of a felony and sentenced to a term of imprisonment. When he went to prison he left his mistress and their two children in the house which he had occupied. During the term of his incarceration those persons left, so that the premises fell vacant. The landlord thereupon re-took possession. The former tenant, on his release from prison, sought to recover possession by action, claiming that his absence from the house was attributable to his involuntary misfortune, so that his statutory tenancy must be treated as still subsisting. I have made so much reference to the facts because counsel for the plaintiff is entitled to point out that the passage from the judgment of ASQUITH, L.J., which I am about to read, was appropriate, as it was delivered, in reference to the particular facts of the particular case before the court. The judgment of the court which B ASQUITH, L.J., delivered was a reserved judgment. Picking up, so to say, the earlier principles which had been expounded by SCRUTTON, L.J., in *Keeves v. Dean* (1), and in *Skinner v. Geary* (3), he analysed closely the precise situation of the person commonly called a statutory tenant. He said ([1948] 1 All E.R. 925):

“We are of opinion that a ‘non-occupying’ tenant prima facie forfeits his status as a statutory tenant. But what is meant by ‘non-occupying’?”

C The term clearly cannot cover every tenant who for however short a time, or however necessary a purpose, or with whatever intention as regards returning, absents himself from the demised premises. To retain possession or occupation for the purpose of retaining protection the tenant cannot be compelled to spend twenty-four hours in all weathers under his own roof for 365 days in the year. Clearly, for instance, the tenant of a London house, who spends his week-ends in the country, or his long vacation in Scotland, does not necessarily cease to be in occupation. Nevertheless, absence may be sufficiently prolonged or unintermittent to compel the inference, prima facie, of a cesser of possession or occupation. The question is one of fact and of degree. Assume an absence sufficiently prolonged to have this effect. The legal result seems to us to be as follows:—(1) The

D onus is then on the tenant to repel the presumption that his possession has ceased. (2) To repel it he must, at all events, establish a de facto intention on his part to return after his absence. (3) But we are of opinion that neither in principle nor on the authorities can this be enough. To suppose that he can absent himself for five or ten years or more and retain possession and his protected status simply by proving an inward intention to return after so protracted an absence would be to frustrate the spirit and policy of the Acts as affirmed in *Keeves v. Dean* (1) and *Skinner v. Geary* (3).

E (4) Notwithstanding an absence so protracted the authorities suggest that its effect may be averted if he couples and clothes his inward intention with some formal, outward, and visible sign of it, i.e., installs in the premises some caretaker or representative, be it a relative or not, with the status of a licensee and with the function of preserving the premises for his own ultimate home-coming. There will then, at all events, be someone to profit by the housing accommodation involved which will not stand empty. It may be that the same result can be secured by leaving on the premises, as deliberate symbols of continued occupation, furniture, though we are not clear that this was necessary to the decision in *Brown v. Draper* (4).

F (5) Apart from authority, in principle possession in fact (for it is with possession in fact and not with possession in law that we are here concerned) requires not merely an ‘animus possidendi’ but a ‘corpus possessionis’, viz., some visible state of affairs in which the animus possidendi finds expression. (6) If the caretaker (to use that term for short) or the furniture be removed from the premises otherwise than quite temporarily, we are of opinion that the protection, artificially prolonged by their presence, ceases, whether

H the tenant wills or desires such removal or not.”

Does the plaintiff in the case now before us fall within the ambit of what ASQUITH, L.J., has called a non-occupying tenant? If he does, it seems to me that, whatever might be the position as between him and his landlord under s. 15 (1) of the Act of 1920, or in any proceedings between him and his landlord, he cannot have such a right to possession of these premises as will support an action of trespass at law. In this case, I think, on the facts as found by the judge, the plaintiff cannot avoid the result that he is a non-occupying tenant within the meaning of that phrase. At least, he has failed to establish that he has such a right of possession as will suffice to maintain his action. In addition to the facts which I have already mentioned, there is this highly important finding of the judge:

"The plaintiff was not sure when he left whether he intended to return but subsequently he re-married and on his re-marriage, if not before, he ceased to have any intention of returning to the premises."

If the matter rested there I should not have felt difficulty, but difficulty there undoubtedly is, and it is of this nature. If reference is made to s. 15 (1) of the Act of 1920, then (says counsel for the plaintiff) the statutory tenant, having failed to take the only step open to him to put an end to the statutory tenancy, remains a statutory tenant, whatever may have been locked in the recesses of his mind. Further (says counsel), the defendant's presence in the house points to the fact that she was given a licence by the plaintiff, and, if those two circumstances are combined, then there is no answer to the plaintiff's claim against her, after the determination of the licence, for possession of the premises.

The Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 15 (1), provides:

"A tenant who by virtue of the provisions of this Act retains possession of any dwelling-house to which this Act applies shall, so long as he retains possession, observe and be entitled to the benefit of all the terms and conditions of the original contract of tenancy, so far as the same are consistent with the provisions of this Act, and shall be entitled to give up possession of the dwelling-house only on giving such notice as would have been required under the original contract of tenancy . . ."

It is not in dispute that no such notice has been given. Nor is it in dispute that if, in any proceedings by the landlord under this section, the tenant sought to say, "I have given up possession", he would be liable to be met with the answer, "No, you have failed to give the notice whereby alone you are entitled to give up possession". I deem it unnecessary, and, indeed, unwise, in these proceedings to involve myself in any attempted exposition of matters which not only are difficult but which, I think, are not material to the present decision. If the tenant "retains possession" within the meaning of s. 15 (1), then, and then only, he is entitled to be called a statutory tenant, and then, and then only, according to the sub-section, he is bound by and enjoys the benefit of the terms and conditions of the original contract of tenancy so far as they are applicable. But the question is: Does the plaintiff now retain possession? If he seeks to rely on s. 15 (1), then, at the least, he must show that he does retain possession. I have already given some reasons for thinking that he has not succeeded to my satisfaction in establishing that he does retain "possession"—possession of a nature and character sufficient to support this action. It seems to me that to decide the contrary would be inevitably to say something which was in conflict with the Court of Appeal's decision in *Brown v. Brash & Ambrose* (2), or, at best, to create undesirable refinements to the propositions which ASQUITH, L.J., there enunciated. It may well be that a tenant, who has lost his right to say he is a statutory tenant having the protection of the Rent Restrictions Acts, none the less remains liable to the landlord for rent, or the equivalent of rent, and, perhaps, for other obligations which he may have failed

A to perform. Indeed, so much, I think, was decided in *King's College, Cambridge v. Kershman* (5), on which counsel for the plaintiff particularly relied. In that case a tenant, having brought on to the premises his wife and her parents, subsequently quarrelled with them and left the premises. The landlord in due course brought proceedings for possession, and recovered possession. The only matter with which the Court of Appeal was concerned in that case was whether the "tenant", having failed to give proper notice under s. 15 (1) of the Act of 1920, still remained liable for rent or mesne profits. This court held that he did so remain liable. The case was decided in October, 1948, some five months after *Brown v. Brash* (2), and it does not appear that *Brown v. Brash* (2) was cited. But I do not think that the principles of *Brown v. Brash* (2) were relevant. The ratio decidendi in *King's College, Cambridge v. Kershman* (5) seems to me clearly to appear from the short judgment of TUCKER, L.J., who said (64 T.L.R. 548):

B

C "Mr. Levine's argument [on behalf of the tenant] on the main part of the case, as I understood it, amounts to this: that, because a person who has been a statutory tenant may deprive himself of the protection of the Act by going out of physical occupation of the premises [an observation, let me interpose, which is entirely consistent with *Brown v. Brash* (2)] it follows that if and when he so does he is relieved from the obligation of giving notice to quit under s. 15 (1) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920. For the reasons stated by my Lord, I do not think that that is a sound proposition."

D It will be seen, therefore, that *King's College, Cambridge v. Kershman* (5) was decided on a much narrower point than was discussed in *Brown v. Brash* (2). It was, however, said by counsel for the plaintiff in the present case that the conflict which (according to him) underlies those two earlier cases came up for consideration before this court in 1950 in *Wiles v. Morse* (6). In that case the defendant, Morse, had been the tenant. He quarrelled with his wife and left the premises in 1941, his wife remaining there. In 1949 husband and wife were divorced, Mrs. Morse became Mrs. Farnol, and she continued to occupy the premises with her new husband, Mr. Farnol. So far as I can discern from the note of the judgment of SOMERVELL, L.J., the point which this court really decided was limited to this, that the mere fact that Mrs. Morse, as a result of the decree absolute, ceased to be Mr. Morse's wife, did not automatically and of itself put an end to her occupation on behalf of Mr. Morse. I add also

E

F that according to the report (though it is said that this sentence is not in accordance with the argument), SOMERVELL, L.J., said:

"Mr. Morse was still saying: 'I am your statutory tenant', and, in these circumstances, the fact that the plaintiffs called and accepted rent due under a statutory tenancy from Mrs. Morse did not seem . . . any evidence . . . which would establish a new relation of landlord and tenant."

G I do not, therefore, think that anything in this report runs counter to what I have said.

I come back then to the question with which I started: Has the plaintiff in this action established such a right to, or interest in, the land as will support an action for trespass? I think that he has failed because, on principle, and particularly having regard to the careful language of ASQUITH, L.J., in giving the judgment of the court in *Brown v. Brash* (2), he is not in "possession" of the premises in any sense which is relevant to an action for trespass, nor is he capable of maintaining such an action. The learned judge came to the contrary conclusion, basing himself, according to his judgment, on *Boyer v. Warbey* (7), also a decision of this court. But that case, as I think, goes no further than *King's College, Cambridge v. Kershman* (5). In *Boyer v. Warbey* (7) the tenant, who had become a statutory tenant, abandoned the premises in the sense that he left them, went away, and had no intention of returning.

H

The landlord was unwilling to accept the departure as a determination of the tenant's obligation for rent. In due course, the landlord re-let, and the re-letting, of course, put an end to any existing obligation which the tenant was under. In an action by the landlord for rent for the period from when the tenant left the house until the new letting, counsel for the tenant contended that the landlord's claim should have been for damages for the failure of the tenant to comply with the statutory obligation to give the notice imposed by s. 15 (1) of the Act of 1920. *Prima facie*, there is no difference between the two claims, for the damages would be measured by the rent, but the point of the contention was that counsel for the tenant sought to show that the landlord had failed to mitigate the damages. On a number of grounds, including the ground that the point had not been taken in the court below, this court rejected the tenant's appeal on this point. True, DENNING, L.J., following *King's College, Cambridge v. Kershman* (5), expressed the view (*ante*, p. 274) that, until an effective notice had been served or the statutory tenancy was otherwise determined by surrender by operation of law, the obligation to pay rent continued. Whether the correct form of claim is for rent or for damages for breach of the statutory obligation may some day have to be further considered, but, for the purposes of this case, it does not, I think, matter. We are not concerned with what may be the rights and duties persisting between the landlord and the plaintiff. We are only concerned with the point whether the plaintiff has established a sufficient foundation for his action of trespass.

Counsel for the plaintiff further contended that, since the defendant's presence on the premises must be attributed to a licence given by the plaintiff, it followed that the plaintiff was still in possession, so to speak, in the person of his licensee. Again, I think that for the purposes of these Acts such a conclusion would be in conflict with the reasoning of ASQUITH, L.J., in *Brown v. Brash* (2). In the passage which I have already cited, he makes it, in my judgment, clear that, in order that a statutory tenant may be said to retain possession through the medium of an occupying licensee, the latter must be his licensee "with the function of preserving the premises for his own ultimate home-coming". A person in the defendant's position, according to the facts of this case, seems to me not to qualify as such a licensee. Therefore, in my opinion, the plaintiff has failed to establish a sufficient right or interest in the property to maintain an action for trespass. In the result, and without going further into the many matters which have been put before us, I think, with all respect to the learned judge, that he should not have made the order for possession which he did, but that he should have dismissed the action. In my judgment, therefore, this appeal should be allowed.

BIRKETT, L.J.: I agree entirely with the judgment of SIR RAYMOND EVERSHERD, M.R. The real contention of counsel for the plaintiff was that the plaintiff was still a statutory tenant and that that position gave him the authority and the necessary power to bring this action against the defendant for possession of 17 Buckingham Road. [HIS LORDSHIP summarised the facts and continued:] The finding by the learned judge was:

"The plaintiff left the premises in 1949 and did not leave any of his property there. The furniture in the part of the premises occupied by her belonged to the defendant . . . The plaintiff was not sure when he left whether he intended to return but subsequently he re-married and on his re-marriage if not before he ceased to have any intention of returning to the premises."

On the face of it, it would be difficult to maintain the position that the plaintiff was still the statutory tenant, and I agree with my Lord that it would be impossible to support the contention of counsel for the plaintiff without flying in the face of the careful decision in *Brown v. Brash* (2). That judgment, if I may say so with the greatest respect, bears evidence of the extreme care

with which it had been prepared, and it is obvious that it was intended to make the law as clear as it could be made on a very difficult part of the Rent Restrictions Acts. The facts in that case differ from those in the present case, and, therefore, counsel for the plaintiff sought to distinguish it, but I do not think it can be done. The material words are ([1948] 1 All E.R. 925): "We are of opinion that a 'non-occupying' tenant *prima facie* forfeits his status as a statutory tenant". On the findings of fact and the evidence in the present case it is clear that, when the action was heard by the county court judge, the plaintiff was "a non-occupying tenant", in the fullest sense of those words.

In seeking to distinguish the present case from *Brown v. Brash* (2) counsel for the plaintiff relied on the wording of s. 15 (1) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920. [HIS LORDSHIP read the sub-section, and continued:] Counsel for the plaintiff contended that, as the plaintiff had not given the notice required by s. 15 (1), it was impossible for him to divest himself of his character as a statutory tenant. I do not propose to enter into the question of the relationship between the plaintiff and his landlord. I am prepared to agree that some nice, interesting, delicate and difficult questions may arise, but I think the only question to be determined in this case is: On the face of this case before the learned county court judge, was the plaintiff in a position to sue the defendant successfully in trespass because of her presence in the house? I do not think he was, and I think that that is sufficient to determine the case. I, therefore, agree that this appeal ought to be allowed.

ROMER, L.J.: I also agree and have very little to add. It was part of the argument of counsel for the plaintiff that the mere installation by a statutory tenant of a licensee in the premises is sufficient to preserve the tenant's right of protection under the Rent Restrictions Acts. I think that it is not possible to accept that submission without running counter to the decision of this court in *Brown v. Brash* (2). ASQUITH, L.J., in delivering the judgment of the court, laid down five propositions, the fourth being as follows ([1948] 1 All E.R. 926):

"Notwithstanding an absence so protracted [by the tenant] the authorities suggest that its effect may be averted if he couples and clothes his inward intention with some formal, outward, and visible sign of it, i.e., instals in the premises some caretaker or representative, be it a relative or not, with the status of a licensee and with the function of preserving the premises for his own ultimate home-coming."

It seems to me that the submission of counsel, to which I have referred, if it be right, would have required in that proposition only the use of the following language, "for example, instals in the premises . . . a licensee". The rest of the words which ASQUITH, L.J., used as a qualification, and as, in my opinion, an essential part of that proposition, could, in that case, have been omitted, but their presence suggests forcibly, and, indeed, irresistibly, to my mind, that it was not merely the installation of a licensee that was regarded as being of importance, but the installation of a licensee with a particular function, viz., the function of preserving the premises for the tenant's home-coming. Unless this can be postulated of a caretaker and he has that function to discharge, then his presence in the house is of no avail to the statutory tenant. Accordingly, I cannot accept the submission of counsel for the plaintiff to the contrary.

The only other point which I should like to mention is what, at first sight, might appear to be something of an anomaly. It was held by this court in *Boyer v. Warbey* (7) that, if a statutory tenant abandons possession without giving the requisite notice to his landlord, he continues liable to pay rent or to make payments in the nature of rent. The result of our view is that that obligation is not accompanied by any corresponding right or interest sufficient to entitle the tenant to bring an action for trespass in relation to the premises. The result may be unexpected, but it is one, as I think, that arises out of the

very special and artificial position of a statutory tenant and the application to such a tenant of the language of s. 15 (1) of the Act of 1920. I agree that the appeal should be allowed. *Appeal allowed.*

Solicitors: *Montagu's and Cox & Cardale* (for the defendant); *Edgar H. Hiscocks* (for the plaintiff).

[Reported by F. GUTTMAN, ESQ., Barrister-at-Law.]

PRACTICE NOTE.

MINKLEY v. MINKLEY.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Lord Merriman, P., and Collingwood, J.), April 23, 1953.]

Legal Aid—Certificate—Amendment—Appeal by husband against maintenance order—Adultery by wife after making of order—Need to inform legal aid authority—Legal Aid (General) Regulations, 1950 (S.I., 1950, No. 1359), reg. 8 (1), reg. 18 (3).

FOR THE LEGAL AID (GENERAL) REGULATIONS, 1950, reg. 8 (1) and reg. 18 (3), see HALSBURY'S STATUTORY INSTRUMENTS, Vol. 5, pp. 208, 218.

APPLICATION under reg. 18 (3) of the Legal Aid (General) Regulations, 1950, for an order for taxation of costs.

On Dec. 1, 1952, justices made an order under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1949, in favour of the wife on the ground of the husband's desertion. On Dec. 7, 1952, the wife committed adultery. On Dec. 31, 1952, the husband gave notice of appeal to the Divisional Court against the order of Dec. 1 and obtained a civil aid certificate to prosecute the appeal. On Jan. 8, 1953, the wife obtained a civil aid certificate to resist the appeal. On or about Mar. 25, 1953, the fact of the wife's adultery first came to the notice of the wife's solicitors, and they thereupon wrote to the husband's solicitors informing them of it. At the hearing of the appeal counsel for the husband stated that by consent the appeal would be dismissed with no order for costs on the wife's undertaking (i) to apply forthwith for the order of Dec. 1 to be revoked, and (ii) not to seek to enforce the payment of any arrears of maintenance from the date of the adultery. Both parties now applied for taxation of costs in accordance with reg. 18 (3) of the Legal Aid (General) Regulations, 1950.

J. M. Milne for the husband.

J. E. N. Russell for the wife.

LORD MERRIMAN, P.: It strikes me as very odd that parties should allow certificates to stand when it is known that the wife is out of court. Technically, I appreciate, she can still hold the order, but *prima facie* the husband is no longer a deserter from the moment she commits adultery. He is under no liability to pay the maintenance directed by the order of Dec. 1, 1952, which he is entitled to get set aside, although he cannot do so now because the appeal is still subsisting. Yet the wife is to get her costs at the public expense for keeping the appeal subsisting which prevents the order being set aside. It seems to me to be a little topsy-turvy. I cannot see why, when it was known, steps were not taken by the wife's legal advisers.

Russell: I may say that it was because it was an assisted case and costs had been incurred and the case had already been in the list that it was thought proper that it should be mentioned to the court.

LORD MERRIMAN, P.: It was right and proper that the other side should be told that the position had become hopeless, but by the same token I should have thought that the legal aid committee ought to have been put in possession of the facts, and then it would have been for them to say whether or not they would suspend, discharge, or revoke the certificate, and, if so, to

A what extent, to safeguard the costs already incurred, or, at any rate, to avoid any further costs. However, the wife's advisers are here today, and on a solicitor and client taxation their attendance will be allowed. But, if this is the true position, it shows a very great lacuna in the regulations, and I think the attention of the Law Society ought to be directed to it. The simplest way to have done so would have been to tell the committee from whom the certificate was obtained after the wife had put herself in the wrong. That, I think, ought to have been done. Whether there is an obligation under the regulations to do it is another matter, but I should have thought it was implicit that not a tittle of public money ought to have been spent after that moment. The certificate ought to have been amended. The area committee has full power to do it under reg. 8 (1) of the Legal Aid (General) Regulations, 1950. B Instead of leaving it as it was, to resist the appeal, it would have been to get rid of the appeal. That would have safeguarded costs up to the moment at which the certificate was amended. The area committee should have been given the opportunity to amend, I think. The position as it is now is that the certificate in its original form stands. That being so, we feel we have no option but to make an order to tax, but we are directing the associate to communicate with the Law Society about the difficulty which has arisen and we are suggesting C that, on any re-consideration of the regulations, it should be made clearer than it is that the area committee should have been given an opportunity of dealing with the certificate on the new facts. This agreement will be made a rule of court, and there will be an order to tax on both sides. *Order accordingly.*

Solicitors: *J. H. Milner & Son*, agents for *James Young*, Grimsby (for the husband); *Biddle, Thorne & Co.*, agents for *Bradford & Son*, Rotherham, Yorks. D (for the wife). A.T.H.

DORRINGTON v. GRIFF FENDER (SWANSEA), LTD.
AND ANOTHER.

E [COURT OF APPEAL (Sir Raymond Evershed, M.R., Birkett and Romer, L.JJ.), April 22, 23, 1953.]

County Court—Appeal—New trial—Essential matter not considered by county court judge.

F The plaintiff rode his motor bicycle along a minor road and at a junction with the main road he turned left, towards the east. As he did so, he collided with the defendants' lorry, which was being driven westwards along the main road and was on its wrong side of that road, overtaking a second lorry. Hedges obscured the plaintiff's view of the main road from the minor road, and would also prevent the driver of the lorry from observing the plaintiff's approach. The plaintiff was injured and claimed damages. G The county court judge found that the lorry driver had no chance to avoid the plaintiff and said: "The onus is on the plaintiff to satisfy the court that the accident was due to the negligence of the second defendant, and, for the reasons I have given, I am by no means satisfied, and feel bound to draw the inference that the plaintiff's negligence was the cause of the accident". The judge in his judgment expressed no finding in regard to the question whether or not the driver of the lorry was negligent H in overtaking as he approached the road junction. On appeal,

HELD: it was not clear from the judgment that the county court judge had put to himself the question whether the lorry driver was in any degree at fault in driving on the right-hand side of the road at that point, although evidence had been given relevant to that consideration, and, while it could not be said that the judge's finding was perverse, the case should be remitted for re-trial, but at the request of the parties would be dealt with by the Court of Appeal.

AS TO JURISDICTION OF COURT OF APPEAL TO ORDER RE-TRIAL, see HALSBURY, Halsham Edn., Vol. 8, p. 386, para. 822, and 1952 Supp.; and FOR CASES; see DIGEST, Vol. 13, p. 514, Nos. 629-633.

Case referred to:

(1) *Foster v. Bush House*, (1952), The Times, Oct. 21.

APPEAL by the plaintiff from an order dated Feb. 16, 1953, of His Honour JUDGE THOMAS sitting at Chepstow County Court.

The plaintiff claimed damages for negligence against the owners of a lorry and their driver in respect of injury suffered by him in a collision with the lorry. JUDGE THOMAS found that the lorry driver had no opportunity to avoid the plaintiff, who was negligent, and dismissed the action.

Edgedale, Q.C., and *Platts-Mills* for the plaintiff.

W. H. Griffiths for the defendants.

SIR RAYMOND EVERSLED, M.R.: The plaintiff was riding a motor bicycle coming into the main road from Netherend and Woolaston Common in South Wales along a side road called Netherend Road. It was his intention when he reached the main road to turn along his own side of the road eastwards towards Gloucester. At this time (it was early in the morning) there was proceeding in a westerly direction, i.e., from Gloucester, a lorry laden with bricks followed by another lorry, the property of the first defendants in this action. Shortly before these lorries came opposite to the entry to Netherend Road into the South Wales main road, the first defendants' lorry, driven by the second defendant, crossed to the right-hand side of the road in order to pass the lorry laden with bricks. He was on his right-hand side of the road at the time that the plaintiff on his motor bicycle emerged from Netherend Road and the collision took place. The plaintiff brought the present proceedings in the Chepstow County Court claiming damages for negligence. There was no counterclaim and the question, therefore, was: Could the plaintiff establish that the damage was attributable to the negligence of the second defendant? In considering that matter, having regard to the Law Reform (Contributory Negligence) Act, 1945, the judge had also to consider the possibility that both the plaintiff and the second defendant were at fault. If he came to that conclusion, then he would have had to consider in what degree (each vis-à-vis the other) they were at fault.

At the trial, evidence was given by the plaintiff, and, on the defendants' side, by the driver of the first defendants' lorry, a Mr. Fender, the second defendant, and also by the driver of the lorry laden with bricks, a Mr. Powell. There was also evidence of a police constable who was not there at the time of the accident, but went there shortly afterwards. It was the plaintiff's case, according to his evidence, that he had already emerged from the Netherend Road when the second defendant entered on his manoeuvre of passing, that the collision took place some few yards on the eastern side of the point of junction, and that he, the plaintiff, had been carried forcibly back by the lorry to the point of junction of the two roads. That explanation on the plaintiff's part the learned judge rejected. He found, in other words, that the collision took place just as the plaintiff emerged from the Netherend Road, from which finding it followed that at that point the defendants' lorry was on the lorry driver's right-hand side of the road actually passing the brick-laden lorry.

I will turn at once to the short note of the learned judge's judgment, and I think, in all the circumstances, I will read it in full.

"The plaintiff's claim is based on his evidence that he emerged from the Netherend Road into the major road and he got, as it were, a few yards round the corner when the defendants' van, which was following another vehicle, turned out to pass the other vehicle, and in doing so scraped alongside the motor cycle, leaving marks on the van and resulting in the fracture of the plaintiff's right hand and causing damage. The case

A for the defendants is that while driving along the main road the driver saw nothing emerging from the minor road and the accident according to the bang must have occurred right at the opening of the road rather than several yards on as indicated by the plaintiff. The police constable in his evidence according to the marks he found on the road was satisfied that the end of the plaintiff's transit [i.e., the end of his own voluntary passage on the motor bicycle] fell short, by several yards, of the position marked on the map. The great difficulty the plaintiff is in is that a much higher duty of care rested on any driver of a vehicle emerging into the main road. It is not enough for him to chance getting in between these vans by emerging from this minor road unless reasonably satisfied that the main road is clear and perfectly safe to go out. The facts speak for themselves. There were two vehicles coming. As he emerged (allowing for his case) but a few yards, they had no chance to avoid him. I feel bound to find on the evidence of the defendants' witnesses, and I do find as a fact, that the collision occurred three feet in the road itself and not on the grass verge a few yards up. I find it incredible that after the accident the plaintiff remained mounted on his motor bicycle and was taken back to the spot indicated by the police constable as the end of his journey. The onus is on the plaintiff to satisfy the court that the accident was due to the negligence of the second defendant and, for the reasons I have given, I am by no means satisfied, and feel bound to draw the inference that the plaintiff's negligence was the cause of the accident."

D Counsel for the plaintiff has challenged the validity of that judgment, broadly speaking, on this ground. He says that on the face of the judgment it is an irresistible inference that the judge applied his mind to the question whether the plaintiff's story was true that the impact occurred, not actually at the corner of the road, but at some distance further along it: that he found on that matter against the plaintiff, whose evidence he did not accept: that he then put to himself this point and this point only—the plaintiff having run into the defendants' lorry at that point, could the second defendant have avoided the accident, for, if not, the plaintiff was solely to blame. Put in another way, the matter can be stated, according to the argument of counsel for the plaintiff, thus: The onus is on the plaintiff to satisfy the court that the accident was due exclusively to the negligence of the second defendant, and, because I disbelieve the plaintiff's explanation, I draw the inference that the plaintiff exclusively was to blame. It is obvious from that recital (if it is a fair representation of the judgment) that the judge never put to himself the question whether, apart from the plaintiff's careless act in emerging from the side road, the second defendant was at fault in being where he was at all? I must emphasise at once two things, first, that in this court, where a judge of the county court has found facts on some admissible evidence, this court cannot and will not disturb the finding, and, secondly, this court will not lightly assume, because a judge's note is necessarily somewhat brief, that he has failed to bear in mind an essential point which he had to determine. Still, on the other side, it is no less important in the public interest, not only that justice should be done, but that it should manifestly appear to be done. This court can only deal with the cases presented to it from the county court on the basis of the learned judge's judgment as it is in fact delivered or recorded.

H Bearing all those matters in mind, I for my part am unable to avoid the conclusion that the essential point which I have stated, viz.: Was the second defendant to blame for being where he was when he was?, was never considered by the learned judge. There was evidence given which was vital to a consideration of that question. Thus, the second defendant stated that the driver in front gave him the overtake signal, and that particular observation is underlined by the judge. It is significant that the driver of the other lorry, Powell,

did not (according to the note of his evidence) so state and, according to junior counsel for the plaintiff, who was present at the trial, the second driver did not in fact recall giving that signal. It may be that the learned judge came to the conclusion, though he does not so find, that the overtake signal was given, and if he did intend so to find or so thought, and if because it was given he thought that, therefore, the defendants were wholly exonerated, he would, in my judgment, have misdirected himself. It may or may not be an exoneration from blame that one has been given a signal to overtake, but, in my judgment, the mere fact that one has been given such a signal is not itself conclusive. In the course of cross-examination, the second defendant also said that he knew there was a turning on the right. That statement is not underlined by the judge, and, again, there is no finding on it. So far as the turning is concerned, it appears from the plan (and it is not in dispute between the parties) that the road itself is obscured by high hedges and, since the accident occurred in May, the hedges would be covered with leaves. It follows that somebody proceeding on the main road would not see a small vehicle come out of Netherend Road. Equally, somebody proceeding along Netherend Road would not see what might be passing on the main road to his left. In all the circumstances of the case, I cannot myself be satisfied that the essential point, viz., the question whether the second defendant was to some extent at fault in passing where he did, was put to himself by the judge. It is not here a question of departing from a judge's finding of fact as in the case to which counsel for the defendants referred, *Foster v. Bush House* (1), or, indeed, of saying that the finding of the judge was perverse. It is a case in which, it seems to me, on the face of the judgment, that this court cannot be satisfied that the essential matter was ever put to himself and considered by the judge at all. I think it must be plain from the evidence that where a driver knows of a blind intersecting road—by which I mean a road the mouth of which is wholly or partially obscured by hedges—he must owe some duty of care if he is considering passing other vehicles. He is not bound to take account of extravagant and reckless behaviour, but he would (I should have thought) be bound to take account of the ordinary chances of mankind, e.g., that a child might come out of Netherend Road. If, therefore, the matter rested there alone, I should feel myself compelled to say that this appeal must succeed and that the right answer would be to remit the case in accordance with the practice of this court, which involves no reflection whatever on the learned county court judge, to another judge on the same circuit for re-trial. That, in default of some agreement between the parties which would render it unnecessary, should, in my judgment, be the order made, but I understand in this case that the parties may desire to avoid costs and concede that we should, doing the best we can on the recorded note of the evidence, decide whether the second defendant was himself negligent, and, if so, apportion the blame between him and the plaintiff.

BIRKETT, L.J.: I agree and I really do not need to add very many words to the judgment which has been just delivered, but we happen to be differing from the county court judge in a running-down case where, as a general rule, the doctrine is that the facts found by a county court judge conclude the matter. I must say that I had very great sympathy and agreed with most of the argument addressed to this court by counsel for the defendants in his presentation of the case. It is, I think, important that what I call the sanctity of the findings of county court judges should be maintained. They see the witnesses, they get what counsel for the defendants called the atmosphere, which is not possible in the Court of Appeal, and, speaking generally, as my Lord said, it is highly important that that doctrine should be firmly upheld. I listened with what I might call disinterested detachment to the recital of *Foster v. Bush House* (1), where counsel for the defendants confronted the Master of the Rolls and ROMER, L.J., with words they had spoken on a former

occasion. I must say for myself that the distinction between that case and this case is that there was no doubt whatever that the learned judge had considered all the relevant facts. In this case it is said that one most material and relevant fact had never been considered at all. Speaking generally, I agree with the propositions put forward by counsel for the defendants on that important matter regarding the findings of fact by the county court judge. I also agree with him in that I do not think that an *ex tempore* judgment of a county court judge should be looked on with too censorious an eye. I think it ought to be rather a benevolent eye. Everybody knows the difficulty, in an *ex tempore* speech, of including everything one intended to say. It ought not to be supposed on such a subject that, when some element is omitted, it has never been in the consideration of the judge at all. The very important matter on which I disagree with counsel for the defendants is that the ground of the decision quite plainly was that the cause of the accident was solely the negligence of the plaintiff. The wording of the judgment is not free from some ambiguity:

“The onus is on the plaintiff to satisfy the court that the accident was due to the negligence of the second defendant and, for the reasons I have given, I am by no means satisfied, and feel bound to draw the inference that the plaintiff’s negligence was the cause of the accident.”

That is negating the negligence of the defendants, and it would appear from the judgment that the way that was done was this, if I may put it in my own way. The judge was saying: “I have considered this case and, in my judgment, the accident was caused in this way: it was entirely due to the plaintiff, because he emerged from this road into the main road and the second defendant had no chance to avoid him”. That, in my judgment, is only a partial view of the situation. I think that a very important matter was how came the second defendant to be there? He was admittedly on the wrong side of the road and, in the ordinary way, people emerging from a side road do not expect to find people on the wrong side of the road. As these things happen in the twinkling of an eye, it may very well be that a child emerging from the side road might be terribly taken by surprise by the fact that, on the wrong side of the road, there was a great lorry. I think a very vital question for the county court judge was not whether there was any chance to avoid the plaintiff, but whether it was not negligent for the lorry to be there at all. Reading the judgment of the judge, as I say, with a benevolent eye, as I would wish to do because of the considerations I have mentioned, I am bound to say that the conclusion seems irresistible that the judgment did not consider that at all. It was raised in cross-examination, but when the judge came to give his judgment he had this one point, it would appear, in mind: When the plaintiff emerged, the second defendant had no chance to avoid him. I think there was the prior question to which he ought to have addressed his mind. For these reasons, I agree with the judgment announced by my Lord.

ROMER, L.J.: I also agree. The sanctity of the findings of fact of county court judges in this court was very well exemplified in *Foster v. Bush House* (1), and it may be that it has never been exemplified better than it was in that case. For the reasons which my brethren have given, the view at which we have arrived today does not in any way infringe the principle on which that case laid emphasis. As to the rest of the case, I so entirely agree with the conclusions that my brethren have expressed that there is nothing that I can usefully add.

[At the request of the parties, their Lordships apportioned the damage. They held that three-quarters of the blame was attributable to the plaintiff, and the remaining one-quarter to the defendants.] *Appeal allowed.*

Solicitors: *O. H. Parsons* (for the plaintiff); *R. I. Lewis & Co.* (for the defendants).

[*Reported by F. GUTTMAN, Esq., Barrister-at-Law.*]

R. v. AGRICULTURAL LAND TRIBUNAL FOR THE WALES
AND MONMOUTH AREA. *Ex parte* DAVIES.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Lynskey and Parker, JJ.),
April 23, 1953.]

*Agriculture—Agricultural holding—Notice to quit—Consent of Minister—
Exercise of discretion—Matters for consideration—Agreement by landlord
to pay tenant compensation—Relevance—“In the interests of efficient
farming”—Agricultural Holdings Act, 1948 (c. 63), s. 25 (1) (a).*

By the Agricultural Holdings Act, 1948, s. 25 (1), the Minister of Agriculture and Fisheries is given a discretion to withhold his consent to the operation of a notice to quit an agricultural holding notwithstanding that the case falls within para. (a) to para. (e) of the sub-section. The discretion is exercisable only in favour of the tenant, and there is no ground on which discretion can be exercised in favour of the landlord so as to enable the Minister, or the Agricultural Land Tribunal on an appeal from the Minister, to consent to the operation of a notice to quit although none of the circumstances set out in para. (a) to para. (e) exists.

The words “in the interests of efficient farming”, in s. 25 (1) (a) of the Act of 1948, refer only to the farming of the holding to which the notice to quit relates, and a tenant cannot be required to vacate that holding on the ground that the landlord is unable to farm efficiently the land which is in his own occupation and could better farm the tenant's holding.

As s. 25 (1) contains no reference to a monetary bargain between the parties, an agreement between the landlord and the tenant that the tenant will vacate the holding on payment of compensation is irrelevant to the question whether the Minister, or the Agricultural Land Tribunal, should consent to the operation of a notice to quit.

FOR THE AGRICULTURAL HOLDINGS ACT, 1948, s. 25 (1), see HALSBURY'S STATUTES, Second Edn., Vol. 28, p. 48.

MOTION for an order of certiorari to bring up and quash a decision of the Agricultural Land Tribunal for the Wales and Monmouth Area, dated Nov. 3, 1952, in respect of a notice to quit an agricultural holding.

The applicant was the tenant of an agricultural holding known as Blaenllyn Farm, Llandyssul, in the county of Cardigan. On Sept. 19, 1951, he received a notice to quit, signed by D. R. Evans and T. Evans as landlords. They said that the reason for giving the notice was that they were leaving their present farm which was being sold and they required the holding for their own occupation. The tenant having served a counter-notice under the Agricultural Holdings Act, 1948, s. 24 (1), D. R. Evans and T. Evans applied for the consent of the Minister of Agriculture and Fisheries to the operation of the notice to quit. It was not disputed that the farming of the holding was satisfactory, and, therefore, s. 25 (1) (a) of the Act did not arise for consideration. On June 23, 1952, the Cardiganshire Agricultural Executive Committee, acting on behalf of the Minister, decided to withhold consent as the landlords had not made out a case of hardship under s. 25 (1) (d) of the Act. D. R. Evans and T. Evans appealed to the Agricultural Land Tribunal. At the hearing before the tribunal it appeared that in 1948 T. Evans had conveyed Blaenllyn Farm (the holding) to his son, D. R. Evans, and, therefore, the ground of hardship did not arise, as the same person was not landlord at the material times for the purpose of s. 25 (1) (d). On behalf of D. R. Evans and T. Evans it was submitted, inter alia, that they were unable to run their present farm efficiently for a number of reasons, including lack of labour and the age of T. Evans. In giving their consent to the operation of the notice to quit, the tribunal said that they exercised their discretion in favour of the present owner under s. 25 (1) (a) of the Act of 1948. They also took into consideration negotiations between

the landlord and the tenant for the tenant to relinquish the tenancy on receiving compensation. The tenant applied for an order of certiorari on the grounds, inter alia, (i) that the abortive attempt at settlement was wholly irrelevant to any question under s. 25 (1) (a), (ii) that the tribunal purported to exercise a general discretion which was not warranted by the Act, and (iii) that they did not find any of the matters which it was necessary to find to enable them to give consent under s. 25 (1) (a).

A

Lloyd-Jones, Q.C., and Plume for the tenant.

H. Edmund Davies, Q.C., and J. C. Rogers for the tribunal.

Wingate-Saul for the Minister of Agriculture and Fisheries.

LORD GODDARD, C.J., stated the facts and continued: By the Agricultural Holdings Act, 1948, s. 24 (1):

B

"Where notice to quit an agricultural holding or part of an agricultural holding is given to the tenant thereof, and not later than one month from the giving of the notice to quit the tenant serves on the landlord a counter-notice in writing requiring that this sub-section shall apply to the notice to quit, then, subject to the provisions of the next following sub-section, the notice to quit shall not have effect unless the Minister consents to the operation thereof."

C

Section 25 (1) of the Act provides:

D

"Without prejudice to the discretion of the Minister in a case falling within para. (a) to para. (e) of this sub-section, the Minister shall withhold his consent under the last foregoing section to the operation of a notice to quit an agricultural holding or part of an agricultural holding unless he is satisfied—(a) that the carrying out of the purpose for which the landlord proposes to terminate the tenancy is desirable in the interests of efficient farming, whether as respects good estate management or good husbandry or otherwise; or . . . (d) where the tenancy was created before [Aug. 6, 1947], and the same person was landlord at the beginning of that day as at the time when the notice to quit was given, or, if the application for the Minister's consent is made before giving the notice to quit, at the time of the application, that greater hardship would be caused by the Minister's withholding than by his granting his consent to the operation of the notice."

E

By s. 25 (4) an appeal from the decision of the Minister lies to the Agricultural Land Tribunal.

F

In this case the question of hardship, under s. 24 (1) (d), was argued before the Cardiganshire County Agricultural Executive Committee, acting on behalf of the Minister, but at the hearing before the Agricultural Land Tribunal it emerged that there was a change of landlord in 1948, and, therefore, s. 24 (1) (d) could not apply. The tribunal apparently thought that the words "in the interests of efficient farming" in s. 25 (1) (a) entitled them to consider, not merely the efficient farming of the holding to which the notice to quit related, but also the efficient farming of the property which the landlord was occupying at the time when he gave the notice to quit. They thought that, if the landlord could not farm efficiently the land which was in his own occupation, the tenant, who was farming efficiently, could be required to vacate his holding. That is contrary to the intention and to the proper construction of s. 25 (1) (a). The words in s. 25 (1) (a),

G

H

" . . . the carrying out of the purpose for which the landlord proposes to terminate the tenancy is desirable in the interests of efficient farming . . .",

must mean the efficient farming of the holding to which the notice to quit relates, and it seems to me extraordinary that the tribunal should have thought the contrary.

With regard to the discretion conferred on the Minister by s. 25 (1), the opening words of the sub-section are:

“Without prejudice to the discretion of the Minister in a case falling within para. (a) to para. (e) of this sub-section . . .”

When one reads the sub-section with care, it is clear what those words mean. The sub-section provides that, before giving his consent, under s. 24 (1), to the operation of a notice to quit, the Minister must be satisfied that the case falls within para. (a) to para. (e) of s. 25 (1), but, even if the case does fall within one of those paragraphs, he is given a discretion to withhold his consent. In other words, even if the Minister finds certain facts, e.g., bad farming on the part of the tenant, which would entitle him to give his consent to the operation of the notice, he may, in the exercise of his discretion, determine not to do so. He has not got a discretion to give his consent to the operation of the notice to quit if none of the circumstances set out in para. (a) to para. (e) exists. For the purposes of certiorari, we have to look at the decision of the tribunal, which is in these terms:

“That the [landlord's] version regarding the tenant's decision or agreement to relinquish the tenancy in consideration of the sum of £500 by way of compensation is accepted. Despite the fact that the method of farming of the said holding of Blaenllyn was not in dispute, and that the question of hardship could not arise under the provisions of s. 25 (1) (d) of the Agricultural Holdings Act, 1948, because the same landlord was not in existence at the material times, possession, having regard to all the circumstances, ought to be given to the present owner. Discretion is exercised in favour of the present owner under s. 25 (1) (a) of the said Act, and the appeal is allowed.”

There is, however, no ground on which discretion can be exercised in favour of the landlord. The discretion conferred by s. 25 (1) can be exercised only in favour of the tenant, and, therefore, for this reason also, the decision of the tribunal cannot stand.

There is a third ground on which this court could grant an order of certiorari, as it is clear on the face of the decision that the tribunal have taken into consideration a fact which is entirely irrelevant. From the affidavits which explain the opening sentence of the decision it appears that there had been negotiations for a settlement between the parties, and, according to the landlord, the tenant had agreed to vacate the holding if he was given the sum of £500. If there were an independent agreement between the parties, an action could, perhaps, be brought to enforce it—I do not express any opinion on the point—but that is not a matter which was relevant to the question whether or not the Minister, or the tribunal, should consent to the operation of the notice. Consent can only be given subject to the provisions of s. 25 (1) of the Act of 1948, and there is nothing in that sub-section about a monetary bargain between the landlord and the tenant. For these reasons, certiorari must go, and the tribunal, who appeared here to contest the case, must pay the costs.

LYNSKEY, J.: I agree.

PARKER, J.: I also agree.

Certiorari granted.

Solicitors: *Ellis & Fairbairn*, agents for *James Jones, Son & Francis*, Llandyssul (for the tenant); *T. D. Jones & Co.*, agents for *J. C. Williams & Roberts*, Carmarthen (for the tribunal); *Solicitor, Ministry of Agriculture and Fisheries*.

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

WYATT v. WYATT (by her guardian).

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Karminski, J.), April 1, 1953.]

Divorce—Insanity—Period of care and treatment—Temporary patient—Absence on trial—Purported discharge by superintendent of hospital—Subsequent treatment as voluntary patient—Matrimonial Causes Act, 1950 (c. 25), s. 1 (1) (d), s. 1 (2) (a) (d).

- A** On Dec. 27, 1946, the wife entered a mental hospital as a temporary patient for a period of six months, which was extended for two further periods of three months. On Nov. 18, 1947, she returned home on trial. On Nov. 24, 1947, the medical superintendent wrote to the husband: "As your wife has now been at home for nearly a week, we are today discharging her from our books." On Nov. 25, 1947, the medical superintendent signed a notice to the Board of Control stating inaccurately that the wife had been discharged on Nov. 24, 1947, on the authority of the husband. On Dec. 3, 1947, the wife signed a form that she was willing to undergo treatment as a voluntary patient and on Dec. 4 she returned to the hospital and had remained there ever since. On a petition by the husband, dated June 25, 1952, under s. 1 (1) (d) of the Matrimonial Causes Act, 1950, for dissolution of the marriage,
- B**
- C**

HELD: under the Mental Treatment Act, 1930, s. 5 (14) (i) and s. 5 (15), and the Mental Treatment Rules, 1930, r. 39 (1), only the Board of Control or the husband could order or obtain the discharge of the wife from the hospital, and so the purported notice of discharge by the superintendent dated Nov. 25, 1947, was a nullity; the wife remained a temporary patient until the expiry of the period of treatment on Dec. 26, 1947, from which date, by reason of her consent to be a voluntary patient on Dec. 3, 1947, she remained in the hospital as a voluntary patient; and, therefore, she had been continuously under care and treatment within the meaning of s. 1 (1) (d) of the Act of 1950, for a period of five years immediately preceding the presentation of the petition, and the petition would be allowed.

- E** **EDITORIAL NOTE.** The Mental Treatment Rules, 1930 (S.I., 1930, No. 1083) ceased to have effect on July 5, 1948, and on that date were superseded by the Mental Treatment Rules, 1948 (S.I., 1948, No. 1071), r. 39 of the old rules becoming r. 23 of the new rules.

- F** FOR THE MATRIMONIAL CAUSES ACT, 1950, s. 1, see HALSBURY'S STATUTES, Second Edn., Vol. 29, pp. 389, 390; FOR THE MENTAL TREATMENT ACT, 1930, s. 5 (14), see *ibid.*, Vol. 17, p. 1236.

Case referred to:

- (1) *Benson v. Benson*, [1941] 2 All E.R. 335; [1941] P. 90; 110 L.J.P. 43; 165 L.T. 172; 27 Digest, Replacement, 371, 3065.

- G** PETITION by the husband for dissolution of the marriage on the ground that the wife was incurably of unsound mind and had been continuously under care and treatment for a period of at least five years immediately preceding the presentation of the petition.

- The parties were married in 1932. In October, 1938, the wife became ill and from then onwards her mental health got worse. On Dec. 27, 1946, she was admitted as a temporary patient at a mental hospital, originally for a period of six months which was extended for two further periods of three months. On Nov. 11, 1947, the husband, who was anxious that the wife should come home on trial, wrote to the medical superintendent: "I am sure one can only try this out and see how she reacts to the change of surroundings". On Nov. 18, 1947, the wife returned home. On Nov. 24, 1947, the medical superintendent wrote to the husband: "As your wife has now been at home for nearly a week, we are today discharging her from our books." On Nov. 25, 1947, the medical superintendent signed a document giving notice to the Board
- H**

of Control that the wife was discharged on Nov. 24, 1947, and that the discharge was effected on the authority of the husband. On Dec. 3, 1947, the wife, who had occasional lucid intervals, signed a form that she was willing to undergo treatment at the hospital, and on Dec. 4 she returned to the hospital and had been there ever since.

Simon, Q.C., and *Victor Williams* for the husband.

Horner for the wife's guardian.

KARMINSKI, J.: This is a petition by a husband for the dissolution of his marriage on the ground that the wife is incurably of unsound mind and has been continuously under care and treatment for a period of at least five years immediately preceding the presentation of the petition. The petition was presented on June 25, 1952. The wife, by her guardian, the Official Solicitor, denies the incurable unsoundness of mind and, in particular, it is denied on her behalf that she has been continuously under care and treatment for a period of five years immediately preceding June, 1952. It is affirmatively alleged on her behalf that she was discharged from her status as a temporary patient with effect from Nov. 24, 1947, and was not admitted as a voluntary patient until Dec. 4, 1947. In the alternative, it is said she was not discharged from her temporary status on Dec. 4, 1947, and, further, that she was not admitted as a voluntary patient on Dec. 26, 1947, or at all. The real point of this case, as I understand it, is whether the wife was in fact, discharged from temporary treatment on Nov. 24 or 25, 1947.

[HIS LORDSHIP stated the facts and continued:] On the evidence before me I have no doubt whatsoever that in the present state of medical knowledge the wife has no prospect of recovery from her present mental disorders. She has been under treatment for a very long time now, she has a long history of mental disorder and I am satisfied that the opinion given without hesitation by the medical superintendent is correct. I have to consider what the petitioner has to prove in a case of this kind. Under s. 1 (1) (d) of the Matrimonial Causes Act, 1950, the court can grant a decree on the ground that the respondent is incurably of unsound mind and has been continuously under care and treatment for a period of at least five years immediately preceding the presentation of the petition. Five years in this case must, of course, go back to June, 1947. The care and treatment requirements are defined by s. 1 (2) of the Matrimonial Causes Act, 1950, which reads:

" . . . a person of unsound mind shall be deemed to be under care and treatment:—(a) While he is detained in pursuance of any order or inquisition under the Lunacy and Mental Treatment Acts, 1890 to 1930 . . ."

or various other Acts which are of no relevance here. Pausing here, for a moment, it is not contested on behalf of the Official Solicitor that the direction for the extension of the period of temporary treatment was an order for detention within the meaning of s. 1 (2) (a). That point was decided in *Benson v. Benson* (1). Section 1 (2) (d) of the Act of 1950 provides that the person shall be deemed to be under care and treatment

"while he is receiving treatment as a voluntary patient under the Mental Treatment Act, 1930, or under any such law as is mentioned in para. (c) of this sub-section, being treatment which follows without any interval a period during which he was detained as mentioned in para. (a), para. (b) or para. (c) of this sub-section; and not otherwise."

It is contended on behalf of the husband that the wife's admission as a voluntary patient followed immediately on her treatment under a temporary order and I come now to what seems to me the main point in this case: Was the notice of discharge signed by the medical superintendent on Nov. 25, 1947, a discharge within the statute or was it a nullity? I am bound to say, without any real hesitation, that I think it was a complete nullity.

The statutes dealing with persons of unsound mind are full and complex and must be strictly applied. The provisions for temporary treatment without certification are contained in s. 5 of the Mental Treatment Act, 1930. That is a very long section with seventeen sub-sections, in turn each of some length, but they define the powers to discharge a person received as a temporary patient. Sub-section (14) says:

- A "The Board of Control may at any time order—(i) that any person received as a temporary patient shall be discharged; or (ii) that steps shall be taken to deal with him under the principal Act as a person of unsound mind,"

- B and sub-s. (15) relates back to s. 72 of the Lunacy Act, 1890 (as substituted by the National Health Service Act, 1946, s. 50 and sched. IX, Part I) which provides that the person who applied for their temporary treatment can also apply for their discharge.

I turn now to the rules made under the Act of 1930. Under r. 39 of the Mental Treatment Rules, 1930:

- C "(1) A private temporary patient detained in an institution, hospital or nursing home or under care as a single patient shall be discharged if the person on whose application the patient was received as a private patient by writing under his hand so directs. (3) If there is no person qualified to direct the discharge of a patient under this rule, or no person able and willing to act, the Board may order his discharge."

- D There is, to my mind, no doubt that the only people who can get the discharge of a temporary patient are (i) the applicant, in this case the husband, or (ii) the Board of Control. The Board of Control certainly did not apply for the discharge, nor, in fact, did the husband, although the notice of discharge given to the Board of Control quite wrongly says that he did. The printed form says the discharge was effected "on the authority of"—and there was typed in the words "the applicant". That was quite wrong. I am satisfied, and, indeed, it has never been suggested otherwise, that the husband here never asked for the wife's discharge as a temporary patient. What he did do was to get her sent out on trial under a different enactment—s. 55 of the Lunacy Act, 1890. It is not contended that absence on trial which is, in fact, part of the treatment, breaks the sequence of detention. It is argued also by counsel for the Official Solicitor, that, even if there were no effective discharge, the notice of admission of Dec. 4 was invalid, as the wife was still detained as a temporary patient up to Dec. 26, 1947. I am bound to say that I have some difficulty in following the force of that argument. On the view I have taken of this matter the order of discharge purported to have been made was a nullity and the wife remained a temporary patient under the valid existing order. The fact that she signed on Dec. 3 a consent to be a voluntary patient and was, in fact, received back into the hospital as a private voluntary patient on Dec. 4, does not, in my view, affect the situation at all. If there were no proper discharge on Nov. 25, the temporary treatment come to an end on Dec. 26, and not, as I think, on Dec. 4. The fact that she had applied for admission as, and, in fact, went back to the hospital on Dec. 4 as, a voluntary patient did not terminate the temporary treatment but merely made her continue after Dec. 26 as a voluntary patient and I believe that to be the true position.

That is my view of this case. It is a somewhat novel point which we have had to discuss, and I think it was rightly contested and argued on the wife's behalf by the guardian ad litem, but once I have come to the conclusion that this purported discharge in November was a nullity, I see no further difficulty in the case. I have already said that I never had any difficulty in this case about the prognosis of this unfortunate wife's condition and I find that the

husband has proved the contents of his petition and I pronounce a decree nisi accordingly. *Decree nisi.*

Solicitors: *Withers & Co.* (for the husband); *Official Solicitor.*

[*Reported by A. T. HOOLAHAN, ESQ., Barrister-at-Law.*]

GRINSTED v. HADRILL AND ANOTHER.

[COURT OF APPEAL (Singleton, Jenkins and Morris, L.J.J.), April 16, 17, 20, 21, 1953.]

Practice—Trial—Submission of no case—Time to make submission—Power of judge to enter judgment on case as whole—R.S.C., Ord. 36, r. 39.

In an action tried with a jury a plaintiff claimed (i) damages for fraudulent misrepresentation and (ii) the return of a sum of money which he alleged the first defendant, as his agent, had made as a secret profit. The judge directed the jury on both issues and they returned a verdict for the defendants on the first issue and for the plaintiff on the second issue. Thereafter counsel for the defendants made a submission that there was no evidence to go to the jury on the second issue, and the judge, notwithstanding the jury's verdict, entered judgment for the defendants on both issues.

HELD: (i) counsel who proposes to submit there is no evidence to go to the jury should do so either at the end of the plaintiff's case or when all the evidence is concluded, and, as counsel had made no such submission before the case went to the jury, he ought not to be allowed to succeed on a submission made after they had returned their verdict.

(ii) a judge has power under R.S.C., Ord. 36, r. 39, to enter judgment for a defendant if on the case as a whole a verdict in the plaintiff's favour would be set aside as unreasonable; if, however, a judge considers that the plaintiff has made out a prima facie case against the defendant and for that reason he submits the case to the jury, he ought not thereafter to enter judgment for the defendant unless he would have been justified in directing the jury to find in favour of the defendant: dictum of LORD READING, C.J., in *Skeate v. Slaters, Ltd.* ([1914] 2 K.B. 434), approved. On the facts of the case the jury's verdict on the second issue should be maintained and judgment entered for the plaintiff.

Case referred to:

(1) *Skeate v. Slaters, Ltd.*, [1914] 2 K.B. 429; 83 L.J.K.B. 676; 110 L.T. 604; Digest, Practice, 564, 2226.

APPEAL by the plaintiff from an order of BARRY, J., sitting with a jury, dated Oct. 24, 1952.

The plaintiff, Percy Frank Grinsted, brought an action against the first defendant, Ralph Arthur Hadrill, the managing director of the London and Commercial Investment Co., Ltd., and the company, in which he claimed damages for fraudulent misrepresentation (which issue is not material to this report), and in para. 9 of his statement of claim he alleged:

"Further or alternatively at or about the end of September, 1948, the plaintiff at the first defendant's request paid to the first defendant as the agent of the plaintiff £1,000 for five hundred shares which the first defendant informed the plaintiff was the purchase price to be paid to one Bisiker for such shares. In fact the first defendant paid to the said Bisiker for the purchase of the said shares the sum of £550 and the first defendant or the second defendants or the directors of the second defendants as their agents made an illegal profit of £450 on such transaction."

The plaintiff claimed the sum of £450 as money had and received to his use by the defendants or one of them.

BARRY, J., submitted the question whether the first defendant acted as the plaintiff's agent to the jury who returned a verdict that the defendants should pay to the plaintiff the sum of £500 representing a secret profit of £450 and an additional sum in respect of interest. Counsel for the defendants then submitted that there was no evidence to go to the jury on the issue raised by para. 9 of the statement of claim, and the judge, after hearing further argument on the point, entered judgment for the defendants. The plaintiff appealed.

A *Gardiner, Q.C.*, and *Harold Brown* for the plaintiff.
Phillimore, Q.C., and *Hawser* for the defendants.

SINGLETON, L.J., stated the facts and continued: The point raised by counsel on behalf of the defendants on the second part of the case is really no more than this: Was Hadrill the agent of the plaintiff? That issue was left by the learned judge to the jury who found for the plaintiff. They said that the plaintiff should have from the defendants the sum of £500, representing £450 secret profit less £20 stamp duty, with something added for interest. Thereafter the learned judge heard argument, and counsel for the defendants submitted there was no case on the question of secret profit. The judge reached a conclusion that, notwithstanding the verdict of the jury, he ought to give judgment for the defendants on that issue. Counsel for the plaintiff submits that is wrong, and that the plaintiff is entitled to judgment. He raised before this court a question of procedure of some nicety. He said there had been no submission on this part of the case that there was no evidence to go to the jury, the jury had given their verdict, and, there having been no submission, it was then the duty of the judge to enter judgment for the plaintiff according to the jury's verdict. He submitted further that as counsel for the defendants had not submitted that there was no evidence to go to the jury before the case went to them, he ought not to be allowed to succeed on a submission made subsequently.

Speaking generally, that expresses the view which I hold on this matter. Counsel who proposes to submit that there is no evidence to go to the jury should do so either at the end of the plaintiff's case, or when all the evidence is concluded. If he takes that course, the presiding judge has the matter before him. He knows that counsel has asked him to rule on it, and, even if he thinks that it is better to leave the case to the jury, he has all the elements before him when he is directing them. Counsel for the defendants told us that he would have made a submission on this part of the case, but for the fact that the learned judge told him that the case would have to go to the jury in any event, but, apart from that, I gained the impression from what I have read and heard that counsel for the defendant was encouraged by the summing-up of the learned judge, who indicated that he did not consider there was much evidence in the plaintiff's favour on this part of the case.

I do not think that any question of procedure arises now, but as we have been referred to authorities I think I should say what I believe to be the correct position, as stated in *Skeate v. Slaters, Ltd.* (1). No question of the failure of counsel to submit is raised there, but the duty of the judge is stated quite clearly. If, at the conclusion of a case, the judge himself thinks there is no case to go to a jury, it is his duty to say so, and if, after a jury's verdict, the judge deems it to be his duty to give judgment for the defendant although the jury have returned a verdict for the plaintiff, it is the judge's duty to do so if, in his view, the evidence compels him to take that course. In *Skeate v. Slaters, Ltd.* (1) the position is stated thus in the headnote ([1914] 2 K.B. 429):

"In an action tried with a jury the judge was asked at the conclusion of the plaintiff's case to withdraw the case from the jury on the ground that the plaintiff had failed to make any case against the defendants. The judge refused to do so. Witnesses were then called for the defence. The

jury disagreed. Subsequently an application was made to the judge to enter judgment for the defendants upon the above ground and also upon the ground that upon all the evidence in the case the jury could not reasonably have found a verdict for the plaintiff. The judge refused to enter judgment for the defendants."

On appeal to this court from the refusal of the judge to enter judgment for the defendants, it was held by LORD READING, C.J., and BUCKLEY, L.J., that the Court of Appeal has power under R.S.C., Ord. 58, r. 4, and by BUCKLEY, L.J., that a judge at the trial also has power under Ord. 36, r. 39, to enter judgment for a defendant if on the case as a whole the evidence for the plaintiff is so weak that a verdict in his favour would have been set aside as unreasonable. It was held further that, on the facts in that case, judgment ought not to be entered for the defendants.

I refer to that decision because of the words of LORD READING, C.J. (*ibid.*, 434):

"It was argued for the plaintiff that the learned judge, having left the case to the jury, could not subsequently alter his decision and enter judgment for the defendants. I do not agree with this contention. It is always open to a judge, if he thinks fit, to re-consider his decision that there was no case to go to the jury and to enter the judgment for the defendants if he is then of opinion that the plaintiff has failed to make a case against the defendants. Frequently at trials with a jury, the judge, although he thinks the plaintiff has not made a case, submits it to the jury in order that their views may be ascertained. This practice very often has the advantage of making an end of the contest as to the facts and in the event of a successful appeal against the judge's ruling enables this court to dispose of the action without sending it for re-trial. If the judge thinks a case, however weak, has been made by the plaintiff which, unanswered, would justify a verdict for the plaintiff, and, therefore, submits the case to a jury, the judge ought not thereafter to enter judgment for the defendants, however strong may be his opinion that, upon all the evidence, including that of the defendants, they should succeed, unless he would have been justified in directing the jury to find a verdict for the defendants. If he could not have so directed the jury he should leave the facts to their decision and should not usurp their province."

Similar expressions of view are to be found in the judgments of BUCKLEY, L.J. (*ibid.*, 438, 439) and of PHILLIMORE, L.J. (*ibid.*, 443).

In the present case the learned judge directed the jury in this way:

"If you or I employ a stockbroker to buy some shares for us, and he goes into the market and buys some shares at 25s. per share, and then comes back and charges us 30s. a share, making a profit of 5s. on each share, which we know nothing about, he is not entitled to keep it. He is acting for us as our agent to purchase shares as cheaply as he can, and he is not entitled to make any illicit or hidden profit of that kind. If the client finds out, the stockbroker is made to hand over that secret profit to him. If you thought that Mr. Hadrill was somewhat in the position of a stockbroker, that he was an agent employed by Mr. Grinsted to purchase shares for him in this company, and that in that position he had made a secret profit, then Mr. Grinsted would be able to recover that secret profit from him."

That was the question put to the jury, and counsel for the defendant does not criticise it. He agrees with it. Indeed, he accepts the statement of the law in BOWSTEAD'S LAW OF AGENCY, 11th ed., p. 95, at the commencement of art. 54, which is in these terms:

"No agent is permitted to acquire any personal benefit in the course of,

or by means of, his agency without the knowledge and consent of the principal. Every agent must account to his principal for every benefit, and pay over to the principal every profit, acquired by him in the course of, or by means of, the agency without such knowledge and consent, even if, in acquiring the benefit or profit, he incurred a risk of loss, and the principal suffered no injury thereby."

- A The point raised by counsel on behalf of the defendants is that Mr. Hadrill was not the agent of the plaintiff. The next line in the learned judge's direction to the jury is this: "Members of the jury, can you find any evidence that that is the position here?" It is clear that the learned judge did not think that it was a strong case for the plaintiff. He then proceeded to set out the case on either side on this issue and he put the case fairly and properly to the jury. After the jury returned a verdict on this part of the case in favour of the plaintiff, counsel for the defendants submitted to the learned judge that there was no case. That was argued before the judge, he considered it, and in the course of his judgment he said:

- C "I have to consider now whether on the whole of the facts in this case there was evidence on which a jury could come to the conclusion that Mr. Hadrill was acting as agent for the plaintiff in acquiring the further five hundred shares which the plaintiff had undertaken to acquire in this company, or that the profit undoubtedly made by Mr. Hadrill in connection with this transaction was an illicit profit made as agent for the amount of which he is accountable to his principal."

- D At the conclusion the judge said that he was still unable to see that there was any real evidence on which the jury could reach the conclusion which they did, and, accordingly, he gave judgment for the defendants on this issue. I think that this was a matter for the jury and one on which they had to make up their minds. This case is of some importance in the commercial world, and if there be *any* evidence, it is better that the jury's verdict should be taken than otherwise. I do not think it is right to say that there was no evidence for them to consider. I think there was evidence, and that it was for the jury to say what the result of this part of the plaintiff's claim should be. They determined it; and though I recognise the great care and attention which BARRY, J., gave to this case, I believe it to be the duty of this court to say that the jury's verdict on the facts on this part of the case should be maintained, and that judgment should be given accordingly. To that extent, I am in favour of
- F allowing the appeal.

JENKINS, L.J.: For the reasons given by my Lord, to which I cannot usefully add anything, I agree that this appeal should fail on the question of fraudulent misrepresentation, but should succeed on the question of secret profit.

- G MORRIS, L.J.: I also entirely concur.

Order accordingly.

Solicitors: *Lee, Ockerby & Co.* (for the plaintiff); *Manches & Co.* (for the defendants).

[*Reported by MISS PHILIPPA PRICE, Barrister-at-Law.*]

WOZNIAK *v.* WOZNIAK.

[COURT OF APPEAL (Denning and Hodson, L.J.J., and Lloyd-Jacob, J.), April 14, 15, 1953.]

Legal Aid—Costs—Interlocutory proceedings—Order for applicant to pay respondent's costs—Assessment only on determination of main suit—Legal Aid (General) Regulations, 1950 (S.I., 1950, No. 1359), reg. 17 (1) (a).

The provision in reg. 17 (1) (a) of the Legal Aid (General) Regulations, 1950, that "the determination of the amount of [an assisted party's] liability for costs . . . shall . . . be made at the trial or hearing of the action, cause or matter . . ." means the final determination of the main suit and not the determination of any interlocutory application therein. When dismissing an interlocutory application made by a person who is legally assisted under the Legal Aid and Advice Act, 1949, therefore, a judge, though able to make an order for costs against the applicant, has no power to assess the amount of those costs, which must be determined at the trial or hearing.

FOR THE LEGAL AID AND ADVICE ACT, 1949, s. 17 (1), see HALSBURY'S STATUTES, Second Edn., Vol. 18, p. 552.

FOR THE LEGAL AID (GENERAL) REGULATIONS, 1950, reg. 17 (1), see HALSBURY'S STATUTORY INSTRUMENTS, Vol. 5, p. 217.

APPEAL by the husband from an order of KARMINSKI, J., dated Feb. 4, 1953, and confirmed by him on Feb. 27, 1953.

The husband, an assisted person under the Legal Aid and Advice Act, 1949, and a respondent to a divorce suit by the wife, took out a summons to show cause why a writ of attachment should not issue against the petitioning wife (also a legally assisted person) for her alleged contempt in failing to comply with an order for further particulars of her petition. KARMINSKI, J., dismissed the husband's application and made an order that the husband should pay party and party costs to the wife amounting to £10. Before the order was drawn up, after hearing further argument on Feb. 27, 1953, the learned judge held that the effect of the Legal Aid (General) Regulations, 1950, reg. 17 (1), construed with the definition of "matrimonial cause" in s. 17 (1) of the Legal Aid and Advice Act, 1949, was to enable the court to condemn an assisted person in costs in a proper case, although the particular matter was not clearly a final determination of the main suit. The husband appealed.

Dobry for the husband.

S. M. Stewart for the wife.

DENNING, L.J.: On Sept. 25, 1951, the wife launched a petition for divorce against her husband. The husband's advisers applied for further particulars of the petition, and an order was made for her to deliver further particulars. Those particulars were not delivered, and an application was made by the husband's advisers asking that the petitioner should be attached—that is, sent to prison—for failing to deliver the particulars. That application came before KARMINSKI, J., and he held—and this decision is not now challenged—that the application was completely misconceived and ought never to have been made. Thereupon he ordered the husband to pay the costs of the application, and he assessed them at £10 to be paid forthwith. The question is whether the judge had power to make that order having regard to the fact that the husband was a legally assisted person.

The matter depends entirely on the interpretation of the Legal Aid and Advice Act, 1949, and the Legal Aid (General) Regulations, 1950, made thereunder. Section 2 (2) (e) of the Act contemplates that an order for costs can be made against an assisted person, but it draws a distinction between an order for costs, on the one hand, and the amount that has to be paid, on the other.

The amount has to be determined in accordance with the regulations, and reg. 17 (1) provides:

“Where an order for costs is made against an assisted person . . .

(a) the determination of the amount of his liability for costs in accordance with s. 2 (2) (e) of the Act shall . . . be made at the trial or hearing of the action, cause or matter and be final.”

A I see no point whatever in the words “at the trial or hearing” unless they mean the final determination of the matter. They do not include preliminary applications. They do not include the application for attachment in this case. The judge had, therefore, no power to assess the sum at £10 as he did.

KARMINSKI, J., was impressed by the definition section of the Act, s. 17 (1), which defines a “matrimonial cause” as meaning

B “proceedings in the House of Lords or the Supreme Court in or in connection with a matrimonial cause or matter within the meaning of the Supreme Court of Judicature (Consolidation) Act, 1925.”

He thought that the words “in connection with a matrimonial cause or matter” gave him the jurisdiction which he was asked to exercise. In my judgment,

C that view is erroneous, because the words “matrimonial cause” in that definition only have application to s. 6 (7) of the Act. They have no application to reg. 17 (1), which does not refer to “matrimonial cause” at all. The power to determine the amount of costs under reg. 17 (1) is the same in the case of a matrimonial cause, a Queen’s Bench action, and a Chancery matter. Matrimonial causes do not stand in a class by themselves in this respect.

D If reg. 17 (1) gave the power to assess the costs on any interlocutory application, it would mean that the master or judge would be bound to determine the amount of the costs. The word in the regulation is imperative—“shall”. All the machinery of inquiry which is provided by the regulations, such as the machinery in reg. 15, would have to be put in motion in order to determine the amount. It would be most inconvenient that, on every interlocutory proceeding, an inquiry of that kind should have to be made.

E It seems to me plain that the intention of the regulation is that, while orders for costs can be made in interlocutory proceedings, nevertheless the amount payable cannot be determined until the trial or hearing, and, as against a legally assisted person, a master or judge cannot order the costs to be taxed and paid forthwith as he can against any other litigant. All he can do is to make an order

F for costs in any event, or for costs in the cause, or a variant of those orders. He cannot determine the amount of the costs on interlocutory proceedings. That can only be done at the trial or hearing of the action, cause or matter. The only way in which the judge can express immediately his disapproval of the application is, in a proper case, to say that the solicitor for the legally assisted person, who took out the misconceived application, should not get his costs against the fund. He can make an order against the party to pay the costs in any event, but he cannot assess the amount. For these reasons, in my judgment, this appeal should be allowed. The order of KARMINSKI, J., should be varied by striking out the assessment of £10 and by ordering the husband to pay the costs in any event.

G
H HODSON, L.J.: I agree. I think the language of reg. 17 (1) (a) is quite clear. Counsel for the wife who sought to uphold the judgment of KARMINSKI, J., was driven in the end to the argument *ab inconvenienti*, because he said, if the judge’s decision were wrong, the judge in all these cases would be deprived of the power of making an order for costs in interlocutory matters such as he could have made against a litigant in ordinary litigation. He said that was an undesirable result because the power of the court to make an order for immediate taxation and payment of costs in respect of a misconceived interlocutory application is a valuable sanction and is a protection for a party who does

not want to embark on litigation on a wasteful and expensive basis. It may be that that, unfortunately, is so, but, in my judgment, it is no reason for departing from the plain words of the regulation, which involve that the assessment of liability for costs must take place once and for all at the trial or hearing of the action, cause or matter. That point has not been reached in this case.

LLOYD-JACOB, J.: I agree.

Appeal allowed.

Solicitors: *George & George* (for the husband); *W. B. Blackwell & Co.* (for the wife).

[*Reported by F. A. AMIES, Esq., Barrister-at-Law.*]

ENGLAND v. NATIONAL COAL BOARD.

[COURT OF APPEAL (Somervell, Birkett and Romer, L.JJ.), February 3, 4, April 27, 1953.]

Coal Mining—Shot firing—Breach of statutory duty and negligence of shot-firer—Plaintiff himself in breach of safety regulations—Liability of mine owner—General Regulations, 1913 (S.R. & O., 1913, No. 748), reg. 1, made under the Coal Mines Act, 1911 (c. 50), s. 86—Explosives in Coal Mines Order, 1934 (S.R. & O., 1934, No. 6), cl. 2 (e), cl. 2 (h).

The Explosives in Coal Mines Order, 1934, cl. 2 provides: "(e) The person firing the shot shall, before doing so, see that all persons in the vicinity have taken proper shelter . . . (h) Where shots are fired electrically they shall only be fired by a person authorised in writing by the manager for the purpose. The authorised person . . . shall himself couple up the cable to the fuse or detonator wires and shall . . . also himself couple the cable to the firing apparatus. Before doing so, he shall see that all persons in the vicinity have taken proper shelter." Regulation 1 of the General Regulations, 1913, made under s. 86 of the Coal Mines Act, 1911, provides: "It shall be the duty of the manager and under-manager to carry out and to the best of their ability enforce the provisions of every order in force under the Act regulating the supply, use and storage of explosives, and it shall be the duty of all persons employed in or about the mine to comply with the provisions of the said orders."

The plaintiff, a miner, and W., a shot-firer, were employed by the defendants in a coal mine. While working in the mine, W. agreed to fire a coal hole at the plaintiff's request. After assisting W. to ram the hole, the plaintiff agreed with W. to couple up the two loose ends of the cable to the two detonator wires. The plaintiff had connected the first cable end to one of the detonator wires and was in the process of connecting the second, when W., without giving warning or taking any steps to satisfy himself that the plaintiff had reached a place of safety, fired the shot, thereby causing the plaintiff to suffer injury. In an action by the plaintiff against the defendants for breach of statutory duty and negligence at common law,

HELD: W. was in breach of his statutory duty under cl. 2 (e) and cl. 2 (h), and his negligence at common law was the effective cause of the accident; the plaintiff was precluded from recovering from the defendants for the breach of statutory duty: *Harrison v. National Coal Board* ([1951] 1 All E.R. 1102), followed; but neither the fact that W.'s duties were precisely defined by the regulations, nor the fact that, in connecting the cable to the detonator wires, the plaintiff was doing an act prohibited by the order, deprived him of his remedy at common law; and, therefore, on that ground he was entitled to recover from the defendants.

Dictum of LORD DUNEDIN in *Smith v. Fife Coal Co., Ltd.* ([1914] A.C. 729), applied.

AS TO REGULATIONS GOVERNING THE USE OF EXPLOSIVES IN MINES, see HALSBURY, Hailsham Edn., Vol. 22, p. 803, para. 1656, and 1952 Supp.;

and FOR CASES, see DIGEST, Vol. 34, pp. 301-303, Nos. 2498-2507, pp. 744, 745, Nos. 1190-1195, and Digest Supps.

Cases referred to:

- (1) *Harrison v. National Coal Board*, [1951] 1 All E.R. 1102; [1951] A.C. 639; 2nd Digest Supp.
- (2) *Stapley v. Gypsum Mines, Ltd.*, [1952] 1 All E.R. 1092; [1952] 2 Q.B. 575.
- A (3) *Wilsons & Clyde Coal Co. v. M'Ferrin. Kerr v. Dunlop (James) & Co.*, [1926] A.C. 377; 95 L.J.P.C. 130; 135 L.T. 164; 19 B.W.C.C. 1; 34 Digest 301, 2499.
- (4) *Smith v. Fife Coal Co., Ltd.*, [1914] A.C. 723; 83 L.J.P.C. 359; 111 L.T. 477; 7 B.W.C.C. 253; 34 Digest 301, 2498.
- B (5) *Paleokas (or Pollock) v. Mount Vernon Colliery Co., Ltd.*, [1931] A.C. 597; 100 L.J.P.C. 225; 145 L.T. 460; 24 B.W.C.C. 283; Digest Supp.
- (6) *Kerr v. Baird & Co., Ltd.*, 1911 S.C. 701; 48 Sc.L.R. 646; [1911] 1 S.L.T. 446; 4 B.W.C.C. 397; 34 Digest 302, t.

APPEAL by the plaintiff from an order of CROOM-JOHNSON, J., at Swansea Assizes, dated July 26, 1952.

C *H. Edmund Davies, Q.C.*, and *Alun Davies* for the plaintiff.

Lloyd-Jones, Q.C., and *D. Meurig Evans* for the defendants, the National Coal Board.

Cur. adv. vult.

Apr. 27. The following judgment was read.

D **SOMERVELL, L.J.** (read by BIRKETT, L.J.): This is an appeal from a decision of CROOM-JOHNSON, J., given at the Glamorganshire Summer Assizes at Swansea on July 26, 1952, when he decided in favour of the defendants.

The plaintiff was employed by the defendants at Bwllfa Colliery, Aberdare. He was injured by a shot fired underground. The shot was fired electrically. After the hole has been rammed and the charge inserted, the wires are attached
E to a detonator. The wires are long enough to enable those concerned to reach a place of safety before the wires are connected to a battery. The circuit is completed by pressing down a switch. The plaintiff was unable to attend the trial before CROOM-JOHNSON, J., and by agreement his proof was read. Except on one point which is not in the passage I am about to read it was accepted. This is his account of how the accident happened:

F "On Thursday, Jan. 25, 1950, I was working on the morning shift commencing at 7 a.m. and due to finish at 2.30 p.m. On this day as I knew that the shotsman, Edward Williams, was shot-firing not far away, I shouted to the colliers in the next 'stent' to pass on to the shotman to come up to my stent. The said shotsman, Edward Williams, came there at about 12 noon. I then told him that I wanted a 'coal hole' fired. He
G examined the stent and being satisfied as to its condition he agreed to fire one. I then assisted him to ram the hole. After this was done the shotsman began to uncoil the cable. After he had uncoiled the cable I caught hold of the loose end and said: 'I will couple up, Ted'. He replied: 'O.K. Harry'. I was on my knees as there was no height to stand. I then coupled up the loose end to the detonator wires, and while I was doing this the
H shotsman was going along the upper end still uncoiling. I assumed that he was warning the other colliers on the upper side as he was going along. It was my intention after coupling up to crawl on my knees towards the lower end to warn the colliers there. It took a little time to connect to the wires as I was wearing a pair of what are known as 'industrial gloves', and the wires being thin it was a little difficult to handle. There were four ends. I had connected one cable-end to one of the detonator wires in the hole. I then proceeded to connect the other end of the cable to the

other end wire of the detonator. As I was proceeding to do this the hole fired. The hole had been penetrated a yard distant in the coal, and I was, I should say, about eighteen inches from the mouth of the hole when the shot fired. The explosion caused the air to be filled with coal dust and powder smoke. The first reaction I felt was that of blindness and that I had lost all the feeling one has in the face."

The shotsman, Williams, was not called and no explanation was given of how he came to fire the shot. The plaintiff claims, inter alia, for negligence at common law on the grounds that Williams was the servant of the defendants and was negligent in that he fired the shot without giving any warning or taking any steps to satisfy himself that the plaintiff, whom he had permitted or invited to connect the wires to the detonator, had finished what he was doing and got to a place of safety.

Shot-firing in mines is the subject of the Explosives in Coal Mines Order, 1934, made under s. 61 of the Coal Mines Act, 1911. Clause 2 (e) and cl. 2 (h) are as follows:

"(e) The person firing the shot shall, before doing so, see that all persons in the vicinity have taken proper shelter, and he shall also take suitable steps to prevent any person approaching the shot. He shall also himself take proper shelter. If he has reason to believe that there is a possibility of the shot blowing through into an adjoining place he shall send verbal warning to the persons in that adjoining place to take proper shelter . . .

(h) Where shots are fired electrically they shall only be fired by a person authorised in writing by the manager for the purpose. The authorised person shall not use, for the purpose of firing, a cable which is less than twenty yards in length. He shall himself couple up the cable to the fuse or detonator wires and shall do so before coupling the cable to the firing apparatus. He shall take care to prevent the cable coming into contact with any power or lighting cables. He shall also himself couple the cable to the firing apparatus. Before doing so, he shall see that all persons in the vicinity have taken proper shelter."

Regulation 1 of the General Regulations made under s. 86 of the Coal Mines Act, 1911, is as follows:

"It shall be the duty of the manager and under-manager to carry out and to the best of their ability enforce the provisions of every order in force under the Act regulating the supply, use and storage of explosives, and it shall be the duty of all persons employed in or about the mine to comply with the provisions of the said orders."

Pausing here, it is clear that Williams committed breaches of the first sentence of cl. 2 (e) and of the similar provision in the last sentence of cl. 2 (h). He was also in breach of cl. 2 (h) in that he did not himself couple up the cable to the detonator before coupling the cable to the firing apparatus or at all. The plaintiff, in doing this himself with the approval of Williams, was an accessory, or, perhaps, a principal.

These regulations were considered in the House of Lords in *Harrison v. National Coal Board* (1). The accident there was at a time when the principle of common employment was in force. The breach of the regulations was that the shot-firer had given no warning as required by cl. 2 (e) and cl. 2 (h). From the statement of facts it would appear that the shot-firer ought to have known the plaintiff was there. The plaintiff started by claiming, as here, for negligence at common law and for breach of statutory duty, the shot-firer having, it was alleged, committed a breach of the regulations I have cited. Common employment was a complete answer to the claim at common law as the plaintiff was relying solely on the negligence of the shot-firer, so that was abandoned in the court of first instance. The questions taken to appeal were whether the provision broken imposed a duty on the owners and also on the manager or

solely on the shot-firer. If on the manager, it was submitted that he was not in common employment. It was held that the only duty in the manager was to enforce the regulation to the best of his ability, and this on the judge's finding he had done. LORD PORTER came to the conclusion ([1951] 1 All E.R. 1112):

A " . . . that the Act and regulations create two sets of duties, one placed on the owner personally and the other on his employees. The first may exist either by direct enactment or be derived from the substance of the relevant section or regulation. Where, however, neither of these circumstances exists the only obligation of the owner is to be found in sections such as s. 75 [of the Coal Mines Act, 1911] which impose a qualified duty on the owner making him responsible both civilly and criminally unless he has used due care."

B Having regard to the duties imposed on a shot-firer (ibid., 1109)

"which he alone can carry out, with which even a manager is not allowed to interfere and which, moreover, it would be difficult if not impossible to oversee . . .",

C the provision in question did not impose a duty on the owners. Similar opinions were expressed by the other noble and learned lords who constituted the majority, LORD REID dissenting.

D A further question was canvassed, but not decided, in *Harrison's* case (1), and it was this. Assume that the doctrine of common employment was abolished (as it has since been), assume that the plaintiff could not establish negligence at common law of the fellow servant, but only a breach of statutory duty imposed, not on owners or employers as such, but on a servant, would the owners be liable on the same basis as if the damage was due to negligence by one of the servants at common law? LORD MACDERMOTT thought that they would. LORD PORTER, at the end of his opinion, made it clear that he regarded the point as open. LORD NORMAND expressly reserved it. LORD OAKSEY's agreement with the other majority opinions was clearly on the point

E which arose for decision on which they were all agreed. For reasons which will emerge I do not find it necessary to decide the point. The learned judge regarded *Harrison's* case (1) as leading to a conclusion in favour of the defendants. It is a complicated area, and, although, of course, *Harrison's* case (1) precludes the plaintiff from alleging a breach of statutory duty by the owners I do not think that concludes the matter.

F The first question to be considered, in my opinion, is whether the plaintiff can rely as against the Coal Board on Williams' negligence at common law. If he can, then what is the effect of the fact that the plaintiff at the time of the accident was doing an act which under the regulation had to be done by Williams? Williams left the plaintiff at the detonator and let off the charge without giving any warning or waiting for his return. In the absence of any

G explanation the only inference is that he was negligent at common law. Counsel for the Coal Board submits that, as the shot-firer's duties have been precisely defined by the regulation, the plaintiff cannot rely on the breach of common law duty. If this is right and the plaintiff's claim must be based on Williams' breach of his statutory duty and if the point canvassed in *Harrison's* case (1) were to be decided in favour of the defendants, the plaintiff could have no

H claim based on Williams' acts. If these submissions were right, those who have described this type of legislation as remedial would have to re-consider their epithet. It is, in my view, plainly wrong. If statutory regulations had never been made, the plaintiff would, once the defence of common employment was abolished, have had his remedy at common law. The regulation makes it a criminal offence for a shot-firer to do or omit to do certain things. Some of the duties so imposed may be the same as the duty to take reasonable care at common law. Some may go beyond the common law duty. But I cannot

see any ground for the submission that it should be construed as taking away civil rights at common law. Claims are constantly made for damages for negligence at common law or in the alternative on the same facts for breach of statutory duty under the Factories Act. In such a case the result is normally, perhaps always, the same if the claim is made out under either head. It could not be suggested that, if the claim is a breach of statutory duty, it cannot be negligence at common law. The courts have frequently decided that the plaintiff is entitled under both heads. If it is sought to distinguish such cases on the ground that the Factories Act places the duty on the occupiers, that fact would make the application of the principle slightly less anomalous than in the present case. The only effect of statutory provisions of this character on the common law that I know of does not assist the argument. If an Act or regulation has, for example, prescribed in detail a system of work for a particular type of operation it is difficult, though not legally impossible, to establish that an employer who has carried out the statutory provisions has failed, for example, to have a reasonably safe system. The reasonable employer is entitled to assume, *prima facie*, that the dangers which would occur to a reasonable man have occurred to Parliament or the framers of the regulations. This line of argument, and that is all it is, affords no support to the argument under consideration. A B C

The question, then, is whether the defendants have a defence in whole or in part to the plaintiff's case. The first question is that of causation. It seems to me impossible to suggest that the fact that the plaintiff with the agreement of Williams was connecting the wires was the cause of the accident. The cause of the accident was the later, independent and unexplained negligence of Williams. The fact that Williams knew of and had agreed to the plaintiff's staying to do this work is simply a circumstance aggravating the negligence of Williams. It was not a case where a shot-firer might fire a shot without warning having no reason to believe anyone was there. D

We were referred to *Stapley v. Gypsum Mines, Ltd.* (2) which emphasises by contrast the conclusion to which I have come. Two men, S and D, of equal status were ordered by their foreman to bring down a piece of roof found to be dangerous. After some unsuccessful efforts they desisted and proceeded to work disregarding the danger from the roof. S was killed by the roof falling. The defendants were held to be in breach of statutory duty, but that breach was held not to be the cause of the death. The learned judge had held that the defendants, as the employers of D, were liable to the widow for half the damage. In this court it was held that S, if he had been injured, could not have recovered since there was no act of negligence on D's part which was not fully and wholly his own. Nor, S having died, could his widow. As BIRKETT, L.J., put it, the sole cause of S's death was his own breach of duty in resuming his normal work under the dangerous roof. The principle laid down in that case would have been applicable if the effective cause of the injuries had been the connecting of the wires and not, as I hold, the later independent negligence of Williams. E F G

It is then said that the plaintiff cannot recover as he was, at the moment of the accident, doing by agreement with Williams an act contrary to the regulations. This argument is said to be supported by a decision under the Workmen's Compensation Act, 1923: *Wilsons & Clyde Coal Co. v. M'Ferrin*. *Kerr v. Dunlop (James) & Co.* (3). In that case a miner was killed while connecting the wires to the detonator in breach of the Explosives in Coal Mines Order, 1913, Part I, arts. 2 (e) (h), which were in the same terms as the regulation which we are considering. A previous shot had been fired and the foreman was not aware that the miner had gone to the detonator. The handle of the firing battery had jammed and the foreman was moving it backwards and forwards in order to free it. While doing this, the wires having been connected to the detonator without the foreman's knowledge, the circuit was completed and the explosion occurred. No question of H

negligence by the foreman, of course, arose, and it is difficult to see how it could have been suggested. The question was whether the accident arose out of and in the course of the man's employment, and s. 7 of the Workmen's Compensation Act, 1923, which provided in effect that a breach of statutory duty by the workman did not in itself prevent the accident being held to be within the words of the Act, fell to be considered. The House of Lords held that the claim failed on the ground that what the man was doing was not his employment at all. He was doing something which he was not engaged to do, and s. 7, therefore, had no application.

An earlier decision of the House of Lords, *Smith v. Fife Coal Co., Ltd.* (4), which was not cited in the *Wilsons & Clyde Coal Co.* case (3), was very close on its facts. There the shot-firer had, in breach of the regulation, handed the cable to the plaintiff to connect to the detonator. The shot-firer, without waiting until the man had got to a place of safety and without ascertaining that all persons in the vicinity had taken shelter, fired the shot. It was held that the cause of the accident was not the unauthorised assumption by the plaintiff of the shot-firer's duty, but premature firing by the shot-firer, and the finding of the arbitrator that the injury arose out of and in the course of the plaintiff's employment was not disturbed. The plaintiff in that case had finished the connecting of the wires and just turned to go when the explosion took place. The *Wilsons & Clyde Coal Co.* (3) and *Smith's* cases (4) were considered in *Paleokas (or Pollock) v. Mount Vernon Colliery Co., Ltd.* (5). The facts were, as it seems to me, identical in all relevant respects with those in *Smith's* case (4) except that the plaintiff was in the act of connecting the cable when the shot was fired. Obviously contact must have been made. *Smith's* case (4) was distinguished on the ground that in that case the prohibited act had been completed, whereas in *Paleokas'* case (5) the accident arose out of and in the course of the prohibited act.

It is unnecessary to consider these cases in detail. I will assume that on the facts here the plaintiff could not have recovered under the Workmen's Compensation Acts, if still in force. The fact, however, that he was doing an act prohibited by the regulation does not take him out of the protection of the common law so that he can be negligently injured with impunity. There is a regulation that no person shall sleep while below ground in the mine (reg. 19 of the General Regulations, 1913). No one could suggest that if such a man was seen asleep in the vicinity of a place where a shot was to be fired no duty was owed to him by the shot-firer, although the sleeper was, no doubt, doing something outside his employment, which he was not engaged to do and which was an offence under the regulations. Examples could be multiplied from other areas. A motorist driving at thirty-five miles an hour in a built-up area is committing an offence, but if he is negligently injured by another motorist he has a right of action. His own unauthorised speed is, of course, relevant to causation or contributory negligence, but it may be held not to have been either the effective or a contributory cause. On causation, which, as *Paleokas'* case (5) shows, is not the relevant consideration in the Workmen's Compensation Act cases, the view which I have expressed is supported by a passage in LORD DUNEDIN's speech in *Smith's* case (4) ([1914] A.C. 729):

"I think I can best make my view clear by taking the case of *Kerr v. Baird & Co., Ltd.* (6) and contrasting it with this. In that case the miner arranged a shot and fired it entirely by himself—I mean without the presence or help of the shot-firer at any stage of the proceeding. It was held rightly that the accident was due to the action of the man, and that such action consisted in taking upon himself duties which he had no right to perform. Here, on the contrary, the miner did not arrange and fire the shot. One part of the composite action was his duty—to insert and stem the detonator—and that he did. The next step—the connecting of

the detonator wire to the cable—he had no business to do, and in doing it he did something which was not in the sphere of his employment. But two more stages are necessary before we arrive at the explosion which causes the injury and forms the accident, namely, the connecting of the cable to the battery and the putting the battery into efficient action by the turning of the handle, and both these stages are done by the shot-firer. In the circumstances I cannot bring myself to see that the efficient cause of the accident was connected with the arrogation of unauthorised duty by the miner. It is true that no explosion could have taken place unless the cable had been connected with the detonator. But that is only a remote cause *sine qua non*, and one in which the relation of the appellant to the act as distinguished from any other person is immaterial.”

Applying those principles it seems to me that the plaintiff is not precluded by the fact that he was doing the prohibited act in question from relying on his rights at common law. It was suggested at one time that, having regard to the statutory provisions as to shot-firers, Williams ought not to be regarded as the servant of the defendants. This was not persisted in, and is, I think, clearly wrong. The defendants are, therefore, liable for the injuries caused by the negligence of Williams. As, in my opinion, following LORD DUNEDIN, the doing of the prohibited act was only a remote cause *sine qua non*, I can see no ground for holding that the breach of statutory duty afforded any ground for reducing the damages recoverable. Nor do I think the plaintiff was negligent at common law for the reasons which I have already given. He had no reason to anticipate the danger which overtook him.

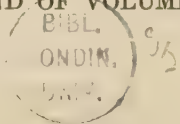
The position with regard to the defendants' liability for Williams' breach of statutory duty does not, therefore, arise. Nor does a further point made by the plaintiff to which I should refer. There was a body of evidence called by the plaintiff to the effect that in this mine it was the common practice for miners at the request of or with the agreement of shot-firers to couple up the cable to the detonator. This evidence was, I think, called primarily in support of a submission that the managers knew or ought to have known of the practice. This was negatived by the learned judge. It was also relied on in a different way. Shot-firers are officials with duties and responsibilities as the Act and the regulations show. It was submitted that, although the defendants and managers had fulfilled their duties under the Act and regulations in doing their best to enforce the system as laid down in the regulations, the plaintiff could rely on a *de facto* dangerous system if, as here, it was acquiesced in or organised by responsible officials within admittedly the scope of their responsibilities. This point does not arise, but I thought it right to observe that it had been made. For these reasons I would allow the appeal and enter judgment for the plaintiff. The plaintiff is, therefore, entitled to £2,400 as damages, the sum assessed by the learned judge in the event of liability being established.

BIRKETT, L.J.: I have had the opportunity of reading and considering with some care the judgment of SOMERVELL, L.J., which I have just read. I desire to express my agreement with it, and to say that I do not desire to add to it.

ROMER, L.J.: I also am in full agreement with the judgment of SOMERVELL, L.J., and there is nothing I wish to add. *Appeal allowed.*

Solicitors: *Theodore Goddard & Co.*, agents for *Morgan, Bruce & Nicholas*, Pontypridd (for the plaintiff); *R. S. S. Allen*, agent for *W. H. F. Barklam*, Cardiff (for the defendants).

[Reported by MISS PHILIPPA PRICE, Barrister-at-Law.]



T-7 JAN 1991

